Oakdale, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TENNECO WEST, INC.,	)	
Respondent,	)	Case No. 77-CE-47-F
and	)	6 ALRB No. 3
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

DECISION AND ORDER

On December 5, 1978, Administrative Law Officer (ALO) Jeffrey S. Brand issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions, a supporting brief and a brief in reply to the other's exceptions.

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 in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent that they are consistent herewith.

The complaint alleged that Respondent violated Labor Code Section 1153(c) and (a) by its discharge of employee Rigoberto Nava and its refusal to rehire his brother, Antonio Nava.

General Counsel excepts to the ALO's conclusion that

Respondent did not violate the Act by refusing to rehire Antonio Nava in the fall of 1977. As the record does not show that this individual was treated in a different manner than other applicants for work, we find no merit in this exception.[1/] See, Radio Officers' Union v. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954).

We disagree with the ALO's conclusion that Respondent's discharge of Rigoberto Nava (Nava) constituted a violation of the Act. Although we concur in the ALO's finding that Respondent had knowledge of Nava's union activity, we find no causal connection between that knowledge and Respondent's decision to terminate Nava.

Nava was rehired by Respondent, pursuant to a settlement agreement, on September 12, 1977, at the beginning of Respondent's harvest season. Like other new hires, he was told at that time that he should not miss any work and that any necessary absences should be cleared in advance with his supervisor. On the following Sunday, Nava's brother Alejandro informed Nava's supervisor, Ron Yamashita, that Nava had a cold and would not be working that day. On Monday, Respondent's ranch manager, Louis Morton, received a call from a union agent saying that Nava had been informed on Saturday night that his grandmother in Mexico was ill and that he had immediately left for Mexico.[2/] Morton replied

---

[1/] In arriving at this conclusion, we disavow the ALO's analysis regarding the relative degree of union involvement of Antonio and the analysis which discounts the significance of the family relationship between Rigoberto and Antonio.

[2/] Nava testified that he traveled by car to Los Angeles and then boarded a bus for more than a 50-hour trip to his destination. He was unable to present any bus receipts or other evidence to substantiate the claimed travel.

that Nava himself should have called and that the ranch offices were open throughout the weekend. The union agent told Morton that Nava had tried without success to contact the ranch, but Nava testified at the hearing that he had not attempted to contact his supervisor or the ranch office.

On the second Thursday following his departure, Nava telephoned to say that he had returned and asked whether he could come back to work. He was advised to call his supervisor, Yamashita, whom he contacted the next day. Yamashita told him he could return on Monday. Upon his return to work, Nava was asked for a verification of the reason for his absence and was told that he would be allowed five days in which to provide it. As he failed to produce any verification within the allotted time, Nava was terminated the following Saturday.

The ALO cites two bases for his conclusion that Respondent discharged Nava because of his union activity: first, that there was no uniformly enforced absentee policy with which Nava should have been expected to comply; second, the requirement of verification within five days was both novel and unreasonable.

The ALO acknowledges the existence of a company policy whereby leaves for personal reasons are granted only upon prior written request to the management, but finds that the policy was applied in an "arbitrary and discretionary" manner, with each case being viewed on its own facts. In support of this statement, the ALO cites Respondent's treatment of the absences of four other employees: Jesus Silva, Jesse Silva, Guadalupe Rodriguez and Santiago Gonzalez. Contrary to the ALO, we find these instances

indicate that Respondent's absence policy was equitably applied as to Nava and the other four employees, and does not constitute evidence of disparate treatment of Nava.

The record shows that Respondent's main concern with regard to absences is that wherever possible they be cleared in advance with ranch management.[3/] Absences not cleared in advance are considered unexcused absences and may result in disciplinary action of varying degrees depending on the number of prior absences. Unexcused absences may become excused absences if the worker can provide an acceptable excuse upon his return. Examples of acceptable and unacceptable excuses are given as part of the written statement of the Employer's absence policy.[4/]

Under Respondent's policy, where an unexcused absence exceeds one week (that is, where the employee has not obtained prior approval and fails to appear for one scheduled week), the employee becomes subject to immediate termination. Termination may be avoided upon presentation of an acceptable excuse. However, this type of absence is viewed more critically than one which does not exceed a week.

The facts concerning the absences of Santiago Gonzalez, Jesus Silva, Guadalupe Rodriguez, and Jesse Silva do

---

[3/]Under Respondent's leave policy, an absence of a week or less may be approved orally. Anything longer is considered a leave of absence for which a prior written request and approval are required. Clearance involves discussion of ranch workload with a supervisor. The record contains an exhibit which consists of numerous filled-in leave-of-absence request forms.

[4/]"Emergency illness in family" can be the basis for an excusable absence.

not establish any substantial deviation from, or discriminatory application of, the aforementioned policies. Gonzalez was off work for a week or so as the result of an eye injury he suffered on the job. Respondent's own doctor recommended that Gonzalez stay off work until released by an eye specialist. This was clearly an excused absence.

Jesus Silva had gone deer hunting on a Saturday and Sunday when work was not being performed. His supervisor, Ron Yamashita, who was also Nava's supervisor, was aware that Silva had gone hunting and accepted Silva's excuse of having sore legs from the trip when Silva returned after missing work on Monday and Tuesday. This absence was the result of a physical problem and lasted only two days. The supervisor had no reason to doubt the excuse offered.

Assistant ranch manager Marvin Allinson testified that Guadalupe Rodriguez had been absent for a week[5/] when he (Allinson) started to write up a termination notice. That evening, Rodriguez' wife or daughter telephoned the ranch and explained that Rodriguez had been in Mexico, had foot problems upon his return, was seeing a doctor, and would be back at work the next day. Rodriguez was known to have a foot problem. However, Allinson subsequently discovered that Rodriguez' excuse

[5/]Respondent's employment records indicate that the total number of days between the last day Rodriguez worked and when he resumed work was 11. This obviously included one weekend and perhaps another weekend and a holiday (Memorial Day). The record does not indicate what days were being worked during this nonharvest period. In any event the General Counsel has not shown that, given all the circumstances, Rodriguez' absence was on a par with that of Rigoberto Nava.

was fabricated and that in fact Rodriguez had been working for another company during his absence. Rodriguez was then terminated.

