

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC.,	)	Case NOS.	75-CE-3-I	76-CE-64-E(R)
	)		75-CE-12-I	76-CE-69-E(R)
Respondent,	)		75-CE-23-I	76-CE-69-1-E(R)
	)		75-CE-69-E(R)	76-CE-69-2-E(R)
and	)		75-CE-2-E(R)	76-CE-78-E(R)
	)		76-CE-3-E(R)	76-CE-94-E
UNITED FARM WORKERS OF	)		76-CE-33-E(R)	76-CE-105-E
AMERICA, AFL-CIO,	)		76-CE-56-E(R)	76-CE-117-E
	)		76-CE-62-E(R)	76-CE-1-E
Charging Party.	)	5 ALRB No. 44		

---

DECISION AND ORDER

On June 6, 1977, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this case. Thereafter, Respondent and General Counsel each timely filed exceptions and a supporting brief, and Respondent and Charging Party timely filed reply briefs.

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 ALO's Decision<sup>1/</sup> in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>2/</sup> and conclusions of the ALO as modi-

---

<sup>1/</sup>Employee Joe Acevedo's surname is incorrectly spelled "Accuedo" in the ALO's Decision.

<sup>2/</sup>Respondent excepts to the ALO's credibility resolutions. We will not reverse an ALO's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that it is incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950); Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

fied herein and to adopt his recommended Order, with modifications.

Respondent excepts to the ALO's conclusion that it violated Section 1153(a) and (b) and 1154.6 of the Act by hiring two labor-contractor crews and attempting to staff them with pro-Teamster and/or anti-UFW workers, while excluding UFW sympathizers, in order to arrange for a Teamster victory in the impending representation election among its employees. We reach the same conclusion as did the ALO, but we do so without relying, as did the ALO in part, on the "inherently destructive" doctrine of NLRB v. Great Dane Trailers, 388 U.S. 26 (1966). There is ample record evidence, based on the circumstances surrounding the recruitment and use of the two labor-contractor

---

(footnote 2 continued)

We find the ALO's credibility resolution herein are supported by the record as a whole.

The General Counsel alleged in Paragraph 21(m) of the Complaint, that Respondent discharged eight named employees in violation of Section 1153(c) and (a) of the Act. The ALO concluded that all eight were terminated in violation of Section 1153(a) and that the discharge of one of these employees, Joe Placencia, also constituted a violation of Section 1153(c). No exception was taken to the ALO's failure to address the alleged Section 1153(c) violation as to the other seven employees. However, the ALO should make findings and conclusions regarding all allegations set forth in the Complaint which are not deleted by amendment or expressly withdrawn.

With respect to the ALO's findings and conclusions concerning the issue of access to the Employer's buses, raised in Paragraph 21(j) of the Complaint, we note that this issue has been further clarified by our regulations. See 3 Cal. Admin. Code Section 20900(e) (3) (A) (1976).

Although we affirm the ALO's dismissal of Paragraph 21(aa) of the Complaint for want of an exception, we expressly reject his statement that unequal access "not sufficiently heinous to result in setting an election aside would not be violative of Section 1153(a) or (b)." While an incident of disparate access might constitute unlawful assistance or interference, it might not be grounds for setting aside an election where, for example, the margin of victory indicates that the incident did not affect the results of the election.

crews, to support our conclusion that Respondent willfully arranged for persons to become employees for the primary purpose of voting in the election. We also conclude that the conduct of Respondent which was found by the ALO to have violated Section 1153(a) and (b) also violated Section 1153(c), inasmuch as it constituted discrimination in hiring which both encouraged membership in the Teamsters union and discouraged membership in the UFW.<sup>3/</sup>

General Counsel excepts to the failure of the ALO to provide a make-whole remedy for the members of the two unlawfully retained crews, arguing that the crew members suffered from Respondent's conduct when they were terminated prematurely before the end of the harvest once Respondent's unlawful purpose had been achieved. We decline to provide such relief herein as the record supports the ALO's conclusion that the two crews were laid off nearly three weeks after the election because of their poor work performance.

Respondent excepts to the ALO's finding that it violated Section 1153(a) by the statements of its supervisors, to employees at a pre-election party sponsored by Respondent, to the effect that the party was given by Respondent to encourage the crew members to vote for the Teamsters and that they should vote for the Teamsters. While it is true that an employer is entitled to state its preference for one of two rival unions, Respondent went beyond the bounds of such protected statements when it linked the

---

<sup>3/</sup>Although this conduct was not alleged in the Complaint as violative of Section 1153(c), this matter was fully litigated and is clearly related to the charges that Respondent violated Sections 1153(a) and (b) and 1154.6 by such conduct.

awarding of a benefit, the party, to its support for the Teamsters, As Respondent supported its preference with the largesse of whiskey and steaks, employees could reasonably expect that such benefits would continue if they supported the Teamsters but would be withheld if they failed to do so. Such attempts to influence employees in the choice of a bargaining representative, naturally tend to interfere with employees' exercise of their Section 1152 rights.<sup>4/</sup>

#### ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Mario Saikhon, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Seizing union records, documents, or material from employees without their consent;

(b) Threatening employees that it will stop planting lettuce, change crops, or otherwise reduce the number of workers it employs if employees join, assist, or sign union authorization cards for the UFW, or if the UFW wins an ALRB

---

<sup>4/</sup>We do not agree with the ALO's treatment of the allegation that Respondent violated Section 1153(b) by its conduct at the party. In United States Postal Service, 205 NLRB 607 (1973), no unlawful assistance was found where the employer used one of two rival unions as a conduit for conducting an employee picnic and there was no evidence that the union used the picnic for partisan advantage. In the instant case, Respondent both sponsored and organized the picnic and engaged in such partisan conduct as distributing Teamster buttons through a supervisor and stating that the party was given to encourage employees to vote for the Teamsters. However, we make no finding regarding the alleged Section 1153(b) violation since no exception was filed.

representation election;

(c) Denying access to its premises, including its buses, to agents or representatives of the UFW or any other labor organization seeking such access pursuant to 8 Cal. Admin. Code Section 20900 et seq;

(d) Denying access to its buses to employees engaged in organizing activity for the UFW or any other labor organization during non-work time;

(e) Assaulting UFW or other union representatives who are attempting to contact or communicate with its employees;

(f) Denying access to places where employees reside on Respondent's premises, including its labor camp, to UFW or other union representatives who are attempting to contact or communicate with employees residing therein;

(g) Discharging, refusing to hire or rehire, or otherwise discriminating against any agricultural employee because of his/her UFW or other union membership, activities, or support;

(h) Willfully hiring employees for the primary purpose of voting in an ALRB representation election;

(i) Promising or granting dinners, parties, or other benefits to employees for the purpose of encouraging them to vote for the Teamsters or any other labor organization in an ALRB election or of otherwise influencing their choice of a collective-bargaining representative.

(j) In any other manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Labor Code Section 1152;

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:<sup>5/</sup>

(a) Immediately offer employees Flavio Alejo, Cresencio Castillo, Fidencio Castillo, and Cruz Castillo full reinstatement to their former positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay and other economic losses they have suffered as a result of Respondent's discrimination, plus interest thereon at seven (7) percent per annum;

(b) Make whole employees Moises Soto, Victor Acosta, Carlos Mojica, and Salvador Aguirre for any loss of pay and other economic losses they have suffered between December 26, 1975 and January 26, 1976, inclusive, as a result of Respondent's discrimination, plus interest thereon at seven (7) percent per annum;

(c) Immediately offer employees Miguel Sosa Romales, Domingo Gonzales, Ramon Montellano Acosta, Jose Arredondo Meza, and Jose Placencia full reinstatement to their former positions without prejudice to their seniority or other rights and privi-

---

<sup>5/</sup>Domingo Gonzales was found by the ALO to have been unlawfully laid off, but was not included, apparently inadvertently, among those designated for make-whole relief by the ALO. We find that Gonzales is entitled to such relief and therefore provide it for him in our Order. The backpay for all those entitled to it by this order shall be calculated in the manner established by this Board in Sunnyside Nurseries, 3 ALRB No. 42 (1977).

Although the ALO did not include in his recommended Order reinstatement for the employees designated in subparagraphs (c) and (d) below, we provide for such reinstatement in order to fully effectuate the policies of the Act. However, the Respondent shall be required to comply with the affirmative provisions of the Board's Order only to the extent that it has not already done so.

leges and make them whole for any loss of pay and other economic losses they have suffered as a result of Respondent's discrimination, plus interest thereon at seven (7) percent per annum;

(d) Immediately offer each and every employee employed in Tony Montejano's crew on January 27, 1976, full reinstatement to their former positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay and other economic losses they have suffered as a result of Respondent's discrimination, plus interest thereon at seven (7) percent per annum;

(e) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records and reports, and other records necessary to determine the amount necessary to make whole the employees named in paragraphs 2(a), (b), (c), and (d) above;

(f) Sign 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;

(g) Distribute copies of the attached Notice in appropriate languages to all present employees and to all employees hired by Respondent during the twelve (12) month period following issuance of this Decision;

(h) Mail copies of the attached Notice in all appropriate languages, within 31 days from receipt of this Order, to all employees employed by Respondent since October 28, 1975;

(i) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property for a period of 90 consecutive days, at times and places to be determined by the Regional Director. Respondent shall promptly replace all Notices which have been altered, defaced, covered, or removed.

(j) Arrange for a representative of Respondent or a Board Agent to read the attached Notice in appropriate languages to Respondent's assembled employees. The Notice shall be read on company time to each crew of Respondent's employees employed during the 1979 peak period of employment. The Board Agent shall be given a reasonable amount of time after each reading, outside the presence of Respondent's agents and supervisors, to answer questions which employees may have about the substance of the Notice and their rights under the Act. Piece-rate workers shall receive compensation for time lost at a rate computed by taking the average hourly pay earned during the remainder of the day and applying that to the time consumed during the reading of the Notice and the question-and-answer period; and

(k) Inform the Regional Director in writing within 30 days after issuance of this Order and thereafter,

//////////

//////////



upon the Regional Director's request, report in writing on the steps Respondent has taken to comply with this Order.

Dated: June 25, 1979

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present its side of the story, the Agricultural Labor Relations Board has found that we have interfered with the rights of our employees. The Board has ordered us to post this Notice and to take other actions.

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 to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and 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 threaten to go out of the lettuce business or otherwise eliminate any jobs for workers because of your feelings about, actions on behalf of, or membership in the UFW or any other labor organization;

WE WILL NOT take union material from you without your permission;

WE WILL NOT assault UFW or other union organizers who are trying to talk to you;

WE WILL NOT interfere with UFW or other union organizers who come onto our land, into our buses, or into our labor camp to talk to you about the union when they are there as the law allows;

WE WILL NOT interfere with employees who go into our buses on non-work time to talk to you about the union;

WE WILL NOT hire farm workers for the primary purpose of having them vote in any election conducted by the Agricultural Labor Relations Board;

WE WILL NOT discharge or refuse to hire or rehire workers because of their support for, membership in, or activity on behalf of the UFW or any other union;

WE WILL NOT promise or grant dinner, parties, or other benefits to employees for the purpose of encouraging them to vote for the Teamsters or any other labor organization in an ALRB election.

WE WILL OFFER the workers named below their jobs back, if they want them, and we will pay each of them any money he/she lost because we discharged them:

- Flavio Alejo
- Cresencio Castillo
- Fidencio Castillo
- Cruz Castillo
- Miguel Sosa Romales
- Domingo Gonzales
- Ramon Montellano Acosta
- Jose Arredondo Meza
- Jose Placencia

WE WILL PAY the workers named below any money they lost because we discharged them:

- Moises Soto
- Victor Acosta
- Carlos Mojica
- Salvador Aguirre

WE WILL OFFER each worker who worked in Tony Montejano's crew on January 27, 1976 his job back and we will pay each of them any money they lost because we did not start Montejano's crew on December 17, 1975.

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.	5 ALRB No. 44	
Case Nos.	75-CE-3-I	76-CE-64-E(R)
	75-CE-12-I	76-CE-69-E(R)
	75-CE-23-I	76-CE-69-1-E(R)
	75-CE-69-E(R)	76-CE-69-2-E(R)
	75-CE-2-E(R)	76-CE-78-E(R)
	76-CE-3-E(R)	76-CE-94-E
	76-CE-33-E(R)	76-CE-105-E
	76-CE-56-E(R)	76-CE-117-E
	76-CE-62-E(R)	76-CE-1-E

ALO DECISION

The ALO concluded that Respondent violated Section 1153(a) of the Act by: (1) seizing and destroying union documents in the possession of an employee; (2) threatening to cease planting lettuce if the UFW won the election; (3) denying UFW organizers access to employees on Respondent's buses prior to work; (4) denying an employee engaged in organizational activity access to employees on Respondent's bus prior to work; (5) accelerating a truck and nearly hitting an organizer who was speaking to employees, and shouting an obscenity as the truck passed them; (6) denying UFW organizers access to its labor camp; and (7) giving a party for a crew one week before the election at which it urged employees to vote for the Teamsters and told them that the party was intended to encourage a Teamster vote. The ALO concluded that Respondent did not violate Section 1153(a) by causing a bus to leave early from the collection situs, noting that the General Counsel had failed to prove an early departure, and that assuming it departed four minutes early, it was de minimis.

The ALO concluded there was no violation of Section 1153(b) and (a) where Respondent ordered UFW organizers to leave its fields while permitting Teamster organizers to remain for about one-half hour [Paragraph 21(aa)]. Although rejecting Respondent's argument that the unequal access was de minimis, the ALO reasoned that as one instance of unequal access was not sufficient to warrant setting an election aside, it could not constitute a violation of Section 1153(b) or (a). The ALO concluded there was no violation of Section 1153(b) and (a), as alleged in Paragraph 21(ee) based on unequal access to the labor camp granted to the UFW and Teamsters; he found that there was no disparate treatment. Reasoning that Respondent's speech was protected by Section 1155, the ALO concluded there was no violation of Section 1153(b) and (a) where its supervisor told employees over a card game: "Let's vote Teamsters tomorrow so we can keep the boss happy."

The ALO concluded that Respondent violated Sections 1153(b) and (a) and 1154.6 by hiring two crews to help the Teamsters win the representation election [Paragraph 21(t)]. The ALO found that the employees were hired through a labor contractor for the first time, that one regular crew was activated later than usual, that the new crews were more expensive than the regular crew, that the new crews were not limited in size as were the others, that membership in the new crews was conditioned upon not being pro-UFW, that former employees

of Respondent were not used in the new crews, and that the new crews were retained after their ineptitude was discovered by Respondent. The ALO reasoned that because Respondent's scheme was so inherently destructive of workers' right to a fair representation election, a violation of Section 1154.6 could be found despite evidence that the new crews did perform work and that no proof of specific motivation or of primary purpose would be required, citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1966). The ALO further found that even if the conduct was not treated as inherently destructive, it was shown that Respondent willfully arranged for persons to become employees for the primary purpose of voting in the election. The ALO also concluded that Respondent violated Section 1153 (a) by failing to hire the members of the crew replaced by the two labor contractor crews which were hired to influence the results of the election [Paragraph 21 (m)]. As to one member of the replaced crew, the ALO also found a violation of Section 1153(c). The ALO declined to provide back pay for the members of the two labor contractor crews who were terminated prior to the end of the season as he found that these two crews were terminated because of their poor work performance almost a month after the election.

The ALO concluded there was no violation in Respondent's denial on November 5, 1975, of a cutting job in its Arizona harvest to a thinning employee because of his union activity; the ALO discredited the employee's testimony that certain incriminating statements were made by a supervisor, found that there was a business reason supporting the decision not to use the employee's crew to cut, and further found that the foreman who allegedly promised the employee a cutting job did not have the authority to ensure such a transfer [Paragraph 21(f)]. The ALO also concluded that Respondent did not refuse to employ UFW supporters in its Arizona harvest operation, finding that none of the employees in question was denied such work and that no discriminatory conduct was established [Paragraph 21(d)].

The ALO concluded there was no violation of Section 1153 (c) and (a) based on the alleged refusal to rehire three employees on December 15, 1975 [Paragraph 21(n)]. No evidence was presented as to one employee, the ALO found no job application by another, and the ALO found that the third employee had rejected an offer earlier in the season and had not engaged in protected activity during this period. The ALO also found that Respondent did not refuse to hire Jose Santos Llamas as a cutter for its operation in Arizona on December 15, 1975, because of his union activity, as alleged in Paragraph 21 (p); the ALO reasoned that the employee's seniority did not entitle him to work in the Arizona harvest. The ALO further found that Respondent did not refuse to hire Daniel Ochoa because of his union activity, as alleged in Paragraph 21(x), based on Ochoa's lack of credibility and the consequent failure to prove Ochoa's job application.

The ALO concluded that Respondent did not fire three employees in January 1976 because of their union activity, as alleged in Paragraph 21(bb), finding that these employees quit voluntarily. The ALO found that Benito Gutierrez was not discharged in January 1976, but was laid off for lack of work, and concluded that his layoff was

not in violation of Section 1153(c) and (a) as alleged in Paragraph 21 (gg).

The ALO concluded that Respondent discharged three brothers and their half-brother in February 1976 in violation of Section 1153 (c) and (a), rejecting Respondent's defense that the four employees were fired for leaving in mid-shift without permission [Paragraph 21(jj)]. The ALO noted that two of the brothers and the half-brother were known active union supporters, that the brothers were perceived as a group and Respondent suspected that the remaining brother was also a union supporter, and that leaving in mid-shift had never been a basis for discharge before as other employees had left in mid-shift without permission without incurring any discipline. However, the ALO concluded that Respondent did not violate Section 1153 (c) and (a) when he arrived late for work after attending the pre-election conference, finding that no discriminatory conduct was established [Paragraph 21(ff)].

The ALO concluded that Respondent terminated four employees in December 1975 because they were believed to be UFW supporters, as alleged in Paragraph 21(w), in violation of Section 1153(c) and (a). The ALO found that the experienced workers had not been criticized for their work, that they were terminated at the close of their only day of work for Respondent and on the same day they were seen signing union authorization cards and talking to organizers in the fields, and that the workers were told that there was no work for them because they lived in Mexicali and were Chavistas.

The ALO concluded that Respondent did not discharge two employees in July 1976 because of their union activity, as alleged in Paragraph 21(ll), in violation of Section 1153(c) and (a). The ALO found that one of the employees had not engaged in any protected activity, and that the employees were terminated because of their undisputed poor work record.

The ALO concluded that Respondent did not refuse to hire Teresa Briseno because of her husband's union activity in early October 1976 as alleged in Paragraph 21(mm), in violation of Section 1153(c) and (a). The ALO found that Teresa Briseno had not engaged in any union activity herself, that although her husband was among the most active union supporters, he had not engaged in any union activity since the January 1976 election, that Teresa Briseno had worked ten scattered days between April and June 1976, and that when work was sought for Teresa Briseno there was no work available.

The ALO also concluded that Respondent did not refuse to hire Enrique Zambrano in November 1976 because of his union activities, in violation of Section 1153 (c) and (a), as alleged in Paragraph 21 (nn). The ALO found that there was no evidence that work was available when Zambrano applied for work.

#### BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent violated Section 1153(a) by destroying union documents, by threatening to

cease lettuce planting, by denying UFW organizers and an employee activist access to Respondent's buses, by assaulting a UFW organizer, by denying UFW organizers access to its labor camp, and by giving employees a party to encourage support for the Teamsters.

The Board affirmed the ALO's conclusion in the absence of exceptions, that Respondent did not violate Section 1153(b) and (a) by granting unequal access, but expressly rejected the ALO's statement that no violation could be found unless the conduct would warrant setting aside an election.

The Board affirmed the ALO's conclusion that Respondent violated Sections 1153(b) and (a) 1154.6 by willfully hiring two new crews for the primary purpose of voting in the election, although the Board declined to rely on *NLRB v. Great pane Trailers, supra*. The Board found that Respondent also violated Section 1153(c) by this conduct. The Board affirmed the ALO's conclusion that Respondent violated Section 1153(a) by failing to hire its regular crew instead of the two new crews, and the ALO's conclusion that Respondent also violated Section 1153 (c) by failing to hire one member of this regular crew. The Board noted that no exception was filed regarding the ALO's failure to address the allegation that Respondent violated Section 1153 (c) by failing to hire the other members of the regular crew, but the Board stated that ALOs should make findings and conclusions regarding all allegations set forth in the Complaint which are not deleted by amendment or expressly withdrawn. The Board affirmed the ALO's refusal to provide make-whole relief to the members of the two unlawfully hired crews, finding that they were discharged because of their poor work record.