Finally, Jesse Silva was discovered to have been off work, without leave, for six or seven days. To ascertain his whereabouts, the Employer called his father, the aforementioned Jesus Silva, who reported what he thought were the reasons for his son's absence. The elder Silva was told that his son would have to appear for work the next day or be terminated. Jesse returned the next day and retained his job. His absence occurred during a nonharvest period and did not exceed the one-week limit.

Rigoberto Nava's absence stands in sharp contrast to each of the situations described above. Without securing either oral or written approval from his Employer, as he had been told he should do, Nava left on a two-week trip to Mexico, in the middle of the harvest season and only one week after he had joined Respondent's work force. These factors make his unauthorized absence considerably more serious than the other employee absences discussed by the ALO.[6/] Moreover, the somewhat inconsistent explanations of Nava's absence that were initially received from Nava's brother and his union agent gave Respondent cause to doubt Nava's excuse and made verification more important than it was in

[6/] In Young & Hay Transportation Co., 205 NLRB 619 (1973), it was noted that the record did not show with any degree of clarity what Respondent's standard was with respect to tolerating certain employee misconduct, but the discharge of the alleged discriminatee was found to be lawful largely because the General Counsel failed to prove that misconduct by other employees who were not discharged was as serious as that of the alleged discriminatee.

the other cited absence situations. Finally, as previously noted, Respondent's own procedures call for unexcused absences exceeding one week to be handled differently from those which do not exceed one week; Nava's was the only absence which clearly exceeded that period of time.

Although Respondent, in accordance with the company leave of absence policy, could have rejected Nava's excuse out of hand and discharged him, it allowed him to retain his job on the condition that he provide verification of the reason he gave for being off work. And although Respondent's rules required that any evidence verifying the reason for an unauthorized absence be submitted to the ranch supervisor within 48 hours after the employee's return, Nava was given five days in which to provide verification.[7/] The record shows that such verification would have been acceptable in telephonic, telegraphic or written form. According to Nava, he complained that five days would not be enough time, but nonetheless wrote to his grandmother the following day. At no time did he tell his supervisor or any other representative of Respondent that the verification was on its way. Although the record shows that calls to the town in Mexico where his grandmother lived had been made from a telephone which Nava used, it is not clear why he did not immediately seek to reach his grandmother by phone. Under these circumstances, we conclude that Nava was not denied an adequate opportunity to verify the reason

---

[7/]The ALO notes the fact that Respondent gave Nava five days as further evidence that "there was no 'set policy'". We draw no adverse inference from the fact that Respondent allowed Nava three extra days to provide the required verification.

for his absence.

Contrary to the ALO, we do not view Respondent's absence policy as a pretextual basis for the discharge simply because it allows for judgment calls to be made by the supervisors. Our concern here is whether the supervisorial discretion was exercised in a manner constituting discrimination or disparate treatment based on union activity, or in a manner consistent with company rules and past personnel actions. Although the absence policy did not require Nava's termination, or even that he provide verification, Respondent's decisions in this regard were not inconsistent with either its written policies[8/] or its treatment of employees in other absence situations.

In view of the above findings, we conclude that the allegations in the complaint regarding both Antonio and Rigoberto Nava have not been proved by a preponderance of the evidence.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural

////////////////

////////////////

[8/]The ALO notes that Respondent failed to prepare a memo on pending disciplinary action for Nava pursuant to Paragraph 26 of its Schedule of Control. This he considered to be an indication that Respondent disregarded its own rules and regulations concerning unexcused leaves. However, review of the document setting forth the Schedule of Control shows that the provision in question was meant to apply to isolated instances of absenteeism, not to unexcused absences of more than one week. Separate procedures, involving preparation of a notice of termination, were applicable to absences exceeding one week.

Labor Relations Board hereby orders that the complaint in this matter be, and it hereby is, dismissed in its entirety.

Dated: January 18, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Tenneco West, Inc. (UFW) 6 ALRB No. 3
Case No. 77-CE-47-F

ALO DECISION

The complaint herein alleged that Respondent violated Section 1153(c) and (a) of the Act by discharging Rigoberto Nava and refusing to rehire his brother, Antonio Nava, because of their union activities.

An election was held among Respondent's employees in 1975, resulting in certification of the union in 1977 and the commencement of negotiations. Both Navas, especially Rigoberto, were active in the 1975 campaign on behalf of the union. Rigoberto was elected president of the ranch committee that was formed on behalf of the union after certification.

Rigoberto and another brother, Alejandro, were involved in a settlement agreement, unrelated to the instant case, which permitted them to return to work in 1977. Upon his return, Rigoberto was informed by the ranch superintendent that he should not miss any work, but if that were necessary, he should notify the company ahead of time.

On the Sunday following his return, Rigoberto left for Mexico after being informed that his grandmother was ill. He drove with his brother Antonio to Los Angeles and then went by bus to Mexico. (No receipt for the bus trip was produced at the hearing.) He did not contact the company, but asked his father to do so. His father instead contacted a union agent, who in turn notified the company. Respondent's general manager indicated then that Rigoberto should have called himself and that the ranch offices were open all weekend.

Eleven days later, Rigoberto called to say that he had returned and wanted to resume work. He was told to come in, but that in order to keep his job he would have to provide verification of the reason for his absence within five days. Failing to produce verification within that time, Rigoberto was terminated.

The ALO concluded that the discharge was motivated by an anti-union purpose and was therefore in violation of Section 1153(c) and (a). He arrived at that conclusion by finding Employer knowledge of Rigoberto's union activity and a pretextual business justification for the discharge. Acknowledging a company policy whereby leaves for personal reasons required a prior written request, the ALO determined that the procedure was applied in a discretionary and arbitrary manner, that each case was viewed on its own

facts. He also found that the five-day verification period was unreasonably short and without precedent and that the strength of the union tended to fluctuate with the presence or absence of Rigoberto.

Antonio Nava was not rehired in 1977 after having missed the 1976 season. He was less active in the union than his brother. He claimed to have sought rehire on four separate occasions. The ranch superintendent testified that there were only two such occasions. Antonio was told that there were no job openings.

The ALO found it unnecessary to resolve the issue as to the number of work requests. He concluded that the General Counsel had not met his burden of showing by a preponderance of the evidence that the failure to rehire was because of Antonio's union activity. Of significance were findings that Antonio had in essence no continuing relationship with Respondent and that there was no specific procedure for notifying potential employees regarding the start of harvest.

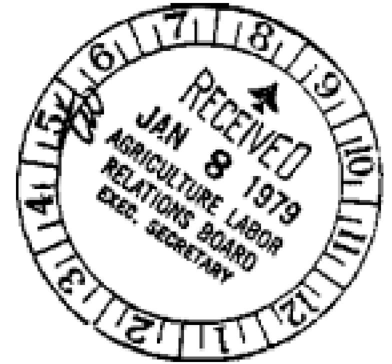
BOARD DECISION

The Board upheld the ALO's conclusion that Respondent did not violate the Act by refusing to rehire Antonio Nava, but it disagreed with his conclusion that Respondent's discharge of Rigoberto Nava (Nava) constituted a violation of the Act.

The Board found no causal connection between the Respondent's knowledge of Nava's union activity and the decision to terminate him. His absence was viewed by the Board as, being considerably more serious than those of other employees who had their excuses accepted. The Board also noted that: (1) the inconsistent explanations of Nava's absence that were initially received from Nava's brother and his union agent gave Respondent cause to doubt Nava's excuse and made verification more important than it was in the other cited absence situations; and (2) Respondent's own procedures call for unexcused absences exceeding one week to be handled differently from those which do not exceed one week, and Nava's was the only absence which clearly exceeded that period of time. As to the five-day verification requirement, the Board concluded that Nava was not denied an adequate opportunity to verify the reason for his absence. The Board concluded that although the absence policy did not require Nava's termination, or even that he provide verification, Respondent's decisions in this regard were not inconsistent with either Respondent's written policies or its treatment of employees in other absence situations. Accordingly, the complaint was dismissed.

* * *

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



STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

TENNECO WEST, INC.,

Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Case No. 77-CE-47-F

DECISION OF THE ADMINISTRATIVE LAW OFFICER

JEFFREY S. BRAND, Administrative Law Officer: This case was heard before me on March 8, 9, 10, 11, 18, 19, 1978, at the City Council Chambers in Merced, California.

I. JURISDICTION

Tenneco West Almond Ranches is one segment of Respondent, Tenneco West, Inc. Further, Tenneco West Almond Ranches is the successor to L. D. Properties Corporation, a wholly owned subsidiary of Hershey Foods Corporation. Tenneco West Almond Ranches, raises Almonds in the Merced, Madera and Fresno Counties. Tenneco West Almond Ranches and the company of which it is a part — Tenneco West, Inc., Respondent herein — is an agricultural employer within the meaning of § 1140(c) of the Agricultural Labor Relations Act.

Further, the United Farmworkers of America, AFL-CIO (hereinafter "the Union") is a labor organization representing agricultural employees within the meaning of § 1140.4(f) of the Agricultural Labor Relations Act (hereinafter referred to as the "Act").

II. THE ALLEGED UNFAIR LABOR PRACTICES

On February 15, 1978, a complaint issued in the above entitled matter alleging that Respondent, Tenneco West, Inc. violated Sections 1153(a) and (c) of the Act by discharging Rigoberto Nava on October 8, 1977, by refusing to rehire his brother Antonio Nava for the 1977 harvest because of their activities on behalf of the union.

Respondent while admitting their status as an agricultural employer and admitting that certain employees were supervisors within the meaning of the Act, denied the allegations of the complaint in all other respects.

III. FINDINGS OF FACT

A. The Operations of Tenneco West, Inc. and Tenneco West Almond Ranches

During the course of the hearing, it was stipulated that Tenneco West Almond Ranches (hereinafter Employer or Respondent) is, for all purposes, a successor to L. D. Properties Corporation and a wholly owned subsidiary of Hershey Foods Corporation. It is undisputed that Tenneco West Almond Ranches came into existence in July of 1977 when Tenneco West, Inc., purchased the real property and equipment now comprising the employer from L. D. Properties Corporation.

It is also undisputed that the personnel and operational structure of Employer remained virtually identical after the takeover of L. D. Properties Corporation by the Employer. Employer maintains almond growing — operations at four ranches named Snelling, Chowchilla, Madera, and Fresno — in the Merced, Madera and Fresno counties.

The General Manager of the four ranches was, during the dates in question, and presently is Lou E. Morton. Morton, who has served as general manager of the ranches since 1975 when they were under the control of L. D. Properties, administers all operations for the ranches including its labor relations policies.

Morton is assisted in his duties by Marvin C. Allinson who has been the assistant General Manager of the four ranches since 1974.

Each of the four ranches is administered by a superintendant. Both the Chowchilla and Snelling Ranches have two foreman. The Madera Ranch has one foreman, while the Fresno Ranch operates without foreman at all and is under the control of its superintendant.

The superintendant of the Madera Ranch, where most of the alleged incidents were to have occurred, has at the times alleged and presently is Ron Yamashita. His responsibilities include making sure that all work is properly done and that jobs are assigned. While he clearly has authority to hire and fire, he testified that he left most of the hiring to his foreman, Delbert Grissom. (It is admitted that Morton, Allinson, Yamashita and Grissom are supervisors within the meaning of the Act.

B. Organizing for an Election at Respondent's Almond Ranches

The Union, charging party herein, commenced an organizational campaign amongst the employees of Employer's predecessor (L. D. Ranches) in November of 1975.

While it is not necessary to fully chronicle the activities of the employer and the Union during the course of the campaign in 1975, the record fully reflects the activities of both. The Company actively pursued its No Union position through the distribution of handbills and other campaign literature. (See Generally Employer Exhibit 11) Lou Morton, who was in charge of Respondent's campaign, testified that the leaflets, handbills and other materials in Employer 11 were either handed to or read to the employees at meetings often convened during the break periods. Morton also testified that guidelines were issued to Company supervisors and foreman on how to proceed during the organizing campaign. (See Employer Exhibit 6) While Morton testified to his belief that these guidelines were generally followed, few if any of the actual supervisors and foreman to whom they were directed testified, so their actual application remains open to question.

Madera Superintendant, Yamashita was actively involved in the election campaign as well. He testified to giving out at least three different handbills and being present at meetings with the workers to explain the company position.