The Board affirmed the ALO's conclusion that Respondent violated Section 1153 (c) and (a) by discharging four employees in February 1976, as alleged in Paragraph 21(jj), and by paying off four employees in December 1975, as alleged in Paragraph 21(w).

The Board also affirmed the ALO's conclusion that Respondent did not violate Section 1153(c) and (a) by discharging two employees in July 1976, as alleged in Paragraph 21(ll), or by failing to hire Teresa Briseno in October 1976, as alleged in Paragraph 21 (mm) .

The Board ordered Respondent to cease and desist from its unlawful practices, to rehire and make whole the employees it unlawfully terminated, and to post, mail and distribute an appropriate remedial Notice to Employees.

\* \* \*

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





amended charges, amended complaint and amendment to complaint were each duly served upon Respondent.

At the outset of the hearing the motion of the United Farm Workers of America, AFL-CIO (UFW), as Charging Party, to intervene was granted. All parties were given a full opportunity to participate in the hearing, and after the close of the hearing the General Counsel filed Requested Findings of Fact and Respondent filed a Post Hearing Brief.

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

#### FINDINGS OF FACT

##### I. Jurisdiction

Mario Saikhon, Inc., hereinafter called Saikhon or Respondent, is a corporation engaged in agriculture in Imperial County, California, and is an agricultural employer within the meaning of Labor Code Section 1140.4(c).

The United Farm Workers of America, hereinafter called UFW or Union, is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Labor Code Section 1140.4(b).

##### 2. The Alleged Unfair Labor Practices

Respondent is alleged to have violated Section 1153(a) in the following respects: threats of loss of employment; assaults<sup>18</sup> upon an employee and upon an organizer; denial of access to organizers; arrest of organizers; disparate treatment with respect to access as between the Teamsters and the UFW; hiring persons for the primary purpose of voting in a representation election; terminating and refusing to hire supporters of the UFW; and soliciting support for the Teamsters.

The complaint alleges that Respondent violated Section 1153(b) by hiring Teamster supporters; by expressing a preference for the Teamsters; by giving selected workers a party for the purpose of securing votes for the Teamsters; by soliciting Teamster support through gifts of liquor; and by permitting unlimited Teamster access to its fields and its labor camp.

Some 32 persons are alleged to have been discriminatorily terminated or refused hire with the object of discouraging membership in the UFW in violation of both Sections 1153(c) and 1153(a).

Respondent is alleged to have violated Labor Code Section 1154.6 by importing two labor contractors who provided 126 employees hired for the primary purpose of voting in a representation election. This action is also said to be violative of Sections 1153(a) and (b).

### 3. The Employer's Operation

Mario Saikhon, Inc., is engaged in farming lettuce, wheat, watermelons and cantaloupe. It is the Saikhon lettuce operations in the Imperial Valley (hereinafter called the Valley) with which this case is concerned.

During a period of approximately eight months, starting about mid-September and ending in mid-April of the following year, Saikhon, Inc., is engaged in the growing and harvesting of lettuce. The cycle starts with weeding and thinning in Welton, Arizona, about September 20. In early October, the crews move to the Valley to thin and cut. In mid-November part of the work force returns to Welton for the harvest, the balance stays in the Valley to continue thinning operations. The Welton harvest lasts until mid-December, at which time the Valley harvest begins. There is no overlap of cutting operations and no hiatus between them. In the 1975-1976 season cutting ceased in Welton on December 13. It began in the Valley on Monday, December 15, and continued until the latter part of March, 1976. The cycle ends with a return to Welton for a second harvest, lasting approximately one month.

Weeding and thinning work is hourly rated. The crews are made up of women and older workers who do not move into harvesting together with workers who thin in order to get the more lucrative harvesting work. Harvesting crews are paid on a piece-work basis, and harvest workers earn considerably more per day than do thinning workers.

— Cutting and packing work is done by trios, a group of three workers, two of whom cut while one packs the cut lettuce into cartons. For the most part, the trio members trade off among themselves as between cutting and packing; however, there are some workers who do not cut. The optimum number of trios to a crew is in the range of 11-13. In addition to the cutter/packers, the crews consist of loaders, closers, a stitcher and a water person. The stitcher folds and stitches (staples) empty cartons into which the lettuce is packed. The packed lettuce is watered, the carton is closed by the closer and then loaded in the field onto flatrack trucks to be moved to a vacuum cooler. A crew's cutter/packers and closers each earn the same amount of money. Earnings are based upon application of a piece rate to the crew's harvest. Loaders are paid by the carton at a rate different from other crew members.

Saikhon uses the Gulf service station in Calexico as an assembly point for workers during the Valley thinning season and

during both the thinning and cutting operations in Welton. Buses are provided to transport the workers to and from Welton, Arizona, and to and from the fields during the Valley thinning season. No transportation is provided during the Valley harvest.

Each crew foreman has full control over his crew with respect to hiring and firing. He has this authority only with respect to his own crew. He has no authority to transfer a member of his crew to another crew. A worker might be fired by one foreman and hired by another. While crew foremen determine who to hire, Mario Saikhon determines how many trios are to be used in each crew.

In selecting employees for the harvest crews, preference is given to those workers who come every year and who work the pre-harvest season. Since cutting is more lucrative to the worker, and good workers prefer to work only under piece-work conditions, giving the preference is the technique used to get workers for thinning. No formal seniority system is maintained, no seniority roster is kept however, the foremen attempt to effect layoffs on a seniority basis, subject to memory limitations. The application of this principle varies with the foreman. Ignacio Alvarez retains those who have worked the longest in his crew when a layoff is necessary. Santiago Herrera retains those who have the longest service with Saikhon. Jesus Vera gives preference to those who have worked the most (helped the most) for him. These are people who help in the thinning and arrive when the season starts.

For the most part, Saikhon workers return year after year. None of the regular foremen go to the border in Calexico, "the hole," to recruit employees. It is not necessary. The word is spread among the workers by the foremen and by the workers that the season is about to start. Workers "present themselves" to their respective foreman at the Gulf station and are employed. In some cases workers are contacted at their homes by their foremen.

Santiago Herrera, Ignacio Alvarez and Jesus Vera are the foremen of the three basic lettuce crews used by Saikhon. Tony Montejano is the foreman of a cutting crew which customarily is formed about two weeks after the Valley harvest starts. The parties stipulated that each of the foremen is a supervisor within the meaning of Section 1140.4(J) of the Act, and I so find. These foremen are in turn responsible to Leonardo Barriga, who is a general foreman. He does no hiring and has done none for at least five years. when he is asked for a Job, he refers the person to a foreman. Barriga has overall responsibility for directing the work of all crews customarily used in the lettuce harvest. The parties stipulated, and I so find, that Barriga is a supervisor within the meaning of Section 1140.4(j) of the Act. Barriga is directly responsible to Carnelo Fiore, the harvesting supervisor, who supervises all field operations with the exception of irrigation. Fiore is directly responsible to Saikhon. He was stipulated to be a supervisor within the meaning of the Act, and I so find.

During the 1975-1976 Valley harvest season, Saikhon utilized, for the first time, crews supplied by two labor contractors, Johnny Bermio and Steve Tira. Both Bermio and Tira had authority to hire and fire members of their respective crews. Bermio and Tira were in turn directly responsible to Buck Gardenhire, a general foreman. Gardenhire also managed the labor camp used to house the workers in the Bermio and Tira crews. Gardenhire appears to have been directly responsible to Mario Saikhon. Bermio, Gardenhire and Tira were each stipulated to be supervisors within the meaning of Section 1140.4(i). I so find.

#### 4. Chronology Of Events

October 28, 1975: On the morning of October 28, 1975, at the Gulf service station in Calexico, UFW organizer Stephan Roberson gave Ramon Sepulveda a paper to be used for the purpose of writing down the names of those in his crew.<sup>1/</sup> The crew took a Saikhon bus to their work site for the day, arriving about one-half hour before work was due to start. The foreman, Ignacio Alvarez ("Nacho"), drove to the work site from the Gulf station in his pick-up.

Just prior to Nacho's arrival Sepulveda, Reyna, Correa, Murillo, Ajon, de Lucas, Mendez, Valencia, Hernandez and others were talking at the side of the field adjacent to a dirt access road. They were Joking among themselves about putting Sepulveda on the Ranch Committee when Alvarez arrived. He told Sepulveda not to get involved with the UFW, and he took from Sepulveda the paper which Roberson had given him and threw it into the canal.

Alvarez asked what the workers were talking about. The workers told him they were talking about the Union. Alvarez said that if we signed cards for the Union, and the Union won, Saikhon would "retire from lettuce and plant alfalfa."<sup>2/</sup> Hernandez responded by saying that if Saikhon stopped planting lettuce, someone else would come in, and he could get a Job with the new company. Alvarez suggested he leave; Hernandez replied he was not leaving until there was a union contract or Saikhon stopped planting lettuce.

These findings are based upon the testimony of Jesus

---

<sup>1/</sup>The Gulf station in Calexico is the assembly point for Saikhon crews. When buses are used to transport the workers to and from the fields, the Gulf station is the point of departure.

<sup>2/</sup>This opinion will adopt the practice of using the term "Union" to apply only to the UFW. The International Brotherhood of Teamsters will be referred to as "Teamsters" or the "IBT." Alvarez did not testify with respect to the "paper" incident. He denied the "alfalfa" statement.

Reyna and Gilberto Hernandez, both of whom were working for Saikhon at the time of the hearing. Reyna has six years' service and Hernandez has eight. Respondent's counsel urges that neither be credited since each was at the time of the occurrence a member of the Union's Ranch Committee. The incident occurred some 15 months ago during an organizational campaign in which both were active. It does not follow that such participation automatically taints their testimony, and standing alone, I find it does not. More significant is the fact that each is a current and long-term employee of Saikhon, and each had every reason to testify truthfully. The National Labor Relations Board has long considered "... particularly noteworthy and credible those witnesses who 'place the future of their Job on the line' when testifying contrary to the presumed desire of their current employer." *Perfection Macaroni Company* (1971), 191 NLRB 82, 89. This concept is particularly appropriate to evaluating credibility of witnesses in Agricultural Labor Relations Board proceedings dealing with the resolution of disputes in this volatile area of our society.

November 3, 1975; In early October, 1975, Lucio Padilla began organizing his fellow workers. As of the start of the Welton harvest, he had everyone in Crew 3 signed up except one person.

On November 3, 1975, Padilla heard Barriga say that if the UFW won an election, Saikhon would plant alfalfa.<sup>3/</sup> He also heard Barriga say that anybody who was with Chavez should go with him; that Chavez was no good and Just wanted our money, and that the UFW organizers had "fun" when they were away from the fields. This was not the only occasion on which Padilla heard such remarks.

These findings are based upon the testimony of Lucio Padilla which I credit despite an obvious error with respect to the date on which he heard the statements or alternatively an error regarding where he was working. This is not the only occasion on which Barriga made such a statement, nor is it the only action by Barriga which was violative of the Act. These factors lead me to discredit his blanket disavowal of having made such statements.

November 5, 1975: The complaint alleges that on or about November 5, 1975, Ignacio Alvarez refused to employ Ernesto Navarro as a lettuce cutter to punish him for his organizational activities.

On November 5, 1975, Navarro was working as a thinner in Alvarez's crew in the Valley. He continued to thin for Alvarez until December 13 when Alvarez began Valley cutting. Navarro, as he had in prior years, moved to another crew as a thinner.<sup>4/</sup> There

---

<sup>3/</sup>The crew time book records Padilla at work in Crew No. 3 on November 3, 1975.

<sup>4/</sup>Navarro's testimony that he worked less than eight hours per day and had gaps in his employment during -- [continued]

is no testimony Navarro asked Alvarez for a cutting Job when the Valley harvest began.5/

The Welton harvest commenced on November 17, 1975. Alvarez's crew was not sent to Welton. It remained in the Valley to thin. The decision to send only two of the three crews then, working to Welton was made by Mario Saikhon. It was predicated upon the loss of 50\$ of the crop to rain shortly before cutting was to commence. The selection of Crew No. 2 as the crew to remain in the Valley was based upon the Company's loose crew rotation policy. Each of the other crews had previously remained in the Valley during the Welton harvest; it was Crew 2's turn.

Navarro testified that Alvarez told him he would take him to Welton and teach him to cut. A crew foreman has control only over the workers in his crew. He has no authority to transfer or assign members of his crew to other crews. When Crew 2 did not go to Welton, it would have been impossible for Alvarez to provide Navarro with a Welton cutting Job.

During the 1972-1973 season Alvarez gave Navarro a chance to cut while the crew was in Welton. He was about one-half as fast as the regular cutters. Navarro has not asked Alvarez for a cutting job since the 1972-1973 season.6/

Navarro testified that Alvarez was aware of his Union activities and cited that activity as the reason Crew 2 did not get to go to Welton and further used that activity as the reason for refusing to teach him to cut lettuce. I find that these conversations did not occur.7/

November 7, 1975:

(a) Plant Alfalfa Statement

Guillermo Duran has been employed by Saikhon as a

---

4/[continued]-November and December, 1975, is contradicted by The Earnings Record. I do not credit his testimony on this point.

5/Navarro was not called to rebut Alvarez's testimony that Navarro did not ask for a cutting Job in 1975.

6/Navarro's testimony that Alvarez failed to honor a 1973 promise to teach him to cut is belied by his Earnings Record.

7/Navarro testified that Alvarez told him he could forget about lettuce, that he was not going to take him to Welton because of his organizing activities. Later when the crew did not go to Welton, Navarro testified that Alvarez told him these organizing activities were the reason the crew did not go to Welton. The improbability that this conversation occurred is discussed below.

"closer" for about eight years. On November 7, 1975, while employed as a thinner in Crew No. 2, he heard Barriga say that if Mario lost the election, he did not want any problems with the UFW so he would plant alfalfa so he would not have to have a lot of workers.

Barriga was at the Gulf station in the morning and talked to all the workers. Duran heard the "alfalfa" statement while a group of workers were talking about the UFW. He did not remember who else was present. November 7 was not the only occasion on which Duran heard similar statements by Barriga.

(b) Reyna Bus Incident

As of November 7, 1975, Jesus Reyna was employed as a thinner in Crew No. 2. He customarily rode the Saikhon bus to work along with other members of his crew. During this period the bus was driven either by Alvarez or by Uribe. his "pusher."<sup>8/</sup> The bus arrived at the station between 4:00 and 4:30 a.m. and would depart for the field between 5:00 and 5:30 a.m. The arrival time could vary substantially depending upon when the driver gets up or whether there are any problems with the bus.

Before his crew left for the fields, Reyna would work at organizational activities. The UFW began organizing effort at the station as early as October 28. Reyna's organizing activities started sometime prior to November 7. On November 7 he arrived at the station between 4:00 and 4:30 a.m. and talked to workers in the Crew 2 bus for approximately 30-40 minutes. He then went to the Crew 1 bus and talked to those workers for about 20 minutes when he heard the Crew 2 bus start to leave. He quickly left the Crew 1 bus and got onto his bus as it was about to leave the service station.

Jesus Uribe, the bus driver, following his usual practice asked Barriga whether he could leave for the fields since his bus was full, and it was almost time to go. Barriga told him to take off. As he started to move toward the street and while still on the premises, he became aware Reyna was not on the bus. Gilberto Hernandez, who was on the bus, hollered for Uribe to wait for Reyna, and Reyna started banging on the door of the bus. Uribe opened the door, and Reyna got in.

The bus arrived at the field about one-half hour before work was to start, an arrival time not inconsistent with normal practice.<sup>9/</sup>

---

<sup>8/A</sup> 'pusher' is a foreman's second in command. Alvarez testified "without contradiction that Uribe has authority to hire.

<sup>9/</sup>These findings rest upon the testimony of Reyna, Hernandez, Uribe, Alvarez and Barriga. Testimony of any of these witnesses inconsistent with these findings has not been credited.

November 10, 1975; On November 10 starting about 4:15 a.m., Stephan Roberson and Joaquin Verdugo, UFW organizers, began distributing leaflets and talking to Saikhon workers at the Gulf station. Roberson gave leaflets for distribution to Reyna, Flavio Alejo and Lucio Padilla.

When Roberson finished these activities, he went into the Crew 2 bus along with Verdugo and Reyna. He had been talking to workers on the buses every morning since the campaign started. The foreman was on the bus; he left in response to Roberson's request. There were 15-20 workers on the bus, and Roberson talked to them about the terms and conditions of the UFW's contract with Inter-Harvest.

Sometime thereafter, Barriga got onto the bus and told Roberson he had to leave. Roberson refused, saying he had a right to be there. Barriga left and returned about 15 minutes later with a policeman who told Roberson to leave. When Roberson said he had a right to be there, the policeman said his Chief had issued orders they should not be there because the buses were Saikhon property.

Roberson got off the bus and went to the UFW office in Calexico to get a copy of the statute. He returned to the station and read this to the policeman, whose position remained unchanged. Roberson was not permitted to board the bus. It left for work while Roberson and the policeman were discussing the law.<sup>10/</sup>

November 13, 1975: The harvest season began in Welton on November 17, 1975. Mario Saikhon selected Crew 1 and Crew 3 to go to Welton. Only two crews were needed and it was Crew 2's turn to remain in the Valley; therefore Alvarez had no control over who went to Welton. It was up to Vera and Herrera to determine which persons made up the crews. Jesus Vera (Crew 3 foreman) gave preference to those who were working in his thinning crew on November 14.<sup>11/</sup>

Six men from Crew 2 worked in Welton in Crew 3. Five of the six contacted Vera and asked to go to Welton. After checking with Alvarez to ascertain he had no objections, the five started work for Vera. Guillermo Duran, the sixth, had not worked the Valley pre-harvest. When it was due to commence, Duran was cutting lettuce for a grower in King City. He received permission from Saikhon to help that grower complete his harvest. When he returned to the Valley, he was not scheduled to go to Welton. He contacted

---

<sup>10/</sup>Barriga testified, but he did not testify regarding this incident. The findings set forth are based upon Roberson's testimony.

<sup>11/</sup>Fiore's testimony affirmed the practice of giving harvest work preference to those who have done pre-harvest work.



Fiore about the situation, and Fiore thereafter told Duran he was to go to Welton despite the fact he did not work the Valley pre-harvest.

Saucedo Flores declined an offer from Vera to go to Welton. Lopez Mendez on one occasion got onto the Welton bus and asked Barriga if he could go to work. Barriga told him that preference was given to those who had thinned in Welton and that he would have to see Vera. There is no evidence that Lopez Mendez contacted Vera regarding a Welton Job. There is no record that Ernesto Navarro ever asked Vera to go to Welton; nor is there any evidence that Jesus Reyna asked to go to Welton. He did not tell Alvarez he wanted to go, and he did not ask Vera for a job.<sup>12/</sup>

With the exception of Reyna, none of the alleged 1153(c)'s were more than usually active on behalf of the UFW. Duran signed an authorization card and wore a UFW button. He did not try to organize other workers. Saucedo Flores talked to his fellow workers, about the UFW. Lopez Mendez wore a UFW button and told workers they should join. Duran solicited signatures for authorization cards.

At the time the Welton harvest began both Crew 2 and Crew 3 were completely organized. In Crew 2 everybody wore a button.

November 20, 1975: On November 20, 1975, while at the Gulf station in Calexico, during the period prior to departure for work, Jesus Reyna boarded the Crew No. 1 bus to induce a member of the crew to volunteer to serve as a UFW election observer, it being his understanding there was soon to be a representation election. Leonardo Barriga told him to get off the bus, that he had no business there.<sup>13/</sup>

December 15, 1975: The Imperial Valley harvest started. Monday, December 15. Prior to the start of the harvest Vera and Herrera each received instructions from Saikhon to reduce his crew to 11 trios. In each instance this meant that people who had finished the harvest in Welton had to be laid off." Alvarez was also told to start the harvest with 11 trios.

On the last day of Welton cutting, Vera told his entire crew to show up at a designated field on Monday. He hired everybody who showed up Herrera did not learn of the crew size reduction until Sunday, the 14th, when he went by the Saikhon office for

---

<sup>12/</sup>Vera appears to have commuted between Welton and Calexico during the harvest. Herrera remained in the Welton area.