C. The Election and it's Aftermath

The election held on December 6, 1975, resulted in a Union victory by 65 to 43 margin. On January 5, 1977, the Union was certified as the representative for the employees of L. D. Corporation.

Negotiations between the Company and the Union commenced almost immediately. Manuel Hernandez, the Union representative for the area, testified that subsequent to certification, he called a meeting in Planada, California, where the workers of L. D. Corporation elected a Ranch committee and set up a committee for negotiations. In fact, numerous meetings with the company to negotiate a contract have been held. (See *infra*.)

D. Rigoberto Nava

(1) Early work history and support for the Union

To a large extent, the facts surrounding the hire, union activities, and eventual discharge of Rigoberto Nava by Respondent are not disputed.

Rigoberto Nava first worked for L. D. Corporation at the Madera Ranch for a brief period in 1972. He also worked for short periods during the 1973 and 1974 seasons at Madera. During these

stints, he was hired by superintendant Ron Yamashita and did primarily field work as an almond pruner. In 1975, Rigoberto Nava returned to the Madera ranch for the 1975 harvest as a tractor driver. Again, he was hired by Ron Yamashita.

During the 1975 campaign, Rigoberto was active in support of the Union. By his own testimony, Rigoberto Nava stated that he constantly spoke with the workers about the Act both before work, during the lunch hour and after work was over for the day. After explaining the rights under the Act, Rigoberto then began soliciting authorization cards so the Union could obtain the necessary showing for an election.

He testified that during the height of the campaign, he would call workers together and answer questions they might have about the Union. In fact, at the time of the election, he was offered as an observer by the Union although he did not serve in that capacity because of company objection. Yamashita acknowledged that Rigoberto was "open" in his support for the Union and that he probably discussed the Union with the employees.

Likewise, Lou Morton testified that by the time of the Pre-Election Conference in 1975, he was aware that Rigoberto was a supporter of the UFW.

In fact, Rigoberto was elected president of the Ranch Committee for the UFW that was formed subsequent to certification in 1977. Thereafter, he participated in negotiating sessions on behalf of the Union — sessions attended by Company supervisorial personnel such as Lou Morton.

Manuel Hernandez the UFW representative involved in organizing Respondent's ranch, also acknowledged Rigoberto's support for and interest in the Union. He noted that when Rigoberto returned to work in 1977 (See infra.) he was hopeful that this would spur a waning interest on behalf of the Union at the Ranch.

(2) Rigoberto's 1977 work history: rehire and discharge

Prior to the 1977 harvest, Unfair Labor Practice charges essentially unrelated to the action herein were pending against L. D. Properties, Inc. The alleged discriminatees were Rigoberto and his brother Alejandro. Those particular charges were eventually settled 1/, and as a part of the settlement, Rigoberto returned to work (the company in the interim had become Tenneco West, Inc.) for the 1977 harvest.

1/ The settlement agreement for those particular unfair labor practice charges, is attached General Counsel Exhibit 6. It has relatively little bearing on this hearing other than to indicate that it explains how Rigoberto and his brother, Alejandro, returned to work at Respondent's ranch for the 1977 harvest.

Rigoberto returned to work approximately the 12th of September. Upon his return, Rigoberto testified that Yamashita told him about the company rules. He was told that he should not miss any work and that if he did miss work he should let Yamashita know. Yamashita, according to Rigoberto, further told him that he would not tolerate "playing around" on the job and if he did, he might be fired on the spot. While Yamashita did not corroborate this conversation in all respects, the substance of his testimony was similar. He said that he expected good attendance and that if someone missed work, someone else would be placed in his stead.

It was not long after Rigoberto's return, however, that he and Yamashita had a disagreement. Rigoberto, as he had in the past, continued in his active support for the Union. The week of his return a negotiating session was scheduled with the Company. Rigoberto sought to attend the session along with his brother Alejandro.

Yamashita was opposed. He saw no reason for both of the brothers to attend. Yamashita expressed his dissatisfaction with the idea to Rigoberto. Nonetheless, Rigoberto, along with his brother, attended the meeting. Yamashita testified that while Rigoberto did not leave with permission, he was not disciplined.

The Sunday following his return and subsequent to the negotiating session, Rigoberto recounted the incident that all parties agree was the catalyst for his discharge. Rigoberto testified that he received a phone call from his niece in Cotija de la Paz, Mexico where he was born. His niece told him that his mother was ill and that he should come immediately.

Rigoberto explained that he, as opposed to the other numerous Navas working for Respondent, felt obligated to go because he owned the house that his mother was living in and he was paying a good portion of her support. 2/

He then recounted that, despite the fact he was feeling ill on Sunday, September 18, he headed for Mexico. He drove with his brother Antonio from Planada to Los Angeles. He stopped briefly in Los Angeles — approximately one hour — add then headed in a bus for Mexico. He paid for the bus ticket in cash. Under cross examination, he admitted that it would have been faster to fly and that he was in a rush, but he maintained that he could not make connections out of Fresno to Mexico and that the combination of car and bus was the fastest means available. No receipt for the bus ride to Mexico was produced at the hearing.

2/ Receipts for money orders that Rigoberto allegedly sent to his mother are part of the record, General Counsels 3a-e.

All parties agree that when he left for Mexico, Rigoberto did not contact the Company directly. Rather, he asked his father to call the Company for him and to explain his expected absence.

Rigoberto's father did not testify but what happened next is corroborated by several witnesses. Apparently, Rigoberto's father did not call the Company directly, but instead contacted the Union representative Manuel Hernandez. Manuel Hernandez testified that, in fact, he did receive a call from Antonio Nava Sr., Rigoberto's father, and he in turn contacted Lou Morton to tell him about the emergency and that Rigoberto would not be at work for approximately two weeks. Hernandez stated that Morton said he wished Rigoberto had been more responsible and had contacted the Company directly. Hernandez tried to explain that it was an emergency and this was the best that could be done. Again, Morton's testimony corroborates this train of events.

It is clear from the record that Rigoberto had returned from Mexico by September 29, 1977. Lou Morton testified that he received a call from Rigoberto on the 29th. Rigoberto told him where he had been and requested he be allowed to return to work. Morton told him that he would have to speak with Yamashita. Rigoberto's recounting of the conversation is similar.

During this period two simultaneous sets of conversations took place. The first involved conversations among Company supervisorial personnel as to whether and under what conditions Rigoberto should be allowed to return to work after what they viewed as an unexcused absence. The second concerned Rigoberto's discussions with Yamashita about his return. For the sake of chronological clarity, they are considered here in reverse order.

The same day as his conversation with Morton, Rigoberto attempted to contact Yamashita. He was unsuccessful, but did manage to reach him the following day. Rigoberto was told by Yamashita that he could return, but that he would only do what ever work was left to be done.

That Saturday, (apparently October 1, 1977) Rigoberto returned. Yamashita told him that since they were only going to move equipment that day, that he should return to work on Monday.

Rigoberto did as instructed and on Monday he returned to the Ranch. At this time, Yamashita questioned him further about his trip to Mexico. It was at this time, that Rigoberto was informed that while he could return to work he could not keep his job unless he had a "letter" or "notarized statement" confirming his trip to Mexico within five days. Rigoberto testified that he protested the short period of time because of the difficulty of communicating with the small town in Mexico.

Yamashita, according to Rigoberto, said that he was sorry, but it was all that he could do.

Yamashitas decision that Rigoberto could only have five days to verify his absence was apparently arrived at in conversations between Morton, Yamashita and Marvin Allinson. Over the course of at least two conversations, the five day rule was agreed to. During the conversations Yamashita opted for immediate termination (see testimony of Lou Morton,) while Morton championed Rigoberto to the extent that he felt it was an emergency and that perhaps immediate termination for leaving without permission was too harsh. It is not clear what Allinson's specific feelings were except that he concurred in the decision and distrusted Rigoberto's reasons for being absent from work.

During the discussions as to whether and under what conditions Rigoberto should be allowed to return to work, it should be noted that Allinson, Morton and Yamashita were aware of and considered the impact of a discharge of Rigoberto in light of the fact that he was openly active in the union and a member of the negotiating committee. As Morton put it, they were aware of it and "gave weight to it" because they "did not want to end up in a hearing such as this."

Yamashita further testified that he relayed the decision to Rigoberto essentially as Rigoberto had recounted it. Yamashita, however, testified that the company was looking for a "letter, telegram or phone call" which would explain the absence. Yamashita further maintained that he favored immediate termination because there was no other case he could recall where someone just left without seeing him. He further testified that he never gave a leave like that unless there was a death in the family.

Rigoberto testified that the day following Yamashita's request for verification, he mailed a letter to his mother requesting the documentation requested by the Company.

Aside from his protestations to Yamashita, Rigoberto did not directly make further complaints about the "five day rule".

It is clear however, that Manuel Hernandez spoke for him at a negotiating session which was held on October 6th, two days prior to the actual termination.

At that time, Allinson, Gus Flores of the Union Negotiating Committee, Rigoberto, Alejandro, and Manuel Hernandez and Morton were present. Hernandez, on behalf of Rigoberto, raised the question of the five day requirement. He explained that the time allotted was inadequate. Morton responded by saying that he had no choice and unless the verification were forthcoming, Rigoberto would be discharged. Both Hernandez and Morton testified to essentially identical accounts of the conversation which occurred at the Merced Public Library.

It is clear that as of October 8, 1977, Rigoberto had not produced the required verification in any form. As a result, without dwelling at this point into the question of motivation, he was terminated.

As to events subsequent to the termination, there is some conflict. Yamashita denies that he heard from Rigoberto thereafter until January 10, 1978 when Rigoberto inquired as to whether there was any work to which Yamashita responded in the negative. He stated that Rigoberto said nothing about verification as to the reason for his absence. Further, he denied receiving any calls or messages from Rigoberto in the interim about verification for his absence.

Likewise, Morton did not testify to other contact with Rigoberto other than the meeting at the Merced library prior to the termination.

Rigoberto on the other hand, testified that a few weeks after he was terminated, he spoke with Lou Morton by phone about the termination. He claims that he told Morton that he, in fact, did have two letters from Mexico — a letter from his grandmother written by her niece and a letter from a Doctor. Morton, according to Rigoberto, said that he should contact Yamashita. Rigoberto said that he did in fact call Yamashita, but that Yamashita stated there was no work available. He did not tell Yamashita about the "proof" because, he testified, Yamashita did not ask nor did he seem interested.

There is some documentary evidence in the record as to these conflicts. First, phone records have been submitted subsequent to the close of the hearing which appear inconclusive as to whether or not Rigoberto attempted to contact Yamashita and Morton subsequent to his termination on October 8. As the employer points out in his brief, telephone logs subpoened by General Counsel (which have been appended as part of this record) indicate no phone call from Rigoberto's house to Morton or Yamashita during October and November. On the other hand, there were some calls during this period to Morton and Yamashita from another phone occasionally used by Rigoberto. Employer correctly points out, however, that during this period Alejandro also used this second phone and was working at the Ranch so he too may have had occasion to call either Yamashita or Morton.

Secondly, General Counsel 4 and 5, a part of this record, appear to be letters to Rigoberto Nava, consistent with his claims, from his mother and a Doctor. As the transcript of this hearing clearly points out, these letters are hearsay. Nonetheless, the mere existence of the documents — as opposed to the contents thereof — are of some evidentiary value (see conclusions, infra.) It should also be noted, that Rigoberto Nava in fact verified the signature on General Counsel 4 as that of this mothers.

(3) Other incidents involving Rigoberto Nava

a. The elevator incident

Just prior to his discharge, Rigoberto was working and was asked by Yamashita to move an almond elevator which Rigoberto described as being 8 feet wide and 20-25 feet high, (While the description on the record regarding the elevator is vague, it is apparent that it is the type with wheels and a conveyor belt to move the almonds along. It is clearly not an elevator in the traditional sense.) Rigoberto objected to doing it himself and attempted to use a metal bar, 2-1/2 - 3 feet long to supply leverage for the move. Rigoberto and Yamashita disagreed as to the procedure. Rigoberto claims that it was too heavy for one person to move and that Yamashita was angered by his use of the bar. Yamashita agreed, he objected to the use of the bar claiming it was unsafe. He did not admit to being angry about the incident and said that Rigoberto was not disciplined.

b. Alleged threats and vandalism [3/]

When Rigoberto returned to work pursuant to the settlement agreement in 1977, Yamashita stated he was not "overjoyed". He based his reaction on prior incidents from the 1975 season. He stated that at the time of the election campaign it was reported that Rigoberto had engaged in vandalism and threats. Since these matters are not a part of the record for the truth of the contents thereof, suffice it to say that the reports of vandalism concerned some pruning poles and several sprinkler heads. The threats were related by various employees. Yamashita surveyed the alleged vandalism and spoke with the employees who were the alleged recipients of the threats. He never confronted Rigoberto about either.