<sup>13/</sup>Barriga testified on behalf of Respondent. He asserts he never talked to Reyna at the Calexico station. The findings set forth above are based upon Reyna's testimony.

orders.

In determining who to retain or who to hire when limitations are placed upon the number of persons he can use in cutting, Vera uses the people who have helped in thinning, especially those who work the entire thinning season. The people he rejects or lay off are those who do not thin or who arrive half-way through the season; i.e., the ones who help the least in all seasons.

When Herrera cannot hire everyone, he hires or keeps those having the greatest seniority with the Company. Alvarez under similar circumstances keeps those who have worked the longest in his crew. The determination with respect to whether particular individuals will be hired or laid off is left to the foreman. None appear to follow the practice of permitting employees entitled to preferential treatment to bump employees in the crew having less relevant service.

Miguel Sosa Romales: Romales is presently employed by Saikhon. He has worked the entire lettuce season in each of the last eight years. During the last four years he worked in Vera's crew. He worked only the last three days of the Welton harvest.14/

On the last day of the Welton harvest Romales asked Vera about harvest work in the Valley. Vera told him to show up at Keystone Road on Monday. Romales showed up and began work. He worked about two hours when Vera's pusher told him to stop working Romales went to talk to Vera, who told him there was no opportunity for him to work at that time. Vera told him there might be work on Thursday or Friday. Romales went to the Gulf station on Thursday, He saw Vera. who said he did not know yet about work. Sometime later he saw Barriga and asked why he was not working. Barriga told him he would be called when work was available for him.15/

---

14/Romales testified he started work in Welton about November 25, 1975. Romales' 1975 Earnings Record shows Welton harvesting work only on December 11, 12 and 13. Mr. Miguel Sosa Romales was referred to during the hearing as Romales.

15/These findings are based upon the Romales testimony. Vera denies seeing Romales on December 15 and testified he did not see Romales until he started work in January. I credit Romales testimony. At the time he testified he was not only employed by Saikhon, but he was working in Vera's crew. The National Labor Relations Board has long recognized the pressures under which a current employee is placed when testifying against his employer. Here those pressures are magnified because the testimony is directed against his current foreman. It is unlikely Romales would fabricate testimony under such circumstances, especially when the gain to him is limited; See: Perfection Macaroni Company, supra.

Romales returned to work on January 1. Vera told his brother to tell Romales a Job was waiting for him at the gas station. His return coincided with Mario Saikhon's order to Vera to bring his crew up to the size it had been in Welton.

Romales wore a UFW button and had a UFW bumper sticker on his car during the period he worked at Welton. During those three days he helped Padilla and Zambrano organize by "being there and knowing what kind of union we should have."

Pedro Sosa Romales: Sosa worked in Vera's thinning crew in the Valley from October 28 through October 31. He was off work from November 1 until November 17 when he resumed work as an hourly employee in Crew 1 with Montejano. No testimony was offered regarding the circumstances of his termination on December 15, 1975.

Dominguez Gonzales; Gonzales is currently employed by Saikhon. He has worked five or six years in Herrera's crew. He worked in Valley thinning for Herrera in the 1975-1976 season; however, he opted not to go to Welton for the harvest because one has to get up too early. He remained in the Valley thinning in Montejano's crew.

When 1975 Valley cutting started, he asked Montejano for work; Montejano said he had received no orders to form a crew. The day the harvest started, Gonzales asked Herrera for work and was told to keep checking.<sup>16/</sup> He kept checking with Herrera or Montejano every third or fourth day for about two weeks. He started to work in Herrera's crew the day of the election.

In the 1974-1975 season Gonzales thinned until November 7; he was off until January 15, 1975, when he commenced work in Herrera's crew as a cutter. In the 1975-1976 season he thinned until December 13 and was off until January 7, 1976.

Gonzales has actively and vocally supported the UFW for four or five years. During the 1975 Valley thinning he wore UFW buttons while at work, and he would yell "Viva Chavez" when he felt the crew was being overworked.

Ramon Montallano Acosta:<sup>17/</sup> Mr. Montallano is currently employed in Crew 2 with Alvarez as his foreman. He has worked for Saikhon for two and one-half years thinning, packing and loading lettuce. He is not a cutter.

---

<sup>16/</sup>Herrera had no recollection of whether Gonzales sought work from him on December 15. For the reasons set forth above, I credit Gonzales' testimony. See Footnote 15. Additionally, I note this testimony was elicited on cross-examination.

<sup>17/</sup>Mr. Montallano Acosta was addressed during the proceeding as Mr. Montallano

During the 1975-1976 season Montallano thinned in Welton and in the Valley in Herrera's crew. He went to the Welton harvest on November 20 and worked until the end of the harvest. He did not start in Valley cutting on December 15.

On December 15 he sought work from Herrera and was refused on the ground he was in Alvarez's crew. He contacted Alvarez the same morning.<sup>18/</sup> The parties stipulated that Montallano sought work each day after December 15, 1975.<sup>19/</sup>

Montallano's Union activity at Welton consisted of helping other workers understand the benefits of the UFW. From time to time he would yell that the workers were oxen and that it was time for them to get rid of their "yoke." Herrera denied knowledge of any Union activities on the part of Montallano.

Cruz Castillo Estrada:<sup>20/</sup> Mr. Castillo's Earnings Record shows that he worked only one day in 1974 and for a month in April, 1975. This work was at an hourly rate in Crew No. 2. In 1975 he worked December 4, 5 and 6 in Crew No. 1 at Welton. The crew did not work the 7, 8, 9 or 10th of December; Castillo worked the 11th, 12th and 13th, the last three days of the season. He returned to work January 2, 1976, and worked until February 7, 1976.

When the Valley harvest started, Herrera told Castillo it was his turn to be laid off. Herrera said he would let him know when there was work for him. He was laid off because he was one the newest people in the crew.

While at Welton, he did not speak to the workers about the UFW, nor did he talk to Herrera about the UFW. He wore a UFW button.

---

<sup>18/</sup>Alvarez did not recall whether he was the Gulf station the morning of the 15th. Herrera testified that Montallano did not appear that morning.

<sup>19/</sup>In view of Respondent's acceptance of this stipulation, I find it unlikely that Montallano did not seek work on December 15; therefore, I credit his testimony regarding his encounters with Alvarez and Herrera on that date. The stipulation also discredits the Herrera testimony regarding a conversation with Montallano in which Montallano purportedly said he had not sought work on the 15th because Herrera's crew worked too fast, and he was going to wait until Crew 4 was formed. Since Respondent concedes Montallano sought work on a daily basis, it is unlikely the inconsistent conversation occurred. I find it did not. Moreover, Montallano's active pursuit of employment through the State's Department of Employment is an additional basis for discrediting Herrera's testimony on this point.

<sup>20/</sup>Referred to as Mr. Castillo or Cruz during the hear

Jose Placencia: Placencia, a current employee, has worked for Saikhon for 11 or 12 years. He has thinned and cut lettuce, packed carrots and picked cantaloupe and watermelon. He normally works from September until the following June or July. For the last eight or nine years he has worked in Herrera's crew, and Herrera tells him when the season is ready to start. He worked the 1975 Welton harvest; Friday, December 12, was the last day he worked in Welton.

On December 15, 1975, Placencia got to the field when Herrera's crew was working about 15 minutes after work started, and Herrera told him he did not need any more people.<sup>21/</sup> He told Placencia that Saikhon had restricted him to 11 trios. Placencia returned on several occasions thereafter seeking work and was told not to come back until after the election. During this period he also tried unsuccessfully to get work with the other foremen.

Placencia resumed work on January 2, 1976, after Herrera came to his home to ask whether he was ready to return to work. The crew's time book shows he worked from January 2 until January 10 in Herrera's crew; at which time his employment ceased until early May, 1976. The propriety of the January 10 work cessation is not under attack.

While at Welton, Placencia's protected activity consisted of talking to his friends about the benefits which the UFW could get the workers.

Juan Cuevas Laguna:<sup>22/</sup> Cuevas has worked for Saikhon both cutting and thinning lettuce since 1966. Prior to the 1975-1976 season he would cut with Crew 1 at Welton and move to Crew I when the Valley harvest started. This meant he did not work the first few weeks of the Valley harvest.

In 1975 Cuevas went to Welton at the start of the harvest, He last worked in Welton during the week ending November 19, 1975. He worked a total of two days.<sup>23/</sup>

---

<sup>21/</sup>Herrera testified that Placencia did not ask for Valley work until Wednesday of the first week. In view of Placencia's length of service with Saikhon and his status as a current employee and Herrera's many manifestations of memory failure, I do not credit the testimony of Herrera. *Perfection Macaroni Co.*(1971), 191 NLRB 82, 89; *Podesta v. Mehrten* U943). 57 C.A.2d 66.

<sup>22/</sup>Referred to by the parties as Cuevas.

<sup>23/</sup>Cuevas testified he left Welton to go thinning about a week before the season was over. The Employer's business records show a substantially earlier departure.

About a week after Valley harvest started Cuevas asked Herrera for a Job. Herrera told him there was no work because he was limited to 11 trios.<sup>24/</sup> When he was unable to get work with Herrera, Cuevas testified he thinned in Leyva's crew. However, this testimony is incorrect since his Earnings Record shows no work after December 11, 1975. Cuevas declined a job offer on December 31, 1975, because he had another Job. The record does not; indicate when this job was obtained.

Cuevas testified that while at work during the period between September and December, 1975, he urged his fellow workers to I Join the UFW. He also testified he did nothing to hide these activities and that Herrera was present when he was engaged in his exortations.

Jose Arredondo-Meza: Mr. Arredondo-Meza is currently employed by Saikhon in Crew 4. In 1975-1976 he started work in Welton in Chago's crew on November 21, 1975. He worked every day the crew worked from November 21 to December 13. 1974 was the first time he cut lettuce for Saikhon.

On the last day of the 1975-1976 Welton harvest, Herrera told the crew to go to the gas station on Monday to see where the crew was to work. He told Arredondo-Meza to show up to see whether he was needed. When Meza saw Herrera on Monday, Herrera told him he was limited to 11 trios and to check back in a few days because a new crew might be formed. Herrera laid him off because he was one of the newest workers.<sup>25/</sup> When he checked back, Herrera said he could not hire any more workers. Arredondo-Meza returned to work on January 2 and worked until the 20th when he was laid off.

Arredondo-Meza associated with Flavio Alejo and his brothers. He was present when they talked to workers about the UFW, and he saw them sign up workers. He wore a UFW button.

Jesus Martinez Ramirez: <sup>26/</sup> Martinez is currently employed in Crew 3. He has been so employed since January 1, 1976 at

---

<sup>24/</sup>This finding is based upon Herrera's testimony. I have not credited Cuevas' testimony that he asked for work the first day of the Valley harvest. The inaccuracies of his testimony with respect to his 1975 work record leads me to conclude he should not be credited with respect to this part of his testimony. Podesta v. Mehrten, supra.

<sup>25/</sup>This finding is based upon the testimony of both Herrera and Meza. Herrera does not remember talking to Meza about work prior to laying him off. The balance of the findings are based upon uncontroverted testimony.

<sup>26/</sup>Addressed as Mr. Martinez by the parties.

all times when lettuce was being thinned or harvested. Martinez works solely as a cutter-packer. He does not thin. Customarily Vera or one of his co-workers advises him when work is to start and Martinez shows up at the gas station.

When the 1975 Welton harvest started, he was ill. He saw Vera at the Gulf station and told him that he was too ill to work. He reported for work the second day of the harvest and rode the bus to work. There were fights on the bus because everyone could not get a seat. Martinez worked only one day in Welton because of the fights on the bus and the lack of an alternative way to get to work.

Martinez did not show up for work on December 15, 1975. The first occasion on which Vera saw him during the Valley harvest was January 1, 1976.<sup>27/</sup> He offered Martinez a Job, and Martinez accepted. It was at this time that Vera brought his crew up to the level it had been in Welton. Martinez worked the balance of the 1975-1976 harvest and also the 1976-1977 harvest.

Martinez did no organizing work. He has demonstrated his support for the UFW by listening when the Union is spoken of. He does not attempt to deter those speaking in favor of the Union.

Felix Uriarte Valenzuela:<sup>28/</sup> Valenzuela was employed as a loader and thinner from 1970 until April, 1975. He did not work during the 1975-1976 season.

Vera contacted Valenzuela at the start of the 1975 thinning season and asked him to come to work. Valenzuela said he could not come to work because he had a truck and was working in melons.<sup>29/</sup>

27/This finding is based on Vera's testimony. Martinez testified he showed up at the Gulf station to seek work each day for a week and was continually told by Vera there was not enough work. I do not credit this portion of his testimony. There is no reason for Vera to falsify his testimony regarding whether Martinez showed up on the 15th. Since he had not worked in Welton and since Welton people were being refused work, and since to hire Martinez would have displaced another worker, Vera had a valid reason for not hiring Martinez had he appeared. The admitted lack of overt protected activity by Martinez is another basis for accepting Vera's testimony on this point. The testimony of Martinez regarding his presence at the Gulf station is uncorroborated. No witness was produced to verify his presence at the station on the 15th or any day thereafter. In the context of the General Counsel's extensive production of witnesses, I find this absence of an independent witness to Martinez' presence at the Gulf station significant.

28/Referred to by the parties as Valenzuela.

29/This testimony by Vera was un rebutted.

Valenzuela sought work at the start of the Welton harve and Vera told him there was no work. Valenzuela again sought work on the first day of the Valley harvest and was told he would probably get work in Crew 4.30/

There is no evidence of protected activity by Valenzuela A during the 1975-1976 season. Valenzuela talked about the UFW in Vera's presence during the 1974-1975 season and told his fellow workers that the IBT was not helpful to the workers.

Joaquin Flores: The amended complaint alleges that Joaquin Flores was refused rehire on or about December 15, 1975. No evidence was offered with respect to Mr. Flores and I recommend dismissal of Paragraph 21(n) with respect to him.

Daniel Ochoa Diaz: 31/ Ochoa's Employee Earnings Record for 1973 shows he worked as a cutter/packer from the week ending November 28 through the week ending December 19. His 1974 Earnings Record shows one day worked as a cutter in April, 1974 (the 1973-1974 season) and five days worked as a thinner between September 28, 1974, and October 31, 1974 (the 1974-1975 season). Also during the 1974-1975 season he worked as a cutter/packer from approximately February 19 until approximately April 24.32/

During the 1975-1976 season he worked nine days as a thinner during the last two weeks in October.33/ No testimony was presented regarding why he ceased working on "October 31, 1975. There is no testimony regarding any attempt to obtain employment cutting in Welton.

Mr. Ochoa testified that he went to Mr. Alvarez's house in

---

30/Barriga testified that Valenzuela asked him for a job sometime in November, and Barriga told him to go see Vera.

31/Referred to by the parties as Ochoa.

32/Ochoa testified during the 1974-1975 season he worked three weeks in Welton as a thinner, worked the Valley thinning season and then went to Welton to cut for three or four weeks, returned to the Valley for the harvest, and when the Valley harvest was finished, he completed the harvest in April. Insofar as Ochoa's testimony, based as it was on his recollections, is contradicted by his Earnings Record, my findings are based upon the Earnings Record.

33/This thinning was during the Valley season. Ochoa testified he was given work at the start of the Welton thinning, and he testified to a conversation with Alvarez in which Alvarez told him not to expect any cutting work. Since Ochoa is in error regarding having started the Welton cutting, I do not credit his testimony regarding the Alvarez conversations.



Mexicali to ask for work and was told he would not get any work because he had signed with Chavez and as long as he went on like this there would be no work.<sup>34/</sup> Ochoa was unspecific with respect to when this conversation occurred; Alvarez does not remember such a conversation.

When Ochoa wanted Work, he customarily asked for it through his wife or his mother, Alvarez does not remember Ochoa personally seeking work from him as a cutter/packer in 1975.

Without specifying any foundational facts beyond the fact the conversations occurred at Alvarez's home in Mexicali, Ochoa testified he went to Alvarez's home on many occasions to seek work in Welton. He testified he frequently went to the gas station seeking work. This testimony was uncorroborated.

Ochoa signed an authorization card with the UFW while employed by another grower. He stated that during the period he thinned in October, 1975, he talked to the workers about Chavez, and Alvarez would separate him from the rest of the workers. Alvarez admitted keeping him separated from other workers because he talked so much he distracted the other workers and interfered with their thinning work.

December 16, 1975: Stephan Roberson is currently the UFW State Director in Florida. During 1975-1976 he was a UFW organizer in Imperial Valley and was active in the Saikhon campaign.

On the morning of December 16, 1975, Roberson, Valenzuela, Santiago and Joe were standing talking on a dirt road adjacent to a Saikhon field. Joe and Santiago were loaders from Crew No. 3.<sup>35/</sup> Valenzuela saw the Barriga pickup approaching them from a distance of approximately three-quarters of a mile. As the truck turned into the road on which Valenzuela and the others were standing, its speed increased and passed right next to them. It sprayed dust on them, and Valenzuela testified it was lucky the truck did not hit them. As Barriga drove by, he hollered "go fuck" at them.<sup>36/</sup>

---

<sup>34/</sup>Alvarez testified without contradiction that he has not lived in Mexicali for eight years.

<sup>35/</sup>The crew time book for Crew 3 for December 16, 1975, lists Santiago Cobarrivios and Jose Galligos as among the loaders working that day.

<sup>36/</sup>These findings are based upon the Valenzuela testimony. The testimony of Roberson to the extent it is inconsistent with that; of Valenzuela is not credited in view of his inability to recall any of the circumstances surrounding the incident and in view of the unlikelihood the truck could have stayed on the road as he described it at a speed of 40 miles per hour. I have disregarded the assertion of Respondent's counsel that Roberson's account of the incident; should be discredited because of inconsistencies between his testimony and a prior declaration introduced into evidence. The assertion is erroneous. Roberson does not allude to the incident in his declaration.

Barriga was admittedly aware that Roberson was a UFW organizer. He denies ever passing by Roberson except on two occasions when Roberson was sitting in his car talking to someone. Neither Roberson nor Valenzuela place an automobile at the scene of the Incident. Roberson testified the road was about a truck and a half wide--the truck reference was to a pickup. This estimate was not contradicted. Since the road was less than two cars wide, it would appear that Barriga could not have passed Roberson and Valenzuela while they were in Roberson's car. In view of Barriga's inability to recall details of many events occurring during this period, I do not credit his testimony regarding the presence of a car.

December 19, 1975: Jose Santos Llamas quit his employment with Saikhon in December, 1975, because he was given thinning work to do rather than cutting.<sup>37/</sup> Llamas felt he was entitled to a cutting assignment because he had thinned for Saikhon for three years. He did not work for Saikhon during the 1973-1974 season. His Earnings Record for the 1974-975 season shows he worked as a thinner for five days, three in Crew No. 1 and two in Crew No. 3. in the 1975-1976 season he worked steadily from the end of September until December 19 in Crew 1. He did not go to Welton with Herrera in November, 1975; he remained in the Valley thinning with Montejano who took over thinning Crew 1 when Herrera went to Welton.

Llamas does not contend that Herrera, in whose crew he worked prior to the commencement of Welton cutting, promised he would get a Job as a cutter. There is no evidence Llamas had previous cutting experience with Saikhon.

According to Llamas, he asked Herrera for a cutting Job on only one occasion. This was about two weeks before he quit, placing it before the start of the Valley harvest. When he asked Herrera if there was a chance to work in the lettuce, Herrera told him he could give him work by the hour. There was no explanation given Llamas regarding the reason. Herrera testified that he did not give Llamas a cutting Job because he did not have enough seniority.

During the 1975 Valley cutting season, Llamas solicited voters for the UFW in the presence of Herrera.

December 22, 1975: Saikhon customarily starts the Valley harvest with three crews headed by Alvarez, Herrera and Vera. This occurred in the 1975-1976 season. Commencing with the 1973-1974 season, Saikhon started a fourth crew under Tony Montejano around the end of December or the first part of January. This crew was not formed during the 1975-1976 season until after January 27.

For the first time in its history, Saikhon utilized two crews put together by labor contractors, individuals with whom he had no prior business relationship. As an accommodation for the

---

<sup>37/</sup>Referred to by the parties as Mr. Llamas.

personnel in these crews, Saikhon activated a labor camp which he had owned for many years but never previously used for his lettuce workers. A foreman (Buck Gardenhire) from his cantaloupe operation was put in charge of the camp and given the responsibility for both crews (Crew 4 and Crew 5). Gardenhire was given the labor camp responsibility sometime around December 1, 1975, and it took him approximately two weeks to have the camp ready for occupancy.

During early December, Mario Saikhon, after introductions by Gardenhire, negotiated terms and conditions of hire with Johnny, Bermio and Steve Tira. Each was ultimately employed by Saikhon. Crew 5, under Tira, started work on December 23, 1975, a week and a day after the Valley harvest commenced, and Crew 4, under Bermio, started on December 17, two days after the harvest began.

Mr. Saikhon testified he heard Bermio had a good crew, and that Bermio stated he had a year-round crew. Saikhon checked a Bakersfield reference given by Tira and received a favorable evaluation. Saikhon testified that his reason for going to Bermio and Tira was to improve the quality of his pack.

The regular Saikhon cutting crews are solicited by the crew foreman generally from among people with previous employment experience with the Company. Since Mario Saikhon is known as a "good" employer, and since he has adopted the practice of limiting his crew size to an optimum of 11-13 trios, there are always more people who want work from him than can be hired. Therefore, each regular foreman has a sort of rough seniority system which he uses to select workers. Workers are obtained through notice to their friends or to them directly that the season is to start. When the word gets out, the workers show up at the Saikhon collection point in Calexico, the Gulf station. It is not the practice of any regular foreman to solicit workers at the "hole" in Calexico.

At the outset of the Valley harvest, there were former Saikhon employees for whom work was not available and did not become available until crew size expanded after January 1, 1976. None of these workers were hired by Bermio or Tira. None of the workers in either the Bermio or Tira crews had ever previously worked in lettuce for Saikhon, and none ever returned to work for Saikhon after their term of employment in the 1975-1976 harvest.

Bermio was instructed to start with 12 trios, this was one more than Saikhon allotted to each regular crew. He brought some workers with him from his labor camp in Somerton, Arizona; he contacted persons who he had known for a long time and either offered them employment or asked them to seek out workers; and workers for Crew 4 were solicited from customary gathering points in Calexico, e.g., the "hole" and the Popular Drug Store, Bermio testified by way of explaining his out of area solicitation of workers that he was unaware of the abundant labor pool at the border.

Steve Tira did not testify. Several individuals who worked in his crew testified they were solicited at the hole. The Representation Petition was filed December 31, 1975. During the payroll period for eligibility Tira employed 42 cutter/packers while having not more than eight trios (24 cutter/packers) at work on a given day.

Bermio's agreement with Saikhon provided he would receive 5 cent a box on all lettuce picked by his crew. The standard rate was 3 cent a box. The explanation for paying Bermio 66-2/3% more than the going rate is that he provided a pickup, paid his own social security and was to pay a supervisor. There is no evidence Bermio ever hired a supervisor.<sup>38/</sup>

Pedro Herrera worked in Crew 5 from December 21, 1975, until January 26, 1976. He went to the "hole" to look for work. He heard Alejandro, Tira's pusher, say he was looking for people so he asked him for work. Alejandro told Herrera he was looking for people to work for Mario Saikhon; that he was looking for people who were Teamsters and not strikers or Chavistas. When Alejandro asked him which union he was with, Herrera responded neither.

During the period he worked for Saikhon, Herrera sometimes rode from the camp to the field with Tira. On several of these occasions Tira told Herrera the Company wanted Teamster workers and not Chavistas.

One pay day the workers had to go to Tira's bedroom at the labor camp to pick up their checks. Tira had them sign a paper to indicate how many Teamster supporters there were.

Pedro Espinoza, Gilberto Parra Contreras, Mario Lopez Ibarra, Armando Lopez Ibarra, Rogolio Soto, Diego Romero and Tino Velasquez all worked in Tira's crew. Each testified to questioning by Tira at the time of hire regarding affiliation with or affinity for the Teamsters as opposed to the UFW. Each said he supported the Teamsters and was hired. Pedro Herrera was told by Alejandro, who was soliciting for Tira, that the boss wanted Teamsters, and he did not want any strikers or people who were for Chavez.

Soto testified that he was hired by Tira at the "hole." When asked whether he was one of Chavez's people, he said no. Tira told him to get into the truck. One person waiting in the truck to go to work was told by Tira to get out when Tira observed his UFW button.<sup>39/</sup>

---

<sup>38/</sup>No testimony was offered regarding the basis for Tira's arrangement which was also 5¢ a carton.

<sup>39/</sup>Tira did not testify at the hearing. No representation was made by Respondent that he was unavailable, nor was any alternative explanation offered for his failure to testify.

Carlos Mojica, Salvador Aguirre, Victor Acosta and Moises Soto each worked one day In Crew No. 4. They were solicited by Elijo Macias at the Popular Drug Store in Calexico and taken to the labor camp where some of them talked with Bermio before going to the fields. Acosta was asked whether he was a Chavista, as was Moises Soto.

Employer Earnings Records show 13 additional Crew 4 workers who worked during the payroll period for eligibility for periods of one, two or three days, and who were then terminated. None of these workers testified. Only two were residents of Mexican. The records for Crew 5 show five employees in the same situation, of whom one had a Mexican address.

Benito Gutierrez began work In Crew 4 on December 24, 1975, after having talked to Bermio the previous evening at the labor camp. When Gutierrez asked for the Job, Bermio told him the boss only wanted Teamsters.

Joe Accuedo, a long time friend of Bermio, telephoned him about work shortly before Bermio started with Saikhon. Bermio said he was looking for Teamsters because the Company did not like Chavistas. After Accuedo went to work for Bermio, he was asked to find Teamster workers to build up the crew.

December 26, 1975: On December 26, 1975, at the close of their only day of work for Saikhon, Carlos Mojica, Victor Acosta, Moises Soto and Salvador Aguirre were terminated by their foreman, Johnny Bermio.<sup>40/</sup> Mojica, Aguirre and Soto each testified in substance that Bermio said there was no work for them because they live in Mexicali and because they were Chavistas. I credit this testimony. Mojica recalled the statement being made in the field at the close of work, while Aguirre and Acosta placed the Incident at the labor camp after they had returned from the fields. Acosta recalled only a statement about not wanting people from Mexican. These differences in testimony are not sufficient to impair a finding that Bermio terminated the named individuals and made substantially the statement attributed to him.<sup>41/</sup> Each testified without

---

<sup>40/</sup>The complaint alleged that Juan Williams, who did not testify, was similarly terminated on December 26, 1975.

<sup>41/</sup>Bermio testified he fired none of the four; that he had only fired one person while employed at Saikhon. To the extent that he may have regarded the terminations of December 26 as having been made in response to a Saikhon directive, and thus not "firings" by him, his testimony is credited. But, to that limited extent only. No evidence was offered to explain why some 11 or 12 workers worked only December 26. My rejection of Bermio's testimony is based in part upon his demeanor and upon the unlikely coincidence that so many workers, who during the lunch period signed UFW authorization cards, would have quit on the same day at the close of a single day's employment.

contradiction to the absence of any complaint about the quality on his work during the day he was employed. Each is an experienced lettuce worker.

At lunch time on the 26th, UFW organizers were present in the field soliciting signatures for authorization cards. Mojica, Aguirre, Acosta and Soto each signed authorization cards and spent time talking to the organizers. Bermio was present and observed their actions. Mojica saw Saikhon in the distance while he was talking to the organizers.

Bermio and one of the UFW organizers had a conversation in the presence of the workers while they were getting and eating their lunch. Bermio told the organizer he did not want them there; the organizer said they were not in the fields. When lunch was over, the organizers left.

January 2, 1976; On January 2, 1976, sometime between 10:30 a.m. and noon, while the workers were taking lunch, Stephan Roberson accompanied by other UFW organizers entered a field near Dogwood to engage in organizational activities. There were seven Teamster organizers and Mario Saikhon already on the premises.

About 45 minutes after arrival, Saikhon told Roberson he should not be in the fields and told him to leave. Roberson asked why the Teamsters were not leaving, and Saikhon said he was going to ask them to leave also. The UFW organizers left the field and watched Saikhon and the Teamster organizers from a nearby road. The Teamsters remained on the premises for approximately one-half hour after the UFW departed.

When the Teamsters left the field, the UFW followed them, lost them and found them again in another Saikhon field. No UFW attempt was made to enter this field; the UFW simply watched while the Teamsters talked to the workers.<sup>42/</sup>

January 3, 1976; On the Friday before the representation election, Respondent had a party for members of Crews 4 and 5. The party started after work and was held in one of the dining areas in the labor camp. It was Mario Saikhon's idea, and Gardenhire arranged for the steaks, whiskey, beer and wine which were served.

Bermio and Gardenhire were present during the early stages of the party. Witnesses also place Tira at the party passing out Teamster buttons. Tira did not testify, and the testimony regarding his activities was not controverted by Bermio or Gardenhire.

During the period each was present at the party, both

---

<sup>42/</sup>No testimony was offered by Respondent to rebut the facts recited above which represent credited testimony by Robersc

Gardenhire and Bermio urged the workers to vote for the Teamsters. Bermio spoke briefly to the workers while they were eating and in substance said this dinner from the Company means you should vote for the Teamsters.<sup>43/</sup> Gardenhire's urgings were directed to individual workers.

January 5, 1976: At approximately 8:00 a.m. on the morning of January 5, 1976, Buck Gardenhire observed some UFW organizers in the workers' living area at the labor camp. There were Teamster organizers in the dining area at the time. Gardenhire, approached the UFW organizers and asked to see their identification. When they declined to show identification, Gardenhire departed and returned shortly to ask them to go into the dining area, saying that the living quarters were off limits. UFW organizer Gamboa told Gardenhire they had a right to be in the living quarters and continued talking to the workers. When the organizers declined to leave the sleeping area, Gardenhire said he would call the sheriff and have them arrested.

Deputy Sheriff-Investigator King responded to a call at the camp at 8:35 a.m. He was dressed in civilian western style clothes and his vehicle was an unmarked pickup truck. After King got there, he told Gamboa that Gardenhire wanted them arrested, but that he had talked him out of it. About 35 minutes later King returned and told Gamboa that Gardenhire wanted them arrested because their hour was over. Gamboa explained that the access rule was not applicable, this was a labor camp. This interchange occurred outside the building. The Teamster organizers were also outside the building by then.

King was ready to leave before 9:00 a.m., but Gardenhire asked him to remain, saying he did not think the organizers would leave when their hour was up. At 9:04 a.m. Gardenhire told the UFW and the Teamster organizers to leave. The Teamsters left. At approximately 9:30 a.m. King told Gamboa they had to leave because they were trespassing. Shortly thereafter a citizen's arrest was

---

<sup>43/</sup>This finding is based on the testimony of Gutierrez and Accuedo with respect to the content of the speech and upon, the testimony of Gutierrez, Espinoza and Accuedo with respect to the fact that Bermio spoke. I have not credited Varela Gamez's testimony that Bermio said there would be no more work if they did not vote for the Teamsters. This testimony, both with respect to content of Bermio's statements and the place where made, is uncorroborated and inconsistent with the testimony of other General Counsel witnesses. I do not credit Bermio's testimony that he made no remarks to the workers. In the environment which existed at Saikhon's on January 3, 1976, it is unlikely that no statement would be made. Moreover, the tenor of the statements I find Bermio to have made is consistent with the undenied urging of Teamster support attributed to Gardenhire and Tira.

effected by Gardenhire.44/

At some point during the course of events, Gardenhire called Saikhon for instructions and was told to have the organizers arrested if they failed to leave when their hour was up. These instructions were consistent with the instructions Gardenhire received from Saikhon prior to opening the camp regarding how to deal with persons coming to the camp for organizational purposes.

Teamster organizers came to the camp on two or three occasions, and Gardenhire never had to call the sheriff with respect to them. January 5 was the only occasion on which Gardenhire called the sheriff to deal with UFW organizers.

January 6, 1976:

(a) Termination of Flavio Alejo

Flavio Alejo was employed during the 1975-1976 season as a cutter/packer in Crew No. 1. He first worked for Saikhon in 1965. During the period preceding the election, he passed out handbills and UFW buttons to members of his crew. He was the crew representative for the UFW. He served as an observer at the election and attended the pre-election conference on January 6, 1976.

Alejo testified that the day before the conference told Herrera he was attending a conference for the election the next day, and Herrera said OK. Herrera denies that Alejo told him he was going to miss work.

On the 6th, Alejo showed up for work after attending the pre-election conference. Herrera asked where he had been, and Alejo told him that he had attended the election conference.<sup>45/</sup> Herrera said there was no work for him that day, and he should come early the next day. The Time Books for the week shows that Alejo worked January 7 and regularly thereafter.

The complaint alleges that Herrera terminated Alejo

---

<sup>44/</sup>These findings are a synthesis of the testimony of Gardenhire, Gamboa and King. The testimony of Gutierrez regarding these events is not credited because his recollection of the dress and vehicle of Deputy King whom I credit in this regard was totally contradicted by King; thus, making unreliable his testimony concerning the events which transpired. Moreover, he left the area about 8:30 a.m.

<sup>45/</sup>Herrera testified that Alejo said nothing about having attended the conference. I do not credit Herrera's testimony on this point. It is unlikely that Alejo would not have been asked why he was late, and there is no reason why he would have refrain from saying where he had been.



on January 6, 1976. The General Counsel does not include in his Requested Findings of Fact any requested findings with respect to this incident.

(b) Urging Support for IBT

On January 6, 1976, at approximately 7:00 p.m., Benito Gutierrez was playing cards with Bermio in the dining room at the labor camp and heard Bermio say: "Lets vote Teamster tomorrow so we can keep the boss happy." Bermio did not contradict this testimony during the course of his testimony.

January 8, 1976: On the morning after the representation election, Gardenhire, as "was his custom, had a conversation with Hooker, Willburn and the other loaders. That morning a loader named Johnny returned to work after having been off for a few days. While he was gone a man named Dede had worked in his place. With Johnny's return, Dede was due to be laid off.

The loaders objected to having Johnny return to work. They wanted Dede kept on. Gardenhire and Bermio both told the loaders the Job was Johnny's. Each of the loaders said he would not work with Johnny, and that if Johnny worked, they would quit.

Gardenhire stayed at the camp for a while when the loaders left for work, and then picked up the Time Books for Crew 4 and Crew 5 and took them to the office. While he was there, a radio call came from the fields stating there was trouble with the loaders. Saikhon told Gardenhire to go take care of the problem.

When Gardenhire got to the field, he saw a considerable amount of lettuce waiting to be loaded. The loaders came up to him and demanded their checks, stating they had been fired. They were all speaking at the same time and kept saying over and over that they were fired. Gardenhire told them they were not fired, that Bermio could not fire them, that only he could fire them, and that they should go back to work. After some discussion, the loaders said we quit, give us our checks. Gardenhire left for the office to get their checks.

Carol Rye, a Saikhon office employee, heard a radio call to the effect that Gardenhire said some loaders had quit and should be given their checks. Shortly thereafter, Gardenhire and the loaders arrived at the office. He said they quit, but the loaders insisted they were fired. An argument ensued. Rye telephoned Saikhon for instructions. He told her to tell them to go back to work because they were not fired. They left, seemingly happy to have their Jobs back.

The four returned about an hour and one-half later and wanted their checks right away. They said they were going to the UFW office. Rye asked why they did not go back to the fields

because they could have their jobs back. They told Rye they did I want their Jobs, they wanted their checks. They did not want to load with Johnny because he was no good and did not hold up his end. Saikhon came into the office to talk to them, but he was unable to solve the problem, so he called his lawyer for advice. The lawyer provided him with language for an acknowledgment to be signed by each of the loaders upon receipt of his check.<sup>46/</sup> Saikhon departed and Rye was left to prepare the statements and to get them executed. While she was preparing the statements, all but one of the loaders went outside. She talked with him and asked why he had quit, saying it would prevent him from getting unemployment insurance. His response was that he could get a Job anywhere, he did not want to work with Johnny. When Rye finished preparing the forms, she went outside to get the others. She told them they would not get their checks unless they signed a statement. Since the loaders said they did not understand the statement, Rye read it aloud for them, after which each loader signed.<sup>47/</sup>

On the afternoon of election day shortly before work was due to stop, there were demonstrations in the field. The workers came into the field to help load the trucks. A caravan of cars came along honking their horns. Everybody was happy, the loaders (Booker, Willburn, et al) said they were glad the UFW won. There were three trios of Mexicans in the field who participated in the celebration. The young Filipinos were also happy. The celebration lasted about 20 minutes. Gardenhire observed the action but did not go into the field during the demonstration.<sup>48/</sup>

---

<sup>46/</sup>The document states the signer is "terminating my job with Mariosaikhon as of today and I have received a check #\_\_\_\_ in the amount of \_\_\_\_\_ for my services to date and in payment in full for all monies due me.

<sup>47/</sup>These findings are based upon the testimony of Gardenhire and Rye. I find that the testimony of Booker and Willburn with respect to the events of January 8 is not to be credited. There are conflicts in their testimony with respect to when they encountered Gardenhire that morning and with respect to whether Bermio or Gardenhire purportedly fired them. Willburn testified he did not see Saikhon that morning; this is inconsistent with Rye's testimony. Booker testified that Gardenhire drank with them during the period immediately preceding the election. Gardenhire testified, without contradiction, that he is an alcoholic and a diabetic and has not had a drink for a number of years. The manifest interest in proving the allegations of Paragraph 21(bb) of Booker and Willburn, their faulty recollection of events and the inconsistencies as between themselves in their testimony has led me to discredit their testimony. I have generally credited the testimony of Carol Rye. Her demeanor while testifying and her obvious efforts to fairly state the facts impressed me favorably.

<sup>48/</sup>This is the only evidence adduced -----(continued)

January 15, 1976: Benito Gutierrez was hired by Johnny Bermio. He started work on December 24, 1975. Gutierrez talked with Bermio the evening before he started work, and Bermio told him the boss did not want any Chavistas; that he only wanted Teamsters. Gutierrez told Bermio he had worked with Teamsters.

After voting in the representation election on January 7, Gutierrez picked up and waved a UFW flag. Another worker got on top of a lettuce truck and waved the same kind of flag. It is not clear where this activity occurred or whether it was observed by a foreman.

The last day Gutierrez worked was January 14, 1976. According to Gutierrez, Bermio told him there was no more work. Bermio testified that about a week before the last day Crew 4 worked, Gutierrez asked for his check. Bermio did not ask Gutierrez why he was leaving. The Time Book shows no work by Gutierrez during the last two weeks Bermio's crew worked.

February 7, 1976: Cresencio Castillo Estrada, Fedencio Castillo Estrada and Cruz Castillo are brothers. Flavio Alejo is their half brother. In early February, 1976, each was employed as a cutter/packer in Crew No. 1.

On February 6 work started about 7:00 a.m. It commenced raining about 20 minutes later and work ceased until the rain stopped. The crew returned to work after the rain ceased and worked until about 10:00 when the rain started again. Herrera, the foreman, told the crew to stop for lunch, and that if the rain stopped, they would resume work. The rain stopped approximately a half hour later, and the crew worked the balance of the day.<sup>49/</sup>

The testimony relating to the circumstances under which the Castillos and Alejo left the fields on February 6 is conflicting. The foreman testified the brothers got into their car and left without speaking to him.

Cresencio testified that when the rain started, the crew had to finish packing the cut lettuce, after which he and his brothers got into their car and went home. Cresencio told Herrera they were leaving, and Herrera said OK; Herrera told the entire crew to go home.

Fedencio testified he told Herrera he was soaking wet and was going home. Herrera said it was all right to leave. His

---

48/(continued) – regarding protected Union activity by any of the loaders. Booker and Willburn were the only loaders who testified.

49/These findings are based upon the testimony of Herrera and Manuel Gonzales, a worker in Crew 1.

brothers were with him when this interchange occurred and they all left together. The rest of the crew were in their cars eating lunch when the brothers left. The crew worked the balance of the day. Cruz testified his tonsils were hurting, and he thought he should not work so he went home. He did not ask for permission. He did not know whether any of his brothers talked to Herrera. Flavio Alejo testified that when it started to rain on February 6, he told Herrera it was not right to work. He left the field to eat lunch and did not return. Herrera told him he could leave.50/

It is an uncontradicted fact the crew worked after the lunch break. Therefore, Cresencio's testimony that Herrera told the entire crew to go home when it started raining cannot be correct. Moreover, in view of the fact the crew members were aware, as manifested by their conduct, that they were to "wait and see" until after lunch whether or not the rain stopped, I do not credit the testimony of Alejo or Fedencio Castillo to the effect they were given permission to leave at the outset of the lunch period.