E. Antonio Nava

The facts surrounding the second discriminatee herein, Antonio Nava, may be stated with relative brevity.

The role of Antonio in his support for the UFW was clearly less than that of either of his brother Rigoberto or Alejandro. While Yamashita acknowledged that the latter two were open in their support of the Union, he was not so clear in regard to Antonio. He only stated that Antonio was "among them" in his support for the Union (i.e. Alejandro and Rigoberto.)

The testimony of Antonio himself corroborates this lesser role. He stated that he spoke to workers in groups and individually; that he distributed leaflets and sought authorization cards. Yet, he openly admitted that Rigoberto was more active in his support

---

3/ It should be emphasized as these facts are related that they were not offered for the truth of the matter, but were made part of the record solely as circumstantial evidence of the state of mind of Yamashita.

for the Union. Further, unlike Rigoberto he never held a Union office or served on the negotiating committee.

Antonio Nava first worked for L. D. Properties in 1971 and then again for brief period in 1972, 1973, and 1974. In 1975, he worked 29 weeks for Respondent terminating his employment in the first week of December, 1975.

The record is uncontradicted that Antonio left the employ of Respondent of his own volition in December of 1975 to work for Bacchus Farms. The record is also uncontradicted that he made no attempt to seek employment with Respondent during 1976.

During 1977, however, Antonio did attempt to work for Respondent. There is a conflict in the testimony as to the number of times that he sought employment. Antonio testified to four separate occasions in which he sought work during the 1977 harvest. The first was just subsequent to the receipt of the notice sent to Rigoberto and Alejandro pursuant to the settlement agreement. According to Antonio, he asked for work but was told by Yamashita that he had enough people, and that he should check back.

On a second occasion, two days after Alejandro started work, Antonio was again told by Yamashita that Respondent had sufficient employees.

Four or five days later, Antonio stated that he was denied work yet another time. Finally Antonio testified that he sought work on a fourth occasion, sometime after September 15, 1977, but was told by Delbert Grissom that he was a little too late, and that there was nothing available.

Yamashita contradicted this testimony. He testified that there were two occasions during 1977 in which Antonio sought employment. The first was in August, during the layoff period prior to harvest, when Yamashita, in the presence of Delbert Grissom, told him that there was no work. According to Yamashita, the second occasion was in mid September when he informed Antonio that there were no job openings.

F. Alejandro Nava

At least one other Nava, Alejandro, played a role in the facts presented herein. He commenced work for L. D. Properties in 1971. He worked briefly that year and seasonally during the pruning season in 1972 and 1973. In 1974 and 1975, he worked in the winter and fall seasons for Respondent.

Alejandro, like his brother, Rigoberto was vocal in support of the Union. Yamashita acknowledges that he was aware of Alejandro's support for the Union. Alejandro also held a Union office. Like Rigoberto he also attended negotiating sessions.

Alejandro returned to work in 1977 pursuant to the same settlement agreement as Rigoberto. When Alejandro returned, he was told, as was Rigoberto, that if he were going to leave he should notify Yamashita. Alejandro also said that he was told to work and not play. Yamashita's version of these events is not substantially different. Both agreed that Alejandro was disappointed when he was informed that he could not be a tractor driver. Alejandro, however, testified that when he requested work on the tractor for 1977, Yamashita curtly responded that he was there "to take orders, not to give them".

Sometime in December of 1977 (well after Rigoberto's discharge), Alejandro was suspended from work. Alejandro testified that this resulted after Yamashita accused him of playing and not working. A shouting match ensued, and Alejandro claims that Yamashita attempted to strike him. In any case, when the argument ceased, Alejandro found himself suspended. The suspension lasted for one week at which point Alejandro was allowed to return.

Yamashita's version of the same incident varies in some detail but essentially confirms the thesis that Rigoberto was suspended based on information that he was not working and that the suspension caused a shouting match between the two of them.

G. Some general policies of Tenneco West Almond Ranches, Inc.

The determination of the factual dispute herein requires a discussion of the general policies of Respondent in two distinct areas: their procedures for hire prior to the harvest, and their policy and practice regarding leave of absences for their seasoned workers.

(1) The hire of employees prior to the harvest

While the record is not clear as to Respondent policies in this area prior to 1977, there is considerable testimony regarding Tenneco hiring policies for the 1977 harvest.

Ron Yamashita testified that the work force for the 1977 harvest consisted of no new hires. Rather, the work force was pooled from workers who had been at the ranch earlier in the summer, but were laif off; from workers who had worked for Tenneco in the past and were rehired; and, from people who were transferred from the Chowchilla Ranch to work the Madera harvest. Yamashita further testified that the total harvest pool for 1977 consisted of a maximum of 36 people.

Yamashita, when recalled by his own counsel, further explained the procedure for hiring during the 1977 harvest. While Tenneco has, in the past, advertised for employees for the harvest, it was not necessary to do so in 1977. Yamashita claimed the word about employment opportunities spread among Tenneco employees through the Ranch grapevine. He claimed that often times employees would ask him about work for the coming harvest and, if no work was

currently available, he would tell them to check back. He said that he felt no responsibility and, in fact, did not call employees to let them know when work was available. As to this latter point, Yamashita testified to one exception. He specifically contacted five employees who had been laid off earlier in the summer to tell them that work would be available during the 1977 harvest at Madera. These employees did return for the harvest.

The sum of Yamashita's testimony in this regard is that for 1977 there were plenty of workers available for the harvest from the Tenneco operations. He even testified that on two occasions he actually turned workers away because there were no more jobs.

Yamashita also testified to procedures at the time of hire. He indicated that forms were filled out only when the workers were actually being hired. Further Yamashita said that at the time of hire he specifically told the employees that he would not tolerate their missing work.