On February 7 Alejo was the only brother who returned to work. His brothers did not return with him because they heard it was going to rain. When he got to the field, Herrera told him that he and his brothers were fired and gave Alejo the final checks for each of them. Herrera testified he discharged them because they left in the middle of a shift. This is worse than not showing up at all. Herrera did not recall whether he had ever terminated an one else for leaving in the middle of a shift.

Lucio Padilla, a member of Crew 3, went to his car when it started raining on February 6. After lunch, Padilla and four others went home without having obtained permission to do so. When they returned to work the next day, there were no repercussions.51/

The extent to which Alejo engaged in protected activity is recited above.52/ Cruz wore UFW buttons and talked in favor of the Union to fellow workers in the presence of Herrera.53/

---

50/Alejo testified that he had to stay in the field the rain started to pack 30 boxes of lettuce because "a row of guys working in the furroughs were behind. Cresencio testified that Alejo and Fedencio were cutting in his trio and that he was packing. The order to pack the cut lettuce was given to the crew not Just to Alejo or his trio. Fedencio testified it was wrong to leave unpacked lettuce in the field.

51/Luis Arias Sandoval, a member of Crew 3, and four others went home after lunch on February 7 because it was raining. When they returned to work, Vera did not say anything to them. Sandoval was employed at Saikhon's at the time of the hearing.

52/See findings for January 6, 1976,

53/It is not clear when he engaged in -- (continued)

Fedencio distributed UFW literature, wore a UFW button and solicited signatures for a representation election. These activities were known to Herrera. Cresencio helped his brothers, who were on a committee from the crew, to organize the Crew 1 workers. He wore and distributed UFW buttons.<sup>54/</sup>

February 20, 1976: Gilberto Garcia worked five or six years-for Respondent during the lettuce thinning and cutting season and also as an irrigator. During the 1975-1976 harvest season he worked in Crew 3 for Vera.

Shortly before the representation election, Vera had a private conversation with Garcia during the course of which he told Garcia that Saikhon wanted him to vote for the Teamsters. Garcia said that he was going to vote for the UFW, and Vera said if the UFW won, Saikhon would plant alfalfa. Garcia admits that when he told Vera he was going to vote for the UFW, Vera did not in any way threaten him.

Garcia worked sporadically in the Valley harvest until early February and then stopped showing up. He missed the last four days of the work week ending January 21 and the first three days of the following week, a total of seven consecutive working days. He missed two days during the work week ending February 11 and did not show up thereafter. At some point during the 1975-1976 Valley harvest, Garcia could not recall when, Vera told Garcia that if he missed any more work, he would be fired. On February 20 Cresencio Castillo delivered Garcia's check to him. About three hours later Garcia encountered Vera and asked why he was fired. Vera said he no longer had a Job. Vera did not recall this conversation.

No testimony was presented regarding the nature and extent of Garcia's Involvement in protected activity, nor was testimony presented, beyond the conversation recited above, of Respondent's awareness of Garcia's UFW sympathies.

July, 1976: Premitivo Ortiz last worked for Respondent on May 31, 1976. He had been employed 12 or 13 years as an irrigator, a tractor driver, planting watermelons and doing whatever else had to be done in connection with the ranch. Miguel Bastidas was his foreman. On May 31 Bastidas told him he would start his vacation the next day. He was to take two weeks with pay and one

---

53/(continued) this conduct. He was laid off when the crew returned from Welton and did not return to work until late January, 1976. He stated he did not talk about the UFW to workers while he was working in Welton.

54/Herrera's denial of knowledge of any UFW activity by any of the crew there is not credited.

week without pay. About June 15 Ortiz had his daughter call Bastidas to ascertain whether he should return to work. His daughter told him Bastidas said he wanted to talk to Ortiz, but not immediately.

Isais Monroy last worked for Respondent May 31, 1975. At that time he had been employed as an irrigator for six or seven years. On May 31 Bastidas told Monroy to start his vacation the next day. He was told to take two weeks with pay and one week on his own. Both Ortiz and Monroy received vacation paychecks the afternoon of the 31st. When he received his vacation check, Monroy asked whether they were fired. Bastidas told him the checks were vacation checks. When his vacation period was over, Monroy went to talk to Bastidas about returning to work. Bastidas told him he had no orders to put him back to work, and he would have to wait. This was the first year in which Monroy had not returned to work immediately upon the conclusion of his vacation.

Having received complaints from both Monroy and Ortiz about not having been returned to work, Guadalupe Gamboa, a UFW representative, wrote Mario Saikhon seeking to clarify their status. Saikhon telephoned Gamboa and told him he did not know whether they had been fired. Saikhon said his foreman was on vacation and suggested they meet when Bastidas returned from vacation.

Gamboa and Ortiz visited Saikhon's office on September 1976, having previously made an appointment to see him. Saikhon was not at his office. They returned the next day. Gamboa talked to Saikhon and wanted to include the workers in the meeting. Saikhon declined to do this, stating the two were fired and that he had previously stated so to Gamboa. When Gamboa told Saikhon that Bastidas said they were on vacation and not fired, Saikhon said they had handled the matter in that fashion so Ortiz and Monroy could draw their unemployment insurance. Gamboa said he felt they had been fired for Union activity. Saikhon said this was ridiculous; if he were going to fire people for Union activity, he would have to fire all 150 of his employees.

In 1974 as well as in 1975 Saikhon directed Bastidas' attention to improperly irrigated fields on which either Monroy or Ortiz had worked. There were four or five occasions when the field roads got so wet from overflow that trucks could not gain access.

On March 26, 1976, Monroy was irrigating cotton. Bastidas told him two or three times to water every other row, but Monroy watered every row and continued to do so despite repeated orders to limit the water to alternate rows. Monroy offered no explanation for failing to follow instructions. Saikhon saw the field about 1:00 p.m. and called Bastidas on the radio to tell him the field was being irrigated improperly.

During April, 1976, Monroy got drunk and drove his car

into one of the planted fields. There were also some irrigating incidents during April for which Monroy was responsible and about which Saikhon inquired. Saikhon told Bastidas that both Monroy and Ortiz did bad work. Saikhon's awareness of their problems resulted from observing the irrigation errors and asking Bastidas who had done the work.

On May 19 Ortiz ran two feet of water into a wheat field which was due to be harvested the next day. As a result of Ortiz's action, the harvest of the field had to be delayed for a period of 12 days. Saikhon learned of Ortiz's responsibility for the error by asking Bastidas. This was the second time in May when Ortiz had done the same thing. Saikhon told Bastidas to give Ortiz his vacation and to get rid of him. Saikhon also told Bastidas to get rid of Monroy because he had problems with him because he did not regulate the water properly and because he left beer cans in the fields.

After he returned from vacation, Saikhon learned that Bastidas had not fired Ortiz or Monroy, but had "kind of laid them off." Saikhon felt this was a better way to handle the matter because they could draw unemployment insurance.

Ortiz was a UFW observer at the election in January. He organized the other irrigators for the UFW in October and November, 1975, by getting them to sign authorization cards. He carried on these activities while Bastidas was present.

There is no evidence that Monroy engaged in any activity on behalf of the UFW.

October 4, 1976: Teresa Briseno Reyna is the spouse of Jesus Reyna.<sup>55/</sup> She has worked in Valley thinning for Saikhon for five years, Customarily she starts work in October and works until the first week in January. In both 1974 and 1975 she worked for Alvarez from the first day of Valley thinning until the end of the calendar year.<sup>56/</sup>

During the 1976 Valley thinning season, Reyna asked Alvarez for a Job for Briseno. There is a conflict regarding when the request was made. Reyna testified he sought a Job for Briseno the day he went to work, and Alvarez said he already had too many women. Alvarez testified that Reyna first requested work for Briseno about two weeks after the season started. He told Reyna he already had too many workers, and that when he had work, he

---

<sup>55/</sup>Referred to as Briseno.

<sup>56/</sup>Alvarez testified Briseno normally worked about three weeks per season. Her Earnings Record shows her work pattern to be as set forth in the text. I do not credit Alvarez's testimony on this point.

would let Reyna know. Sometime thereafter Briseno went to Alvarez house seeking work. Briseno asked Alvarez for a Job, and he told her he had no Job for her. There is a conflict with respect to whether he said he already had too many women (Briseno's version) or whether he said he already had more people than he needed (Alvarez's version). Alvarez also told Briseno that when he needed someone, he would tell Reyna to bring her.

Briseno did not work during the 1976 thinning season. However, commencing in April and ending in June, 1976, she worked 10 scattered days.

There is no evidence that Briseno engaged in any protected activity. As evidenced above, her husband was among the more active employee participants in the organizing campaign the previous season. There is no evidence of his participation in any "Union" activities after the representation election in January, 1976.

I do not credit the Reyna version of his request for work for Briseno. There is no evidence that Respondent had a quota system for utilization of women in thinning crews; therefore, I find it unlikely that Alvarez would have used "too many women" as the reason for not employing Briseno. I also credit Alvarez's testimony with regard to the timing of Reyna's request on Briseno's behalf. If Reyna had requested work for Briseno when he was hired, there is no reason to conclude she would not have been hired, or alternatively, there is no reason to infer a refusal to hire her would violate Section 1153(c).

To make such an inference in the face of no protected activity by Briseno herself and in the face of the absence of any interference or discrimination with respect to the tenure of employment of her husband, and in the absence of any independent 1153 (a) activity during the 1976-1977 season would exceed the bounds which permit drawing reasonable inferences from the evidence. Such an inference could be based upon no more than a suspicion that Alvarez acted from unlawful motives, and circumstances which merely create a suspicion the Employer acted upon unlawful motives are not sufficient to support a finding. N.L.R.B. v. Ace Comb Co. (Cir. 8, 1965), 342 F.2d 841, 848; N.L.R.B. v. Shen-Valley Packers (Cir. 4, 1954), \_\_\_ F.2d \_\_\_\_.

November 8, 1976: Enrique Zambrano was employed two seasons as a cutter/packer. During the 1974-1975 season he worked Alvarez, and during the 1975-1976 season he worked for Vera.

He was the UFW employee representative for the Vera crew during the election campaign. He distributed UFW buttons and leaflets, discussed the Union with his fellow workers and with Vera and Fiore. Zambrano attended the pre-election conference and was the Crew 3 election observer. Vera, his foreman, became aware that



Zambrano was the Crew 3 UFW representative when Zambrano was late for work the day he attended the pre-election conference. He was permitted to work that day after Vera ascertained the crew did not object to his being late. He received the same pay as other crew members for the day's work.

The day the 1976-1977 Welton harvest began, Zambrano arrived at the Gulf station about 15 minutes after the bus departed. When he asked thinning foreman Pelayo whether he could catch the bus in his car, he was told he would not get work if he did because there were a lot of lettuce workers left at the station. He did not attempt to catch the bus.

The next day Zambrano got to the Gulf station even earlier and asked an unidentified foreman whether there was work; the foreman told him he had no orders for new people. He also talked to Montejano, who was not currently a foreman, who told him there was no chance for work until a new crew was formed. For about two weeks thereafter, Zambrano continued to check daily with the bus drivers to see whether there was work. Since Vera stayed in Welton during the harvest, Zambrano did not talk to him.

After the harvest began in the Valley, Zambrano went to the field to talk to Vera about work. Vera told him he could not give him work because Saikhon had not given orders to put on more people. He suggested that Zambrano go talk to Saikhon. Zambrano told Vera there were people working who were newer than he was. Vera told Zambrano to point them out, and he would get rid of them. None were pointed out.<sup>57/</sup> This was the only occasion on which Zambrano asked Vera for work. During this period Zambrano also spoke to Barriga about getting work. Barriga told him he could not do anything because there were still thinners who had more seniority than he who were not working. Barriga told him that another crew was to be formed and if there were a chance for work, it would be then.

When Crew 4 was formed in December, 1976, it is Zambrano's testimony that he asked Montejano whether he was going to get work. He did not go to work in Montejano's crew; the basis for his not being hired was not articulated.

#### ANALYSIS AND CONCLUSIONS

The allegations in the complaint cover a time period commencing with October 28, 1975, and ending in November, 1976; however, its major focus is upon events occurring during December, 1975, the period immediately preceding the representation election held on January 7, 1976. During this time frame Respondent engaged

---

<sup>57/</sup>Although there is disagreement regarding when this conversation occurred, its substance as related by Vera was not rebutted by Zambrano.

in a series of acts claimed to be violative of Sections 1153(a), and (c) of the Act as well as of Section 1154.6.

The Use Of Crews Supplied By Labor Contractors.

We turn first to the contentions regarding Section 1154.6. This section makes it an unfair labor practice for an employer or a labor organization "willfully to arrange for persons to become employees for the primary purpose of voting in elections." Here, it is alleged that employees were hired "solely for the purpose of supporting the Teamsters in a representation election." Section 1154.6 does not track any section of the National Labor Relations Act; thus, there are no specifically applicable National Labor Relations Board precedents to provide guidance. Since Section 1154.6, like Section 1153(c), requires proof of specific motivation in order to find a violation, it is appropriate to adapt the scheme of analysis set forth by the Supreme Court in *N.L.R.B. v. Great Dane Trailers* (1966), 388 U.S. 26, in determining whether Respondent's employment of two-labor contractor crews violated the Act.

Preliminarily, it must be noted that contrary to Respondent's contention and to the language in the complaint, Section 1154.6 does not require proof that the "sole" purpose for hiring be to vote in an election. The statute reads "primary" purpose, and this language can only be read as the chief purpose or the purpose first in importance among a group of purposes as against the sole or only purpose, a purpose existing or functioning without any others.<sup>58/</sup> On the other hand, a violation of the section is not found in proof that "a purpose" of the hiring was to vote. Had this been the intendment, the section would read a purpose."<sup>59/</sup>

The violation is complete with proof of hire for the primary purpose. Whether or not those hired actually voted is irrelevant as is the question of whether Respondent's objective was to provide votes for the Teamsters or to provide "no union" votes.

There is no question but that Mario Saikhon willfully arranged for persons hired into the Bermio and Tira crews to become Respondent's employees. At issue is whether Respondent's primary motivation in hiring the labor contractor crews was to enable those hired to vote in an anticipated Agricultural Labor Relations Board election. This objective must be shown by substantial evidence on the record as a whole and may be proved by circumstantial evidence \_\_since \_\_it is. likely to be all that is available. *N.L.R.B. v. Putnam*

---

<sup>58/</sup>See *The American Heritage Dictionary*, 1969 Edition.

<sup>59/</sup>Compare Section 1154(d) where a violation occurs if "an object" of the union's conduct is one proscribed by the section.

The evidence offered to prove primary purpose may be summarized as follows:

The 1975 Valley harvest is the only occasion on which Respondent ever used crews provided by labor contractors instead of its regular fourth crew. Ordinarily Crew 4 started work about the end of December. In the 1975-1976 season, it was not activated until the Bermio and Tira crews were terminated for poor work. This crew was again activated during the 1976-1977 Valley harvest.

Saikhon paid Bermio and Tira two-thirds more than the going rate paid labor contractors per carton. By using labor contractors, Saikhon was put to the cost of activating a labor camp and to the cost of using Buck Gardenhire as camp manager and general foreman over those crews. Gardenhire was outside the normal chain of command and responsible directly to Saikhon.<sup>60</sup> At the start of the Valley harvest, Mario Saikhon limited the regular crews to 11 trios, thereby laying off some persons who had worked the Welton harvest. There was no effective limitation of the Bermio crew during the period immediately prior to the representation election; after the election Bermio's crew steadily declined in number until it was finally terminated. Tira's hiring practices during the first week his crew worked produced 42 eligible cutter/packer voters and seven eligible loaders and water boys.

Additional circumstantial evidence of Saikhon's primary purpose in the use of the extra crews is found in the testimony of former members of each crew regarding questions about any Chavez affiliation put to them at or near their time of hire by the foremen or by the person who solicited them for employment. The testimony of former Crew 5 members in this regard was not contradicted. Respondent's unexplained failure to call Tira gives rise to the inference that his testimony would not have controverted the workers' testimony. Sheldon Pontiac, 199 NLRB No. 148. Employment in Bermio's crew was conditioned upon not being a Chavez supporter. Bermio sent Elijio Macias to Calxico to obtain workers. Macias was careful to inquire about UFW affiliation before bringing persons to camp and on one occasion rejected a worker after noting he wore a UFW button. That Macias was acting pursuant to Bermio's instructions is apparent from his interrogation of people produced by Macias. Respondent is chargeable with this conduct of Bermio and Tira since Mr. Saikhon testified that the foremen have sole authority with respect to hiring and firing the employees under them.

On December 26, 1975, nine persons in Crew 4, who worked

---

<sup>60</sup>The parties stipulated, and I find, that Gardenhire, Tira and Bermio were supervisors within the meaning of Section, 1140.4(j) of the Act.

only that day, were terminated. Four of those terminated testified they were observed by Bermio signing UFW authorization cards during their lunch break. The explanation for their terminations was the boss does not want people who live in Mexican or who are Chavistas.

Admittedly the work performance of both crews was atrocious from the outset. The first day was a disaster and things improved but slightly thereafter. In late January the poor performance led to the dismissal of both crews. The failure to get rid of the crews when their ineptitude was discovered; the failure to use former Saikhon workers in these crews; the extra expense of an additional general foreman; the substantially above-scale rate paid the labor contractors; the conditioning of hire in the contractors' crews upon not being a Chavista; the failure until well after the election to establish regular Crew 4; and the failure to control the size of Crews 4 and 5 prior to the filing of the representation petition, while limiting regular crews to 11 trios, taken in sum establishes prima facie violation of Section 1154.6.

It is arguable that this scheme was so "inherently destructive" of the workers' right, to a representation election untainted by the participation of spurious employees that a violation of Section 1154.6 can be found even in the face of evidence that the use of Crews 4 and 5 was motivated by business considerations. See N.L.R.B. v. Great Dane Trailers (1966), 388 U.S. 26, 34.

Coupling the factors listed above with the fact that Respondent's conduct produced 126 additional eligible voters, a 38% increase in the number eligible to vote, it is reasonable to conclude that the adverse effect of the Employer's wrongful conduct was more than "comparatively slight"; thus, no proof of specific motivation or specific primary purpose is required. The thing speaks for itself. N.L.R.B. v. Great Dane Trailers, supra.

However, since this is a case of first impression, Respondent is entitled to a "full lunch bucket." Therefore, I shall not treat Respondent's conduct as "inherently destructive of employee rights and proceed to examine the defense of legitimate business purpose.

Mario Saikhon testified he had trouble with one crew and sought to improve his pack through use of Bermio and Tira. No testimony was offered to support his assertion of prior crew trouble. No explanation is offered for continuing to use two crews, which on the basis of Saikhon's testimony, may fairly be characterized as inept and uneconomic from the outset. No explanation is offered for failing to control Bermio's crew size prior to the representation election. No explanation is offered for permitting expansion of the regular crews after the representation petition was filed. No evidence was offered to support Saikhon's assertion that the rate Respondent paid Bermio was economically warranted by the extras Bern was furnishing; nor is there any explanation for paying Tira the

same rate. No evidence was offered to support the assertion that because of fringes and regular employment, regular foremen were compensated commensurately with Bermio and Tira.

The failure of Respondent to produce evidence in its control to support its legitimate objective defense to the charged violation of 1154.6 supports a conclusion that the primary purpose in utilizing the Bermio and Tira crews was to procure additional eligible voters. See Fred Stark and Jamacia 201 St. Corp., Jamacia 202 St. Corp., Inc., 213 NLRB No. 38. Therefore, Respondent violated Labor Code Section 1154.6, as alleged in Paragraph 21(t) of the amended complaint.

The use of the Bermio and Tira crews is also alleged to have violated both 1153(a) and (b). The evidence cited above supports the conclusion of violation of both 1153(b) and (a) by the hiring of the contractor crews. The Respondent's conduct was aimed at providing voters for the Teamsters. It attempted to staff Crews 4 and 5 only with Teamster voters. Respondent's conduct goes beyond merely interfering with the 1153 rights of its employees, it was aimed at making the Teamsters the bargaining agent for those employees, thereby assisting the Teamsters as an entity in securing the benefits of such status. Denied by statute the right to grant pre-certification recognition [section 1153(f)], Respondent attempted to provide sufficient voters to achieve the same result, i.e., recognition of a union not the majority representative of its employees.

Respondent's argument that its refusal to renew its Teamster contract in the summer of 1975 supports its contentions of neutrality does not wash, since entering into a new pre-Act contract would not have barred the organizational campaign of the UFW. Section 1156.7(a).

The conclusion that Respondent's conduct also violated Section 1153(a) is so apparent as to obviate explication.

#### Terminations And Refusals To Hire.

The December 15 Terminations; The 1975 Valley harvest began on December 15. The amended complaint alleges eight discriminatory discharges and four discriminatory refusals to hire occurring on that date.<sup>61</sup> The events of that day must be examined against the backdrop of the totality of Respondent's conduct during the period. Especially significant is the fact that by December 15 Mario Saikhon had formulated and was in the process of effectuating his plan to bring in two crews supplied by labor contractors.

---

<sup>61</sup>Paragraphs 21(m), 21(n) and 21(x) of the amended complaint.

The size limitation imposed upon the regular crews at the outset of the Valley harvest can be viewed as a device used to enhance the chances of the payroll padding to result in the defeat of the UFW. The regular crews were known to be overwhelmingly supportive of the UFW. Thus, the crew size limitation shores up the conclusion that hiring Crews 4 and 5 violated Section 1154.6, and the unprecedented utilization of these crews supports a conclusion that the 11-trio limitation placed upon the regular crews violated Section 1153(a).

Respondent urges economic Justification for its conduct with respect to both crew size limitation and utilization of Crews 4 and 5. The Justification does not stand up against the facts. The regular crews were permitted to expand to their Welton strengths once the representation petition was filed and the payroll period for eligibility had passed. Rigorous attempts at limiting the size and turnover of Crews 4 and 5 coincided with the cut-off of the voter eligibility period. Once Respondent's pre-petition course of conduct no longer served a purpose it was abandoned; reins were tightened with respect to the catastrophic work performance of Crews 4 and 5 and loosened with respect to Respondent's regular crews.

The economic Justification purports to be trouble with the pack of one crew; trouble which led Saikhon to seek out the labor contractors. Although the crew in question was not identified, it was apparently Crew 4. No elucidation of the crew trouble was forthcoming; nor did Saikhon explain why he returned to the Montejano crew after terminating the labor contractors' crews. The totality of events occurring during the 1975 campaign coupled with the post-campaign return of the Montejano crew, and its use during the 1976-1977 season leads to the conclusion that Saikhon's stated reason for crew size reduction and utilization of labor contractor crews was pretextual. It is noted that Saikhon could have had 52 trios function in four crews of 13 trios each, a 13-trio crew being within the optimum crew size range by utilizing his four regular crews.

Therefore, the crew size reduction effected on December 15, 1975, violated Section 1153(a) by interfering with and restraining the exercise of rights guaranteed by Section 1152. It remains to examine the individual terminations or refusals to hire occurring on that date to determine whether they resulted from the crew reduction decision.

Paragraph 21(m) of the amended complaint alleges the termination of eight employees on December 15.

Pedro Sosa Romales: There is no evidence Pedro Romales was terminated on December 15, 1975, nor is there evidence he sought work in any cutting crew on that date. I shall recommend that the allegations of Paragraph 21(m) be dismissed with respect to Pedro Romales.

Miguel Sosa Romales: Romales has worked for Saikhon for eight years. At the time of the hearing he was currently employed by Respondent and working for Vera. For the reasons cited above, I credit his testimony that Vera told him to show up for work on the 15th; that he showed up and started to work; that he was stopped after about two hours and told there was no work for him; and that he unsuccessfully tried repeatedly to get work until he was recalled on January 1, 1976.

During the three days immediately preceding his layoff, he had a limited involvement in protected activity in conjunction with Padilla and Zambrano, two of the UFW lead campaigners.

Respondent's layoff of Romales during the period from December 15, 1975, to January 1, 1976, resulted from the crew reduction order and violated Section 1153(a) of the Act. *N.L.R.B. v. Burnup and Sims* (1964), 379 U.S. 21, 85 S.Ct. 171, 13 L.Ed.2d 1.62/

Domingo Gonzales: Gonzales, at the time of the hearing, was employed by sanction in Crew 4. During the 1975-1976 season, he opted not to go to Welton with Herrera because the work required getting up too early. He remained in the Valley in Montejano's thinning crew. He testified credibly that on December 15 he sought and did not receive work as a cutter in Herrera's crew. It is uncontradicted that during the 1975 UFW campaign that Gonzales from time to time during work hours would shout "Viva Chavez."

Respondent's layoff of Gonzales during the period from December 15, 1975, to January 7, 1976, violated Section 1153(a), but for the crew reduction he would have been hired when he presented himself on December 15.

Ramon Montellano Acosta: Montellano worked the 1975-1976 thinning season in both welt on and the Valley in Herrera's crew. He also worked the Welton harvest for Herrera. When he sought work from Herrera on December 15, he was refused. The reason given by Herrera was that Montellano was in Alvarez's crew and that he was limited to 11 trios.<sup>63/</sup> Alvarez refused him work the same day because of the 11-trio limitation.

While in Welton he talked to other workers about the UFW.

---

<sup>62/</sup>Since the remedy I propose for the Section 1153 (a) violation is the same as the remedy I would propose for an 1153(c) violation, no purpose would be served by extending this opinion by an analysis of the question of whether the layoff was violative of Section 1153(c). I reach no conclusion on the 1153(c) issue.

<sup>63/</sup>In prior seasons Montellano had worked for Alvarez. He had not worked for Alvarez during the 1975-1976 season. At the time he testified, Montellano was working for Alvarez.

and its benefits, helping them to understand its advantages. From time to time while in the fields he would holler that it was time for the workers to get rid of their "yoke."

Montellano's layoff resulted from Mario Saikhon's crew limitation decision. His participation in protected activity was uncontroverted and was sufficiently overt to have led Respondent to suspect he was actively engaged in the UFW organizing campaign. I do not credit Herrera's testimony of ignorance of Montellano's conduct.

Montellano's layoff from December 15, 1975, until he was recalled as a loader in Crew 4 on January 21, 1976, violated Section 1153(a). For reasons stated above, no determination is made regarding the question of whether the layoff also violated Section 1153 (c).

Cruz Castillo Estrada: The record does not support a finding that Castillo would have been retained at the outset of the valley harvest even if there had been no cut-back to 11-trios. Except for one day worked in 1974, his career at Saikhon consisted of six days worked during the 1975 Welton harvest and one day as an hourly employee. He testified he engaged in no Union activity while at Welton. Some reduction in crew size at the close of a Welton harvest is customary, and by whatever rough seniority standard one applies, Castillo was an obvious candidate for layoff. He was re called to work for Herrera on January 2, 1976.

I shall recommend dismissal of Paragraph 21(m) of the amended complaint with respect to Cruz Castillo.

Jose Arredondo Meza: Meza was admittedly laid off on December 15 because of the cut-back to 11 trios. He returned to work when the crew was increased to 13 trios. His layoff violated Section 1153(a).

Jose Plascencia: Plascencia has been almost a year-round employee of Saikhon for the past 11 or 12 years. For the last eight or nine years he has worked in Herrera's crew, and he worked for Herrera during the 1975 Welton harvest. When he got to the field 15 minutes after work started on day one of the 1975 Valley harvest, Herrera told him he did not need any more people. He told Plascencia the "boss" had told him to work only 11 trios.

When Herrera cannot hire everyone, he hires those with the most service with the Company. While there is no testimony regarding the length of service of each person utilized by Herrera at the start of the Valley harvest, the probability that each of those retained had greater service than Plascencia is so slight as to warrant the finding that the General Counsel's evidence establishes a prima facie showing that Plascencia's layoff was a discriminator act.



Assuming arguendo a business reason for the crew reduction, the choice of Plascencia for layoff is unexplained; Respondent offered no evidence that Plascencia's layoff was consistent with the seniority practices claimed by Herrera. The Respondent failed to meet its burden of proving the layoff was not a discriminatory act. N.L.R.B. v. Great Dane Trailers, supra.

Plascencia's involvement in protected activity while at Welton was not great; he talked to his fellow workers about the benefits to be obtained from UFW representation. I do not credit Herrera's denial of awareness of this activity.

Respondent's layoff of Plascencia on December 15, 1975, violated both Sections 1153(a) and (c) of the Act.

Juan Cuevas Laguna: The General Counsel has failed to prove that Cuevas was denied work on December 15. Herrera testified credibly that Cuevas did not seek work until three or four days after the harvest began, at which time the crew was full. It is apparent the crew would have filled up the first day of the harvest even if there had been no 11-trio limitation. Thus, it is unlikely the crew, even if larger, would have still had openings when, Laguna reported. Since there is no evidence of a Saikhon practice of bumping persons with lesser seniority to make room for senior, employees, Herrera's refusal to bump someone to put Cuevas to work was not a discriminatory act violative of either 1153(a) or 1153(c).

I shall recommend that the allegations of Paragraph 21(m) as they relate to Cuevas Laguna be dismissed.

#### The December 15 Refusals To Hire.

Jesus Martinez Ramirez: On the basis of credible testimony of Jesus Vera that Martinez did not seek employment on December 15, 1975, I shall recommend dismissal of Paragraph 21(n) of the amended complaint as far as it refers to Martinez.

Felix Uriarte Valenzuela: Valenzuela declined Vera's Job offer at the start of the 1975 thinning season. Thereafter he sought and did not get harvest work both in Welton and in the Valley. There is no evidence he engaged in any protected activity during this period. A conclusion that the failure to hire him on December 15 violated the statute would require a finding that Respondent obtained knowledge of or a suspicion of protected activity by Valenzuela during the period between the start of the Welton harvest and December 15, since the complaint does, not allege the refusal to hire for the Welton harvest to be discriminatory. Such a finding is not supported by the record. The General Counsel urges that statements by Valenzuela to his fellow workers during the 1974-1975 season regarding the inadequacy of Teamster representation and the desirability of UFW representation were the reason he was not hired on December 15. This theory does not explain why Vera sought

him out at the start of the thinning season nor why the refusal to hire in November was not improper. Moreover, it requires the conclusion that Valenzuela's degree of protected activity in 1974-1975 was so marked that Vera noted Valenzuela as a UFW activist. The record does not support this conclusion. I shall recommend dismissal of Paragraph 21(n) so far as it relates to Valenzuela.

Danil Ochoa Diaz: Ochoa's testimony is not credible. He testified to visits to Alvarez's house in Mexican seeking work. Alvarez has not lived in Mexicali for eight years. This patent error in his testimony coupled with his faulty ability to recall facts as manifested by the discrepancies in his testimony regarding his work history makes him an unreliable witness. In view of this unreliability, I do not credit his uncorroborated statement regarding repeated visits to the Gulf station seeking work.

I shall recommend dismissal of Paragraph 21(x) of the amended complaint.

Jose Santos Llamas: The General Counsel requested no finding regarding Paragraph 21(p) which alleges a refusal to hire Llamas as a cutter/packer on December 19, 1975. Rather, he seeks a finding regarding a failure to assign Llamas to cutting at the outset of the Welton harvest. This requested finding is beyond the scope of the complaint so far as Llamas is concerned and is not supported by the evidence.

Llamas asked Herrera for a cutting Job about two weeks before he quit. This timing would have the request made while Herrera was still staying in Welton, and I would not credit this testimony, but for Herrera's testimony on cross-examination that Llamas was not given a cutting Job because he did not have enough seniority. Even if Herrera's crew had remained at 12 trios as it was at the close of the Welton harvest, Llamas would not have had sufficient seniority to be placed cutting. The crew time book shows that there were people laid off with the move to the Valley who had more Company service than Llamas' one season.

The General Counsel has failed to prove the allegations of Paragraph 21(p); I shall recommend dismissal of the paragraph.

The Terminations Of December 26, 1975.

There is little question but that Mojica, Acosta, Aguirre and Moises Soto were employed because they were thought to be Teamster supporters. There is also little question that each was terminated at the close of his first day of employment because he was observed by Bermio signing a UFW authorization card.

Counsel for Respondent argues that none of General Counsel's witnesses are to be credited because of varying recollections regarding the "exact words" used by Bermio. In rejecting

counsel's argument, I have noted that the thrust of the testimony of each of the General Counsel's witnesses testifying to Bermio's statements was the same, and I have considered the lapse of time since the events occurred in discounting differences in the exact words used. *La Jolla Casa DeManana v. Hopkins* (1950), 98 Cal.App.2d 339.

The termination on December 26, 1975, of Mojica, Acosta, Aguirre and Moises Soto violated Sections 1153(c) and 1153(a) of the Act.

The November 3 Refusals To Hire.

Though not as stated, Paragraph 21(d) essentially alleges that Respondent violated Labor Code Section 1153(c) by refusing to transfer Jesus Reyna, Guillermo Duran, Ernesto Navarro, Vicente Saucedo Flores and Nazario Lopez Mendez from Crew 2 into one of the crews going to Welton for the harvest, or alternatively that Respondent violated 1153(c) with respect to these persons by failing to send Crew 2 to Welton.

The contention that the failure to select Crew 2 to go to Welton violated the Act has been discussed above and rejected. There remains to be discussed the General Counsel's theory that each of the above-named is a discriminatee because he was not sent to Welton.

The general pattern of employment in a crew and movement from site to site in that crew is uncontested. People tend to work in the same crew year after year, and for the most part retain their places in the crew as the season progresses from thinning to cutting. There are exceptions, some people work only in thinning while others work only in the harvest. Thus, there is nothing initially startling in the fact that none of the six alleged discriminatees were not selected to go to Welton; their crew was not going. Members of Herrera's and Vera's crews were the persons to go. There was no automatic reason for a Crew 2 member to go.

Duran was sent to Welton on November 19, 1975, two days after the harvest began. He testified that Barriga went into the field and picked people from Crew 2 to go to Welton. When he was not picked, he contacted Fiore to ascertain why he had not been selected. His inquiry bore fruit; he was sent to Welton.

Vera's testimony that Reyna did not ask for a Welton cutting job was unrebutted as was Vera's testimony that Saucedo Flores declined his offer of a Welton Job; nor is there any evidence that Lopez Mendez asked Vera for a Job in Welton. The Ernesto Navarro situation has been discussed above.

With respect to Paragraph 21(d), the General Counsel has failed to prove step one in an 1153(c) case in that he has failed

to prove a discriminatory action toward any of the five discriminatees. Duran asked for and received a Welton Job; none of the others asked for Welton Jobs. The evidence does not establish that Respondent was ever put into the position of having to refuse any but Duran the chance to go to Welton.

The Duran and Saucedo testimony regarding separate occasions on which Barriga called out names of persons to go to Welton is not inconsistent with Vera's testimony that the Crew 2 members who went to Welton were ones who specifically asked to go. With the exception of Duran, whose testimony did not tend to prove the allegation, none of those going to Welton from Crew 2 testified.

I shall recommend that the allegations of Paragraph 21(d) be dismissed.

The Loader Terminations Of January 8, 1976.

The General Counsel contends that Fred Booker, Thurman Willburn, Errol Jones and one other loader were discharged on January 8, 1976. Contrary to the General Counsel's contention, I conclude that the four loaders quit despite being urged to return to the fields and despite repeated assurances that they were not fired.

Booker and Willburn were the only General Counsel witnesses testifying with respect to these allegations. I find their testimony unreliable because of repeated contradictions with respect to occurrences about which one would anticipate a common memory. Booker testified that Bermio fired them; Willburn testified that Gardenhire told them they were fired. Their testimony conflicts regarding where they encountered Gardenhire on their way back to the fields from Saikhon's office. Willburn says they met Gardenhire when they got back to the field, and that he again told them they were fired and sent them back to the office. Booker says they met Gardenhire as they were driving back to the field, and he told them to return to the office.

I was favorably impressed with the demeanor of Respondent witness Rye who came across as straightforward, earnest and as having a good recollection of the events of the day. Crediting her testimony leads to the conclusion the loaders were not discharged, but rather they quit. Rye testified she repeatedly urged them to go back to work, but they declined to do so because of not wanting to work with a loader named Johnny.

The absence of any corroborative testimony from a worker witness present in the field on the morning of the 8th supports the conclusion that Booker and Willburn are not to be credited. The testimony of General Counsel witness Gutierrez also supports this conclusion. He testified the loaders were drinking beer during time they were at the field between trips to the office; the

loaders testified they did not drink beer. Since Gutierrez is an alleged a fellow discriminatee, there is no reason for him to falsely testify in Respondent's favor. His testimony is credited.

Finally, the absence of any significant or even noticeable pro-UFW activity by either Booker or Willburn was considered in reaching the conclusion that the General Counsel failed to prove the terminations violated the Act. I shall recommend dismissal of Paragraph 21(bb) of the amended complaint.

#### The Termination Of Benito Gutierrez.

Gutierrez's last day of employment was January 15, 1976. Paragraph 21(hh) alleges he was discharged that day in violation of Section 1153(c). The General Counsel did not include the Gutierrez incident in his "Requested Findings of Fact," an omission indicating abandonment of the alleged violation.

While Gutierrez testified at length about events involving other workers which occurred during his term of employment, his testimony regarding his termination was limited to a statement that on the morning of the 15th Bermio told him there was no more work, Bermio says Gutierrez asked for his check. This was a period during which Bermio, consistent with Mario Saikhon's Instructions, was reducing the size of his crew.

There is not substantial evidence upon which to rest a conclusion that Gutierrez was terminated; therefore I shall recommend that the allegations of Paragraph 21(hh) of the amended complaint be dismissed.

#### The Termination Of Gilberto Garcia.

In the month before February 20, 1976, Garcia worked Intermittently. He missed seven consecutive work days between January 14 and January 28. He missed two days during the week ending February 11 and did not show up for work during the week ending February 18, 1976, the week immediately preceding his alleged termination. Garcia offered no explanation for his extended absences from work; nor is it contended the records reflecting such absences are inaccurate. Sometime prior to February 20, he had been warned that if he missed any more work, he would be terminated.

There is no evidence Garcia engaged in any protected activity, nor was there any reason for Respondent to suspect he supported and was active on behalf of the UFW. The sum and substance of his UFW Involvement as manifested by his own testimony is his pre-election statement to Vera that he was going to vote for the UFW.

The record is as conducive of a conclusion that Garcia quit as of a conclusion that he was fired. Accepting for argument's

sake that Garcia was fired, the General Counsel has failed to make a prima facie case that the discharge violated Section 1153(c). Relevant evidence which a reasonable mind might accept as adequate to support a conclusion that Garcia was discriminatorily discharged has not been presented. N.L.R.B. v. Columbian Engineering & Stamping Co. (1939), 306 U.S. 292, 59 S.Ct. 501, 83 L.Ed. 660. At best, a suspicion of such motive has been raised, and suspicion does not suffice. Amyx Industries, Inc. V. N.L.R.B. (8th Cir. 1972), 457 F.2d 904, 907; therefore, I shall recommend that the allegations of Paragraph 21(kk) be dismissed.

#### The Termination Of The "Bullets"

Flavio Alejo and his three half-brothers were discharged for the stated reason of having left work without permission on February 6, 1976. It started to rain, the foreman told the crew to take the lunch break, and if it stopped raining, work would be resumed. The rain stopped and work was resumed. The Castillos and Alejo left at the start of the lunch break without permission.

Herrera, the foreman, testified he fired the four because leaving work in mid-shift was worse than not showing up at all. So far as Herrera could recall, the discharge of the "bullets," as the four are known, is the first discharge he has effected in 10 years as a foreman because a worker left during the course of a work day Herrera could neither recall any worker ever having left during the course of a shift nor ever having disciplined one for leaving. The improbability that in 10 years' service as supervisor Herrera never had a worker leave work without permission leads me to conclude that such departures have not in the past resulted in terminations. This conclusion is supported by uncontradicted testimony that two carloads of people in Crew 3 left without permission and were not disciplined when they returned the next day. As with Crew 1, Crew 3 finished out the day when the rain ceased.

Herrera's statement that he hired no one to replace the "bullets" tends to undermine his testimony regarding the reason for the discharges. The Crew 1 time book for the week ending February 18 lists two new crew workers, Banuelas and Haul Sosa, and also includes the name of Luna, a person who had worked but one day during the previous work week. Essentially there were three people—a trio—put on the payroll after the "bullets" termination. Moreover, since Respondent does not contend any sort of layoff was in progress, it would seem likely that Herrera would have a need to replace the discharges forthwith in order to maintain production.