Much testimony was had regarding specific employees that were hired for the 1977 harvest. It is not necessary to summarize it in detail. In essence, with each employee mentioned, Yamashita testified that all employees for the 1977 harvest had worked for Tenneco in the past; that most filled out forms at the time of hire; and that he was not sure how the employees found out about the work for the harvest, but he was clear that, except for the laid off workers, he contacted none of them. 4/

(2) The leave of absence policy

Numerous exhibits herein were claimed by Respondent to reflect the leave of absence policy for hourly employees at Tenneco West Almond Ranches.

In 1969 L. D. Properties issued "A Leave of Absence Policy" which is employer's exhibit 8. It states that absences without notification are considered "unexcusable" and then provides the following procedures for absences up to one week:

> ABSENCES UP TO ONE WEEK:
>
> Absences up to one week may be authorised by the Ranch Foreman after first discussing ranch workload with Ranch Manager, Assistant Ranch Manager or Ranch Superintendent. Any absence beyond that is considered a leave of absence and must be approved by the Ranch Superintendent and the Ranch Manager.

4/ It should be reiterated that Alejandro and Rigoberto were exceptions for the 1977 harvest in that they were brought back to work pursuant to the settlement agreement between the Union and Respondent's predecessor.

WHEN UNEXCUSED ABSENCES EXCEED ONE (1) WEEK:

(1) When an employee does not report off and fails to appear for one scheduled week, a Termination Notice should state he quit without notice.

(2) If his excuse for not appearing cannot be accepted, he should be told that a Termination Notice is being put through and then sent home.... (Emphasis added.)

(Employer's Exhibit 8.)

Testimony from Lou Morton indicated that Employer 8 was distributed to all foreman and supervisors and was distributed to employees around the effective date of February 1, 1969.

In 1970, according to Morton, a revised leave policy was distributed., (Employer Exhibit 9) It provided in part:

Personal Leave

Personal leaves of absences may be granted to hourly employees at the discretion of management. Subh leaves must be kept to a minimum for efficient operations.

General Provisions

Any absence, other than layoff, lasting more than one calendar week, must be covered by written leave of absence, approved by the Ranch Superintendent. (Emphasis added.)

Page 3 of Employer 9 is a leave of absence form that was included as part of the policy.

The relationship of the leave policies to company benefits, according to Morton, was spelled out in Employer 10, In sum, Morton testified, on direct examination that Employer's 8, 9, and 10 constituted the leave of absence policy for L. D. Properties and was the same policy in effect when Tenneco took over the operations.

Yamashita also testified that Employer's 8 and 9 generally reflected the absentee policy in effect at Tenneco West Almond Ranches. He agreed that the leave of absence form in E-9 was in use by Tenneco and stated that only the words Tenneco West were substituted for L. D. Properties. Otherwise, the form was identical to that which had been used by L. D. Properties, Inc.

Ron Yamashita further elaborated on the 2 leave of absence policy for Tenneco West Almond Ranches. Yamashita made

reference to General Counsel 2 which is a document entitled "Statement of Objectives and Conditions of Employment for Agricultural Field Employees". He testified that the leave of policy reflected therein was given to him when Tenneco first took over. While he is not sure that this specific document was distributed to the employees, he was clear that a similar document with the information was distributed. He testified to a belief that the Ranch foremen gave out General Counsel 2 and he was clear that Grissom, in fact, discussed General Counsel 2 with the employees. General Counsel 2 states in relevant part that:

> Terms and Conditions of Employment (continued)
>
> Leaves of Absence (continued)
>
> 3. Personal Reasons - Leaves of absence without pay for a reasonable period may be granted to employees who request a leave in writing and in the Company's judgment, the leave is consistent with operating requirements.
>
> Should he/she fail to return to work at the expiration of an approved personal leave period, an employee shall be terminated.

Morton also acknowledged the existence of General Counsel 2. He stated that it only went to hourly employees.

While Respondent contended that these documents reflected the absentee policy, it is clear that the total picture was not quite that simple.

Lou Morton, on cross examination first stated that E-9 superceded E-8, but then retracted and claimed that E-9 augmented E-8. Actual distribution of the policy was also in question. As to both E-8 and E-9 Morton could not be sure as to the last time that they were distributed to the employees after 1969 and 1970 respectively. Similarly, he could not recall the last time E-10 was distributed after its initial issuance in 1976.

Further, while the documents spelled out a policy based on written request, both Morton and Yamashita testified that there were times when leaves were granted without written request.

Yamashita said that, in fact, the leave policy was discretionary. Yamashita further testified that it was arbitrary to the extent that if he knew someone, he would accept their excuse despite non compliance with the formal procedures for requesting a leave of absence. He noted that if he accepted a reason for an absence it was not unexcused, i.e. once he approved it, it was excused.

In fact, the testimony reflects several instances where employees were absent from work and allowed to return despite the

fact that no formal request was ever made. These included an absence by Jesus Silva, Sr. who was excused for missing work for two days as the result of a hunting trip for which he had not made a written request. Likewise, his son Jesse Silva was absent from work for seven full days without written request. While he was cautioned upon his return, he was allowed back to work after the week long unexcused absence. Similarly, Santiago Gonzales missed work because of an eye injury. While he did not file a formal written request for a leave, he was allowed to return to work after the Company doctor confirmed that he had the injury claimed. Finally, Marvin Allinson, then superintendent of the Chowchilla and Madera Ranches rescinded a decision to terminate worker Guadalupe Rodriquez after receiving a phone call from a relative explaining the absence which was never formally requested. While it is true that Gonzales was ultimately fired, it was only after it was determined that he had lied about the reason for his absence.

Some final factual points should be made regarding the leave of absence policy. First, Yamashita testified that he did not comply with Schedule of Control, paragraph 2b., in regard to the question of the absence of Rigoberto as reflected in E-8. 5/

5/ Employer 8 states in relevant part:

Schedule of Control:

1. For unexcused absence prior to disciplinary action - designated Ranch Supervisor in charge of attendance will try to encourage the employee to notify his Ranch Supervisor of the need for time off and also will point out the consequences of repeated unexcused absenteeism.

2. Three (3) separate days of unexcused absence — or one (1) or two (2) unexcused absences totaling three (3) days or more in any twelve (12) month period of active employment shall result in sending the attendance card to the designated Ranch Supervisor and referral of the absentee to him.