Herrera had knowledge of Alejo's involvement with the UFW. A month earlier Alejo was late for work as a result of attending the pre-election conference. Herrera sent him home and told him to return the next day. The General Counsel has urged this action as violative of Section 1153(c); however, he failed to prove the discriminating character of that action; so I shall recommend

dismissal of Paragraph 21(ff). However, that incident establishes Employer knowledge of Alejo's activities. With regard to the others, Cresencio and Fedencio Castillo engaged in protected activity during the Welton harvest. I do not credit Herrera's disavowal of knowledge of these activities in view of a foreman's continual contact with his crew during the course of a work day. Coupling Herrera's actual knowledge of participation in protected activity with the fact the four are thought of as a group by their fellow workers, I find that Herrera suspected that Cruz was also a UFW activist.

Finally, the attitude of Respondent toward the UFW as manifested by the unlawful acts it committed during the election campaign is a factor supporting the conclusion that the discharge of the "bullets" violated Sections 1153(c) and 1153(a). Diamond Automotive Industries (1974) 214 NLRB No. 63.

#### The Termination Of Monroy And Ortiz.

The General Counsel's theory regarding the terminations of Ortiz and Monroy seems to be as follows: (1) the reason for the discharges was pretextual because they were no more inept or incompetent during 1976 than they had been in previous years. As it is so colorfully and revealingly put: "Nothing in respondent's testimony suggests the irrigators post-election incompetence exceeded or was in any way different than their pre-election incompetence." (2) Ortiz and Monroy were not told they were terminated until some months after they were fired and were given no explanation for the termination. (3) Ortiz had an active role during the election campaign. Q.E.D. ... discriminatory treatment of UFW supporters was the real reason for the termination of Mr. Ortiz and Mr. Monroy." The General Counsel's argument is not persuasive.

With respect to Monroy, there is no evidence of any protected activity by him during the organization campaign which preceded the election, nor any evidence of such activity during the six months between the election and his termination.<sup>64/</sup> As has been so often recited, it is impossible for a discharge to be discriminatory without proof that the employer had knowledge of the dischargee's union activities or, alternatively, without proof that the employee's discharge was motivated by a belief or suspicion the employee was engaged in union activities, even though there was no such-participation. N.L.R.B. v. Garner Tool and Die Manufacturing, Inc. (8th Cir. 1974), 493 F.2d 263, 268. Since the General Counsel produced no evidence of Monroy's UFW activity, he could not prove Employer knowledge of such activity. Nor has he produced evidence

---

<sup>64/</sup>Neither party raises any issue with respect to when the termination occurred or states any position with respect to when it occurred. June 30 is the work week in which Monroy's and Ortiz's names were removed from the time book.

establishing any basis for concluding that Respondent's suspicion that Monroy was engaged in protected activity motivated his termination. Monroy's long-time friendship with Ortiz is too tenuous a fact from which to infer an illicit motivation. *Amyx Industries, Inc. v. N.L.R.B.* (8th Cir. 1972), 457 F.2d 904, 907.

Contrary to the General Counsel's assertion, it is not necessary that an increase in incompetence be present in order to justify the discharges. Employees may properly be discharged for incidents which, standing alone, would not warrant such a disciplinary response when the incident's is one but one of a series of acts of misconduct which have gone uncorrected. In such cases the cause for discharge is not the final act of misconduct, but the fact that the employee is incorrigible. *Arden Farms Co.* (1965), 45 LA 1124; *Ampex Corporation* (1965), 44 LA 412; *Michigan Seamless Tube Co.* (1955), 24 LA 132. Certainly the record shows a long history of irrigation problems with both Monroy and Ortiz, as well as a repetition of those problems during March through May, 1976. It is reasonable to infer that the continuing manifestations of incompetence by both Ortiz and Monroy during this period was the straw that broke the camel's back.

The irrigation foreman, Bastidas, was reluctant to effect Mario Saikhon's order to fire Ortiz and Monroy. However, the General Counsel does not explain how this reluctance translates into either an 1153(a) or an 1153(c) discharge. In view of the minimal Union activity by Ortiz and the absence of such activity by Monroy, an easier and, thus, more reasonable inference is that Bastidas had an understandable reluctance to tell two long-time workers they were through, despite his instructions from Mario Saikhon.

Finally, the passage of time between Ortiz's pre-election protected activity, assuming Employer knowledge thereof, and his termination is such that National Labor Relations Board cases finding just cause for discharge to be pretextual in view of the proximity of the discharge and the employee's union activity are not in point. In the face of the substantial UFW margin at the polls, Respondent had no reason to discharge Ortiz for discriminatory reasons some six months after his last participation in any protected activity. *The Van Heusen Co.* (1975), 221 NLRB 732, 733; *Freeport Transportation, Inc.* (1975). 220 NLRB No. 125. Cf. *Stone & Webster Engineering Corp.* (1975), 220 NLRB No. 124; *Gateway Press, Inc.* (1975), 220 NLRB No. 102.

I shall recommend dismissal of the allegations of Paragraph 21(11) of the amended complaint.

#### Refusal To Hire Ernesto Navarro.

The amended complaint alleges that on or about November 5, 1975, Ignacio Alvarez refused to hire Ernesto Navarro



as a cutter in order to punish him for having engaged in organizational activities. Before the close of the hearing, the General Counsel's motion to amend the complaint to conform to the proof was granted; therefore, I shall regard this paragraph of the complaint as amended to allege that on or about November 17, 1975, Alvarez refused to transfer Navarro to one of the crews assigned to the Welton harvest. The Welton harvest started November 17 not November 5 and Navarro was employed by Saikhon at the time and, thus, could not have been refused hire.

The General Counsel's theory with respect to Navarro is that during the 1975 Valley thinning season Alvarez promised to take him to Welton and teach him to be a cutter; that he failed to perform on this promise; and that he failed to perform because of Navarro's active participation in protected activities on behalf of the UFW. For the reasons set forth below, the General Counsel's theory is rejected.

The only evidence offered in support of the theory is the uncorroborated testimony of Navarro. This is not an inherent defect, for the uncorroborated and credited testimony of an alleged discriminatee may suffice as a basis for finding a violation of Section 8(a)(3) and thus of 1153(c). However, the absence of corroborating testimony has been a significant factor in concluding that Navarro's testimony, for the most part, cannot be credited.

Navarro's testimony is generally unreliable. His testimony that Alvarez failed to give him an opportunity to cut during the 1972-1973 season is controverted by his Earnings Record for that season, which shows work at the cutter/packer piece rate operative at that time. The General Counsel does not contest the accuracy or authenticity of that record. Navarro testified that after he started soliciting signatures for authorization cards in October, 1975, he worked less than eight hours a day and had days when he did not work. Again, his testimony is contradicted by his 1975 Earnings Record. When these obvious errors are coupled with the Improbability of other parts of his testimony, it cannot be credited, particularly in the areas indicated below.

Alvarez testified that Navarro did not ask for a cutting Job in 1975. Navarro was not called to rebut this statement. I credit Alvarez on this point. Unless we are to conclude that Alvarez's alleged promise to teach Navarro was made on his own motion, so to speak, an antecedent request to cut is an essential prerequisite to any promise to teach. Therefore, the failure to call Navarro as a rebuttal witness warrants the inference he could not deny that he did not ask Alvarez for a cutting Job during the 1975 season. Thus, the premise of the General Counsel's theory disappears.

Even if one were to assume the promise was made, it is apparent that only the most convoluted reasoning would support the

conclusion that the failure to keep it violated Section 1153(c). Alvarez could not keep his promise because Crew 2 did not go to Welton. He had no authority with respect to worker placement in any crew but his own. Since Alvarez did not make the decision to keep his crew in the Valley, one must hypothesize that Mario Saikhon kept the crew in the Valley to discriminate against Navarro by denying him the chance to have Alvarez keep his promise and against other members of Crew 2. No reason presents itself for taking such an hypothesis seriously.

Saikhon's business records support his reason for concluding that two harvest crews were all that were necessary in Welton. Mario Saikhon's testimony regarding his policy of rotating crews was uncontradicted as was testimony that Crew 2 was the only crew which had not yet stayed in the Valley. These stated reasons cannot reasonably be urged to be pretextual on the theory that Respondent was going to punish Crew 2 members for their high degree of UFW support. The record shows a high degree of organization in <sup>10</sup> both Vera's and Herrera's crews.

Thus, assuming arguendo Alvarez made a promise, his failure to keep it was not a discriminatory act.

This analysis leads to the conclusion that it is highly improbable the Navarro-Alvarez conversations regarding not teaching Navarro to cut and assigning responsibility for the crew remaining in the Valley to Navarro's UFW activities ever occurred. Alvarez denied such conversations, and there is no logical reason for them to have occurred.

I shall recommend dismissal of the allegations of Paragraph 21(f) of the amended complaint.

#### Refusal To Hire Teresa Briseno.

The General Counsel contends that Respondent failed to hire Teresa Briseno Reyna in October, 1976, because of the UFW activities of her husband, Jesus Reyna. No contention is made, and none could be, that Mrs. Reyna personally engaged in any protected activity or that she engaged in any conduct which could reasonably be expected to arouse any suspicion in Respondent that she was active on behalf of the UFW. Rather, the General Counsel's theory is that Briseno was being punished for her husband's protected activity.

The protection afforded by National Labor Relations Act Section 8(a)(3) and thus by Section 1153(c) extends to applicants for employment as well as to persons already employed. Phelps Dodge Corporation v. National Labor Relations Board (1954), 347 U.S. 17. The National Labor Relations Board has found terminations because of the protected activity of a relative to violate 8(a)(3). Forest City Containers Inc., 212 NLRB 38 (1974); Hickman Garment

Co., 216 NLRB 801 (1975). Such findings generally occur in situations in which the employer is interdicted from action against the activist, and is not the case here. The Respondent was not prevented from chancing direct retaliation against Reyna.

There is no evidence of any independent 1153(a) activity during the 1976-1977 season to lend support to an inference that Briseno was not hired because of Reyna's protected activity. There was no discriminatory refusal to hire Reyna in the 1976-1977 season to support an inference of bad motive for the failure to hire, Briseno. If Respondent were seeking to discourage UFW membership by the technique of discriminatory refusals to hire, it boggles the mind to hear urged that effectuation of this goal is obtained by hiring the vocal and activist spouse and declining to hire the quiescent one.

The General Counsel has failed to adduce sufficient evidence to establish that Briseno's failure to be hired during October, 1976, was a violation of the Act. I shall recommend that the allegations of Paragraph 21(mm) of the amended complaint be dismissed.

#### Refusal To Hire Enrique Zambrano.

On the first day of the 1976-1977 Welton harvest Zambrano arrived at the Gulf station after the crew had been hired and departed for work. During the next two weeks Zambrano contacted the bus drivers and pushers about work. He did not go to work. The record does not establish either bus drivers or pushers to be supervisors within the meaning of the Act or as agents of the Respondent clothed with authority to hire. Therefore, any failure of Zambrano's to obtain work during the Welton harvest cannot be said to result from any act of Respondent directed toward him.

Zambrano sought work from Vera during the 1976-1977 Valley harvest at a point in time when Vera had already selected his crew. Vera told him he had no work. When Zambrano said there were people working who had less seniority than he, Vera offered to displace anyone Zambrano pointed out and give him the Job. No such person was pointed out. Similarly, when Zambrano talked to Barriga about work, he was told there were still thinners who were not working who had more seniority than he so work was not available. Barriga's testimony was not rebutted.

Admittedly Respondent in the persons of Vera and Fiore had knowledge of Zambrano's UFW activities even before the January, 1976, election and admittedly Zambrano was one of the more active UFW supporters during the election campaign; but Employer knowledge of his activities standing alone does not make a violation of Section 1153(c), especially when those activities occurred approximately a year prior to the alleged discriminatory act. The Van Heusen Co. (1975), 221 NLRB 732, 733; Freeport Transportation, Inc.

(1975), 220 NLRB No. 124. The General Counsel must prove a discriminatory act by Respondent. On this record, Respondent's treatment of Zambrano during the Valley harvest of 1976-1977 was consistent with its overall hiring policy. At best, there is a suspicion of a discriminatory act. But, suspicions do not a violation of 1153(a) or 1153(c) make.

I shall recommend that the allegations of Paragraph 21(m) of the complaint be dismissed.

The Section 1153 (a) Incidents.

The Threat To Plant Alfalfa: Prior to the start of work on October 28, 1975, Ignacio Alvarez, in the presence of members of his crew, grabbed a piece of paper from the hands of Ramon Sepulveda and threw it in a nearby canal while telling Sepulveda not to get involved with the UFW. Alvarez's action was coupled with a statement to the workers that if the Union won an election, Saikhon would "retire" from lettuce and plant alfalfa.

On at least two occasions Leonardo Barriga made statements to the effect that Saikhon would plant alfalfa if the UFW won the election. Guillermo Duran testified credibly to hearing Barriga say Saikhon wanted no problems with the UFW so he would plant alfalfa so he would not need a lot of workers. Lucio Padilla testified credibly to hearing such a statement in early November.

Statements by supervisors or agents of an employer to the effect that an employer will go out of business or substantially change his operation in the event of a union victory at the polls violate Section 8(a)(1) of the National Labor Relations Act. *N.L.R.B. v. River Togs. Inc.* (2nd Cir. 1967), 382 F.2d 198; *N.L.R.B. v. Marsh supermarkets. Inc.* (7th Cir. 1963), 327 F.2d 109, cert. denied (1964) 377 U.S. 944; *N.L.R.B. v. Winn-Dixies Stores, Inc.* (6th Cir. 1965);, 341 F.2d 750, cert., denied (1965), 382 U.S. 836 *United Mercantile, Inc.* (1973), 204 NLRB 663; and *Automated Business Systems* (1973) 205 NLRB 532.

Assaults by supervisors upon union adherents engaged in protected activity violate Section 8(a)(1) of the National Labor Relations Act and therefore violate Agricultural Labor Relations Act Section 1153(a). See *Kellwood Co. Greenfield Mfg. Co. Div.*, (1972), 199 NLRB 756; *Allegheny Corp.*, *Jones Motor Co. Div.* (1973), 202 NLRB 123.

The Employer conduct alleged in Paragraphs 21(b), 21(c), 21(e) and 21(i) of the amended complaint violated Section 1153(a) of the Act.

The Bus Incident: During the early part of the electing campaign Jesus Reyna solicited support for the UFW at the Gulf Station prior to the buses leaving for work. On November 7 he was on

the bus for Crew 1 organizing the workers when he heard the Crew 2 bus, his bus, start to leave. He ran and boarded the bus before it left the station.

The General Counsel contends the bus started to leave early with the object of interfering with the Section 1152 rights of Reyna and others. To find a violation of Section 1153(b), it is not necessary to find an illicit motive, the test is whether the Respondent's conduct tended to interfere with the free exercise of employee rights. *Munro Enterprises, Inc.* (1974), 210 NLRB No. 62.

The General Counsel failed to prove such interference. He failed to prove by a preponderance of the evidence that the bus left early. Even if it is assumed that the bus left early, it would appear from all the testimony, even Reyna's, that the departure was not advanced more than three or four minutes. In the total framework of the UFW 1975 organization campaign at Saikhon, any Interference with Section 1152 rights occasioned by the alleged early bus departure would have been de minimis.

I shall recommend that the allegations of Paragraph 21(h) be dismissed.

#### The Arrest Of UFW Organizers.

On January 5, 1976, Buck Gardenhire called the sheriff and later imposed a citizen's arrest upon UFW organizers at the Saikhon labor camp. Respondent's Justification for the arrest as well as calling the sheriff was that the UFW organizers exceeded the one hour before work limitation of the access regulation, 8 Cal. Admin. Code Section 20900 (1975), and thus became trespassers as defined in the Penal Code.

Respondent's counsel argues that Section 20900 has application only to the employer's fields and that labor camp access is governed by *N.L.R.B. v. Babcock & Wilcox Co.* (1956), 351 U.S. 105, which permits access to an employer's property when no alternative the one-hour access to the camp pursuant to Saikhon's rules was reasonable. Thus, the arrests were not violative of the statute.

The Board has held that an employer's threat to call the sheriff to arrest organizers on his property for legitimate organizing, purposes constitutes an unfair labor practice. *D'Arrigo Brothers Co. of California* (1976), 3 ALRB No. 31. The Board in *Mitch Knego* (1976), 3 ALRB No. 32, held that organizers must be allowed access to employer-owned labor camps, citing *United Farm Workers of America, APL-CIO v. Superior Court (Wm. Buak Fruit Co.)* (1975), 14 Cal.3d 902. In Buak the court found labor camp access by union organizers to be protected by the free speech provisions of Article I, Section 2 of the California Constitution. Thus, the legitimacy of the organizers' presence at the Saikhon labor camp is

well established and is based upon a Constitutional as opposed to an administrative regulation right. It follows therefore that Respondent violated Section 1153(a) by imposing a citizen's arrest upon the UFW organizers.

The Teamster organizers who were present on January 5 were not arrested by Gardenhire. It appears they left the premises in response to his directive, thereby obviating the need for arrest. Under these circumstances, there was no disparate treatment and no unlawful assistance of the IBT by Respondent. Since I find no violation of Section 1153(b) as alleged in the complaint at Paragraph 21(ee), I shall recommend dismissal of said paragraph.

#### Denial Of Bus Access.

Prior to their departure for work, on November 10, 1975, UFW organizers were denied access to Saikhon buses parked at the Gulf station in Calexico. Organizers had been on the buses every morning since the campaign started; the record does not indicate whether bus contact by UFW organizers was resumed. If so, it apparently was not again interdicted. Respondent called the Calexico police department to remove the organizers. The bus departed for work while the organizers and the Calexico police were discussing access rights.

As with the labor camp access incident discussed above, Respondent urges the situation is covered by Babcock & Wilcox as opposed to the access regulation; and as with the labor camp incident, the General Counsel articulates no theory in support of the complaint's allegations.

The difficulty with Respondent's Babcock & Wilcox argument is that its rationale as a basis for requiring access to an employer's property has been rejected by the Agricultural Labor Relations Board. The regulation states:

Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working. [8 Cal. Admin. Code Section 20900 (5)(a).]

Undeniably, the main concern of the Board in adopting the regulation was field access, but the Company buses are within the literal language of the regulation. It would be anomalous to require growers to permit access to their fields and to permit them to frustrate that requirement by prohibiting access to their property in the form of buses when such property is the situs where workers gather prior to the commencement of work. During the preceding the commencement of work, the bus is the only piece of

Company property where workers customarily gather. It is an appropriate situs for organization activity just as a delivery truck becomes an appropriate situs for furthering a union's objective in the roving situs cases under the National Labor Relations Act. *Electrical Workers Local 861 (Plauché Electric) (1962)*, 135 NLRB 250.

Since the organizers' presence on the bus had a legitimate organizational purpose, Respondent's denial of that access, and its resort to the Calexico police to enforce its denial, violated Section 1153(a). Respondent argues the incident was de minimis, and presumably would warrant no remedy if a violation were found. I disagree. The incident was one of a series of interactions between Respondent and the UFW, and its employees. As part of that con-text, it cannot go unnoticed. Cf. *Mitch Knego, supra*.

#### Interference With Employee Organizational Activity.

On November 20, 1975, Supervisor Barriga prevented Jesus Reyna from soliciting a member of Crew No. 1 to volunteer to be an election observer. Barriga directed Reyna to get off the Crew 1 bus at a time when the bus was parked at the Gulf station before transporting workers to Welton.

The National Labor Relations Board with Supreme Court affirmation in *Republic Aviation Corp. v. N.L.R.B. (1945)*, 324 U.S. 793, has long adopted the presumption that the promulgation and enforcement of a rule prohibiting union solicitation by employees outside working time, although on company property, . . . is an unreasonable impediment to self organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary [for maintaining] production and discipline."65/ Employee access and solicitation is distinguished from non-employee solicitation. Respondent's reference to the Board's access regulation is inappropriate in the context of allegations of interference with employee organizational activity.

Having credited Reyna's uncontroverted testimony of Barriga's conduct toward him and his uncontroverted testimony regarding his ejection from the Company bus, it is apparent Respondent's conduct violated Section 1153(a).

#### Disparate Access On January 2, 1976.

During the pre-election campaign both Teamster and UFW organizers were frequently in Respondent's fields. Respondent had a problem on one occasion with UFW access because of a disagreement over the meaning of the access regulation [8 Cal. Admin. Code Section 20900 (1975)]. Mario Saikhon called the Agricultural Labor

---

65/324 U.S. 793, 803.

Relations Board office and asked to have a representative sent out to resolve the problem. A Field Examiner came to the field, explained the regulation to the UFW organizers and told them to leave. The organizers left. On another occasion each union's organizers refused to be the first to leave. Mario Saikhon called the sheriff, and both groups departed when they saw the sheriff approaching. Neither of these incidents is charged as violative of Section 1153(a). They are cited to provide a backdrop against which to consider Respondent's argument that the disparate access granted the Teamsters on January 2, 1976, should be disregarded as de minimis.

Bonita Packing Company (1976), 3 ALRB No. 27, cited by Respondent is distinguishable. There the Board found the totality of the employer conduct to be de minimis and found no evidence of discriminatory employer action. Here, the Employer was engaged in a broad scheme aimed at defeating the UFW and the disparate access accorded the IBT on January 2 is one manifestation of the Employer's campaign. It cannot be viewed in isolation. Certainly the totality of Respondent's conduct is not de minimis.

However, in view of the frequency with which the UFW organizers had access to Saikhon employees both in the field and when they assembled before work at the Gulf station, the one instance of disparate treatment does not establish the substantially unequal access required to warrant finding a violation of Section 1153(a) or Section 1153(b). The Board, in an "R" case context, found one instance of unobstructed Teamster access in the framework of otherwise relatively equal access did not warrant setting aside an election. Tomooka Brothers (1976), 2 ALRB No. 52. There are no other counts in the complaint alleging unequal access.

Disparate access not sufficiently heinous to result in setting an election aside would not be violative of Sections 1153 (a) or 1153(b). I shall recommend dismissal of the allegations of Paragraph 21(aa).

#### Urging A Teamster Vote.

Paragraph 21(gg) alleges the Respondent contributed support to the Teamsters on January 6, 1975, by urging Benito Gutierrez and others to vote for the Teamsters. Since the General Counsel submitted no requested finding of fact on this issue, it appears he has abandoned his claim. The evidence adduced did not produce statements chargeable to Respondent amounting to threats of reprisals or promise of benefits. I shall recommend the allegations be dismissed. The Employer statements in evidence are within the scope of Section 1155 and are, therefore, not evidence of an unfair labor practice.

//



The Assault On Roberson.

On the day after the Valley harvest began UFW organizer Roberson, Felix Valenzuela and a loader were standing alongside a dirt road adjacent to one of Respondent's fields when Barriga drove his pickup past them at more than the usual rate of speed. The passing pickup sprayed dust on Roberson and the others. Barriga was heard to shout "go fuck" as he drove by.

The Agricultural Labor Relations Board in Tex-Cal Land Management. Inc. (1977), 3 ALRB No. 14, has cited with approval National Labor Relations Board cases finding violations of Section 8(a)(1) for conduct "... ranging from that as seemingly minimal as pushing a union organizer in the presence of workers (Green Briar Nursing Home. 201 NLRB 503, 82 LRRM 1249 (1973) . . ." to conduct as aggravated as mob attack on organizers.<sup>66/</sup> Employer conduct directed toward union organizers which manifests employer disregard of their lawful rights or which manifests threats of violence or assault is violative of Section 8(a)(1) and thus, Section 1153(a).

While the conduct involved in this incident, standing alone, might be considered too insignificant to warrant a remedy, it cannot be so viewed when occurring, as it does here, in the context of a broad spectrum of Employer unfair labor practices. The incident was perhaps a chance happening, but it was another manifestation of Respondent's interference with the Section 1152 rights of its workers.

The Fiesta.

Labor Code Section 1153(b) makes it an unfair labor practice for an employer:

To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

. . .

This section tracks the substance of National Labor Relations Act Section 8(b)(2).

Adhering to the mandate of Labor Code Section 1148 reference to National Labor Relations Board decisions is appropriate in determining whether the Respondent violated Section 1153(b) in that it:

---

<sup>66/</sup>Slip Opinion 3 ALRB No. 14, at p. 11. Cf. Bonita Packing Co. (1977), 3 ALRB No. 27.

[D]id lend support to the Teamsters and directly and indirectly pressure employees, through the deliverance of various things of value including food and drink and the payment of money, to seek to induce them to vote for the Teamster Union and otherwise interfere with their right to organize and bargain collectively through representative of their own choosing.

The conduct proved in connection with this allegation was the following: Respondent had a "fiesta" for members of Crews 4 and the Friday before the representation election. These were the labor contractor supplied crews. At the party supervisors stated the Employer had provided the party so they should vote for the Teamsters. Additionally, a supervisor gave some the whiskey and wine left over from the party to one of the loaders in his crew.

A violation of 8(a)(2) is found when the employer support or domination of a union has reached the point where it is reasonable to infer that the union is not truly the employees' representative in disputes; Commerce Clearing House, Guidebook To Labor Relations 149 (1960). The violation is found in conduct directed toward or on behalf of a union as opposed to conduct directed toward employees which interferes with or restrains or coerces them in the exercise of their right to reject or accept freely the favored union. Typically, the National Labor Relations Board has found a violation of 8(a)(2) in situations in which an employer defrays a union's costs of an election,<sup>67/</sup> supplies a place for its meetings,<sup>68/</sup> supplies refreshment for its meetings,<sup>69/</sup> supplies direct financial support,<sup>70/</sup> provides indirect financial support by permitting the union to use its office equipment<sup>71/</sup> its telephone, or by providing it with secretarial services.<sup>72/</sup>

The conduct herein alleged is not the kind of conduct which the cases teach constitutes 8(a)(2). It is not conduct which would endanger the independence of the Teamsters.

The sum of this is that a [section] 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of

---

<sup>67/</sup>Newman-Green, Inc. (1966), 161 NLRB 1062.

<sup>68/</sup>Dennison Mfg. Co. (1967), 168 NLRB 1012.

<sup>69/</sup>Kunst d/b/a Connor Foundry Co. (1952), 100 NLRB 146, 151.

<sup>70/</sup>Dennison Mfg. Co., supra; Kunst, supra.

<sup>71/</sup>Nutone, Inc. (1955), 112 NLRB 1153, 1170.

<sup>72/</sup>Newman-Green, Inc., supra.

organization or in the assertion of demands, is stifled by the degree of employer involvement at issue. [Hertzka of Knowles v. N.L.R.B. (9th Cir. 1974), 503 F.2d 625, 630.]

Such a degree of involvement is not manifested in the employee party or in the liquor incident.

A separate question is whether Respondent's sponsorship of the fiesta was violative of Section 1153(a). In United States Postal Service (1973), 205 NLRB 607, the employer through its participation in a vending committee gave money to the Mail Handlers to assist in its sponsorship of a craft picnic at a time when a rival organization had a representation petition on file. The Administrative Law Judge found the assistance given by the service violated both 8(a)(1) and (2). The Board reversed.

We cannot agree that because the picnic might have possessed "inherent promotional advantage for the Mail Handler," much like those enjoyed by any incumbent, Respondent violated the Act by participating in the committee's use of the Mail Handlers as a conduit for sponsoring a mail handlers' picnic. There is no evidence whatsoever that Mail Handlers engaged in any union activity at the picnic or otherwise sought to gain partisan advantage by its sponsorship of the picnic. [205 NLRB at p. 608, cf, Wyco Metal Products (1970), 181 NLRB 901.]

Here, there is no evidence the Teamsters engaged in any union activity at the fiesta or sought to gain partisan advantage as a result thereof. However, the Respondent's sponsorship of the party in a context of its known preference for the Teamsters could reasonably lead the workers to conclude that there would be more parties or other prerequisites if the Teamsters prevailed, thereby interfering with employee rights under Section 1152. The same reasoning is applicable to Gardenhire's gift of a bottle of whiskey to one of the loaders.

In this regard, while the statements made by the supervisors at the party may not provide the basis for finding an unfair labor practice (Section 1155), the statements explain to the workers the reason for the event and arouse reasonable expectations of future benefits. Therefore, Respondent's conduct violated Section 1153(a).

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153(a), 1153(c) and

1154.6 of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off Miguel Sosa Romales, Ramon Montellano Acosta, Jose Arredondo Meza and Jose Plascencia on December 15, 1975, I shall recommend that Respondent be ordered to make each whole for any losses incurred as the result of its unlawful action against him by payment to him of a sum of money equal to the wages he would have earned from the date of his layoff to the date he returned to work or was offered reinstatement, less his net earnings during that period, together with interest thereon at 1% per annum. I shall recommend that the loss of pay and interest be computed in accordance with the formula used by the National Labor Relations Board in F. W Woolworth Co., 90 NLRB 289; and Isis Plumbing and Heating Co., 138 NLRB 716. I shall recommend that each person named above be offered employment at the commencement of the 1977-1978 lettuce season, i.e., the Welton thinning.

Having found that Respondent unlawfully discharged Flavio Alejo, Cresencio Castillo Estrada, Fidencio Castillo Estrada and Cruz Castillo, I shall recommend that Respondent be ordered to offer each of them full and immediate reinstatement to his former or to a substantially equivalent Job. I shall further recommend that Respondent be ordered to make each whole for any losses incurred as the result of its unlawful discriminatory action against him by payment to him of a sum of money equal to the wages he would have earned from the date of his discharge to the date he is reinstated or offered reinstatement, less his net earnings, together with interest thereon at the rate of 7% per annum, the loss of pay and interest to be calculated in the manner set forth above.

Having found that Respondent unlawfully discharged Carlos Mojica, Victor Acosta, Moises Soto and Salvador Aguirre on December 26, 1975, I shall recommend that Respondent be ordered to make each whole for any losses incurred as the result of Respondent's unlawful discriminatory action against each by payment to each of a sum of money equal to the wages he would have earned from the date of discharge until January 26, 1976, the date the entire crew was terminated, less his net earnings, together with interest thereon at the rate of 7% per annum, the loss of pay and interest to be calculated as described above.73/

---

73/Since the employment of these four individuals was illicitly motivated, and since they displaced bona fide workers, I do not recommend an offer of reinstatement. I have recommended termination of their back pay on January 26 because that is the date the crew of which they were members was terminated for reasons not alleged to violate the Act.

Having found that Respondent unlawfully hired persons for the primary purpose of having them vote in a representation election, thereby depriving customary employees of work, I shall recommend that Respondent be ordered to make each worker, working in Montejano's crew on the first day the crew worked, whole for any losses incurred as the result of Respondent's wrongful employment of workers to vote in a representation election by payment of a sum of money equal to the wages he would have earned during the period the illicit crew was employed, less his net earnings, together with interest thereon at the rate of 7%. I shall recommend that the loss of pay and interest be computed in accordance with the formula used in F. W. Woolworth Co., supra; and Isis Plumbing and Heating Co, supra.

In order to more fully remedy the Respondent's unlawful conduct, I shall recommend that Respondent make known to its current employees, to all persons employed during the 1975-1976 lettuce season, to all persons employed during the 1976-1977 lettuce season and to all persons who are hired during the 1977-1978 lettuce season that it has been found in violation of the Agricultural Labor Relations Act, that it has been ordered to make certain of its employees whole for wage losses resulting from its unlawful acts, and that it has been ordered to cease violating the Act and not to engage in future violations.

To this end I shall recommend:

(1) That Respondent be ordered to mail a copy of the attached Notice To Employees to each person employed during the 1975-1976 lettuce season and to each person employed during the 1976-1977 lettuce season at his or her last known address on file with Respondent or to any more current address furnished Respondent by the Sub-Regional Director, El Centro, or Charging Party;

(2) That Respondent be ordered to distribute a copy of the Notice to each of its current employees;

(3) That Respondent be ordered to post the Notice at the commencement of the 1977-1978 lettuce season in each of the buses used to transport workers to and from the Job; the Notice to remain posted in the buses for so long as they are utilized during the 1977-1978 season.

(4) That Respondent be ordered to post the Notice conspicuously on each of the stitcher trucks utilized during the 1977-1978 harvest and for the entire period of the harvest as well as at any other location on its properties where workers may reasonably be expected to become aware of the Notice.

(5) That Respondent be directed to distribute a copy of the Notice to each person hired during the 1977-1978 lettuce season.

(6) That the Notice be read in Spanish to the workers & the outset of the Welton and Valley thinning seasons and the Welton harvest season at the Gulf Oil station in Calxico or at any other assembly point then utilized by Respondent.

I shall further recommend that the Notice as posted and distributed be printed in both Spanish and English.

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

ORDER

Respondent, its officers, agents, supervisors and representatives shall:

(1) Cease and desist from:

(a) Discouraging the membership of any of its employees in the United Farm Workers of America, AFL-CIO, by threatening reprisals for supporting the UFW, by interfering with or restraining employees from engaging in lawful protected activity, by hiring employees for the primary purpose of having them vote in a representation election, by interfering with the lawful access of non-employee Union representatives onto its properties, by threatening to arrest or arresting UFW representatives lawfully on Respondent's properties, by assaulting UFW representatives or employees engaged in activities on behalf of the UFW, by discharging, laying off or in any other manner discriminating against individuals in regard to hire or tenure of employment, except as authorized in Section 1153(c) of the Act, and by giving or promising benefits to workers to obtain support for the IBT.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed employees by Section 1152 of the Act.

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Flavio Alejo, Cresencio Castillo Estrada, Fidencio Castillo Estrada and Cruz Castillo full and immediate reinstatement to their former or substantially equivalent Jobs without prejudice to their seniority or other rights and privileges and to make each of them whole in the manner described above in the section called "Remedy" for any losses suffered as a result of his termination.

(b) Make Miguel Sosa Romales, Ramon Montellano Acosta, Jose Arredondo Meza and Jose Plascencia whole in the manner described above in the section titled "The Remedy" for any

loss suffered as the result of his layoff by Respondent.

(c) Make Carlos Mojica, Victor Acosta, Moises Soto and Salvador Aguirre whole in the manner described in the section titled "The Remedy" for any losses suffered as the result of being discharged by Respondent.

(d) Make each and every person employed in Tony Montejano's crew on January 27, 1976, whole in the manner described in the section titled "The Remedy" for any losses suffered as the result of not being hired on December 17, 1975, by Respondent.

(e) Preserve and make available to the Regional Director or his representatives, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to ascertain the back pay due.

(f) Mail to each employee employed during the 1975-1976 or the 1976-1977 lettuce season a copy of the Notice attached hereto and marked "Appendix." The Notice shall be mailed to the person's last known address on file with Respondent or the person's address as supplied by the El Centro sub-Regional Director or the Charging Party.

(g) Give to each of its current employees a copy of the Notice attached hereto and marked "Appendix."

(h) Give to each employee hired during the 1977-1978 lettuce season a copy of the Notice attached hereto and marked "Appendix."

(i) At the commencement of the 1977-1978 lettuce season post the "Notice" attached hereto and marked "Appendix" in a conspicuous place in each of the buses used by Respondent to transport workers to and from work. The Notice shall remain so posted for the entire period the bus is used for worker transport.

(j) At all times during the 1977-1978 lettuce harvest season, post in a conspicuous place on each stitcher truck a copy of the Notice attached hereto and marked "Appendix."

(k) At the commencement of the 1977 Welton thinning season, the 1977 Imperial Valley thinning season and the 1977 Welton lettuce harvest, read in Spanish to employees assembled at the Gulf station in Calexico the Notice attached hereto and marked "Appendix."

(l) Notify the Sub-Regional Director in the El Centro Sub-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 further compliance is achieved.

Copies of the Notice attached hereto shall be furnished Respondent for distribution by the Sub-Regional Director for the El Centro Sub-Regional Office.

It is further recommended that the allegations of the amended complaint as set forth in Paragraphs 21(d), 21(f), 21(h), 21(m) with respect to Pedro Sosa Romales, Cruz Castillo Estrada and Juan Cuevas Laguna, 21(n), 21(p), 21(x), 21(aa), 21(bb), 21(ee), 21(ff), 21(gg), 21(hh), 21(kk), 21(ll), 21(mm) and 21(nn) be dismissed.

Dated: June 6, 1977.

AGRICULTURAL LABOR RELATIONS BOARD

By   
\_\_\_\_\_  
Robert LeProhn  
Administrative Law Officer



APPENDIX "A"

NOTICE TO EMPLOYEES

After a trial at which all sides had the opportunity to present their evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act, and has ordered us to send out and to post this notice. We will do what the Board has ordered.

The Act gives all agricultural employees the following rights:

To engage in self-organization;

To form, Join or assist labor unions;

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

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

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.

Particularly,

WE WILL NOT threaten to go out of the lettuce business because of your feelings about, actions on behalf of, or membership in any labor organization;

WE WILL NOT threaten to arrest or arrest any union organizers who come onto our land, into our buses or into our labor camp to talk to you about a union when they are there as the law allows;

WE WILL NOT hire farm workers for the primary purpose of having them vote in any election conducted by the Agricultural Labor Relations Board.

WE WILL OFFER the workers named below their jobs back, if they want them, at the start of the 1977-1978 lettuce season and we will pay each of them any money they lost because we discharged or laid them off:

//

Miguel Sosa Romales  
Ramon Montellano Acosta  
Jose Arredondo Meza  
Jose Plascencia  
Flavio Alejo  
Cresencio Castillo Estrada  
Fidencio Castillo Estrada  
Cruz Castillo

WE WILL PAY the workers named below any money they lost between December 26, 1975, and January 26, 1976, because we discharged them:

Carlos Mojica  
Victor Acosta  
Moises Soto  
Salvador Aguirre

WE WILL PAY each worker who worked in Tony Montejano's crew on January 27, 1976, any money they lost between December 17, 1975, and January 27, 1976, because we did not start Montejano's crew on December 17, 1975.

WE WILL NOT promise you or give you benefits for not supporting a union.

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: )  
MARIO SAIKHON, )  
Respondent, )  
and )  
UNITED FARM WORKERS OF )  
AMERICA, AFL-CIO, )  
Charging party. )

CASE NO. 77-CE-3-I, et al  
ORDER AMENDING AND CORRECTING  
ADMINISTRATIVE LAW OFFICER'S  
DECISION

---

On page 40 of the Administrative Law Officer's decision in the above-captioned matter, the decision states that Respondent's layoff of Domingo Gonzales during the period from December 15, 1975, to January 7, 1976 violated Section 1153(a).

At page 61 of the decision, lines 3-10, the name of Domingo Gonzales was inadvertently omitted from the recommendation set forth. The decision at page 61, lines 3-10 is amended to read as follows:

Having found that Respondent unlawfully laid off Miguel Sosa Romales, Ramon Montellano Acosta, Jose Arredondo Meza, Jose Plascencia and Domingo Gonzales on December 15, 1975, I shall recommend that Respondent be ordered to make each whole for any losses incurred as the result of its unlawful action against him by payment to him of a sum of money equal to the wages he would have earned from the date of his layoff to the date he returned to work or was offered reinstatement, less his net earnings during that period, together with interest thereon at 7% per annum. I shall recommend that the loss of pay and interest be computed in accordance with the formula used by the National Labor Relations Board in F.W. Woolworth Co., 90 NLRB 289; and Isis Plumbing and Heating Co., 138 NLRB 716. I shall recommend that each person named above be offered employment at the commencement of the 1977-1978 lettuce season, i.e., the Welton thinning.

The recommended Order, item (2)(b) at page 63, lines 25-26 of the decision is amended to read as follows:

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(b) Make Miguel Sosa Romales, Ramon Montellano Acosta, Jose Arredondo Meza, Jose Plascencia and Domingo Gonzales whole in the manner described above in the section titled "The Remedy" for any loss suffered as the result of his layoff by Respondent.

Appendix "A" commencing at page 1, line 24 and ending at page 2, line 4 is amended to read as follows:

WE WILL OFFER the workers named below their jobs back, if they want them, at the start of the 1977-1978 lettuce season and we will pay each of them any money they lost because we discharged or laid them off:

Miguel Sosa Romales  
Ramon Montellano Acosta  
Jose Arredondo Meza  
Jose Plascencia  
Flavio Alejo  
Cresencio Castillo Estrada  
Fidencio Castillo Estrada  
Cruz Castillo  
Domingo Gonzales

DATED: July 5, 1977



ROBERT LE PROHN  
Administrative Law Officer