Two (2) unexcused absences occuring within the same work week will evoke the same action — whereby attendance card and absentee will be referred to Ranch Manager, Assistant Ranch Manager or- Ranch Superintendent.

a. The designated Ranch Supervisor will cite Company policy and warn the absentee of the disciplinary action which his present situation can now invoke.

b. A report of this action is made in memo form, one copy of which is given to the employee and the original is filed in the employee's record. One copy of Notice to be sent to Ranch office.

The section calls for a report after citation for unexcused absence. Second, Lou Morton testified that he was unaware of a no leave policy during the harvest. During his testimony, Yamashita implied such an unwritten rule. Further, Lou Morton testified that he knew of no other case in which an hourly employee was given a deadline for the submission of proof for an otherwise unexcused absence. Finally, Employer produced Employer Exhibits 20, 21, and 22 indicating that some year round and season employees had used the leave of absence forms which the company provided. It is apparent that most of the files for L. D. Properties were not examined during the course of the hearing.

It is against this background that the General Counsel alleges violations of the Agricultural Labor Relations Act, Sections 1153 (a) and (c).

IV. CONCLUSIONS

A. The discharge of Rigoberto Nava constitutes a violation of Sections 1151 (a) and (c) of the Agricultural Labor Relations Act.

General Counsel theorizes that the termination of Rigoberto interferred with, restrained and coerced him in the exercise of his rights guaranteed by Section 1152 of the Act, thereby resulting in violations of Sections 1153 (a) and (c) of the Act. General Counsel maintains that Rigoberto was discharged by Respondent not because he failed to comply with a well established leave of absence policy, but because of his strong support for the Union and that Respondent's discriminatory and wrongfully motivated behavior violated the Act. For the reasons set forth below, I concur.

Section 1152 of the Act reads in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...

Section 1153 then goes on to note in relevant part that:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.
>
> (c) By discrimination in regard to the hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor oaganization.

In reaching my decision, I follow certain elementary principals. First, it is clear that in determining whether the termination of Rigoberto violated the Act. NLRB precedent may be applicable. Labor Code Section 1148. Second, if the dismissal of the employee was motivated by an anti-union purpose resulting in discriminatory treatment to Rigoberto, it may be a violation of the Act. Colonial Press, Inc., 204 NLRB No. 12, 83 LRRM 1648 (1973).

Further, it appears to me, that the termination of the employee, even if it discouraged Union membership, will not be a violation of the Act unless it is shown by General Counsel to have been motivated by discriminatory, anti-union purpose. See: NLRB v. Central Power and Light Co., (1970, 5th Cir.), 425 F. 2d 1318, 1322. Conversely, the mere fact of justification on the part of the employer for the termination will not obviate a violation if the cause of the termination was motivated by anti-union purpose. See: NLRB v. Central Power and Light Co., Id; and, NLRB v. Security Plating Co., (1966, 9th Cir.) 356 F. 2d 725, "... the existence of some justifiable ground for discharge is no defense if it was not the moving cause". At 728.

In making out a violation, the initial burden rests with the General Counsel:

> With discharge of employees as a normal, lawful, legitimate exercise of the prerogative of management, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal — not proper — motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful notices, the General Counsel must prove by a preponderance of the evidence that Respondent's was an unlawful one. Savannah Electric, supra.

Stated another way, General Counsel must show that Respondent
1) knew of the union activity of the terminated employees, and,
2) that this knowledge was the motivating cause of the termination. See NLRB v. Great Dane Trailers (1967) 388 US 26, 33, 65 LRRM 2465, 2468; and, Southwest Latex Corp. 426 F. 2d 50, at 56. I find, for the reasons set forth below, that General Counsel has met his burden in that the evidence does justify a finding that the employer knew of the Union activities of Rigoberto and that the "motivating cause" of the termination was his Union activities.

1. The Employer's Knowledge:

Southwest Latex Corp., supra, reminds us that "at least some legally justifiable inference of employer knowledge of dischargee's union membership is an essential preprequisite to finding of a discriminatory discharge therefore". At 56.

As to Respondent's knowledge of Rigoberto's Union activities, there appears to be no debate. It is clear from the evidence that all those involved in the administration of Tenneco operations were all too aware of the strong support Rigoberto lent to the UFW.

General Counsel, in his Post-Hearing Brief spends a good deal of time arguing that knowledge should be informed to Respondent because of the so called "small plant" doctrine. Indeed, it has been held that the size of the plant and the work force may be sufficient circumstantial evidence to infer knowledge of Union activities on the part of acknowledged supervisorial personnel. NLRB v. Joseph Antell (1966, 1st Cir.) 358 F. 2d 880, 62 LRRM 2014. Therein the Court noted: "The smallness of the plant may be material, but only to the extent that it may be shown to have made it likely that the employer had observed the activity in question..." At 882, emphasis added. While such a doctrine could in fact support employer knowledge herein it certainly is not necessary. The record is replete with factual support that Ron Yamashita and Lou Morton were fully aware of the strong support Rigoberto expressed for the Union, his active role in the Union, and his attempts to insure Union presence and strength at the Madera Ranch.

It need only briefly be mentioned that Rigoberto in his own testimony outlined his support for the Union. He, along with brother Alejandro, were the leading workers who spearheaded the UFW drive during the 1975 election campaign. He spoke with workers, explained their rights under the Act and solicited the authorization cards. Subsequent to the election, he was elected President of the Ranch Committee which was formed to further the Union goals. Thereafter, he served as a negotiator for the Union.

Manuel Hernandez, the UFW representative charged with organizing the Madera Ranch, corroborates Rigoberto's strong work for the Union. He testified to Rigoberto's early work for the Union and then noted that when Rigoberto returned to work in 1977 he (Hernandez) hoped that this would re-kindle an otherwise waning interest in the Union.

In fact, upon his return one of Rigoberto's first encounters with the Company involved the controversy over whether both he and Alejandro could attend the Merced negotiating session.

Rigoberto's activities were no mystery to Yamashita. He testified to being "aware" of Rigoberto's support for the Union. He acknowledged disagreement over whether Rigoberto could attend the 1977 negotiating session. He further acknowledged Rigoberto's organizing activity during the election campaign.

Lou Morton similarly acknowledged Rigoberto's work for the Union. He stated that he was aware of the activity by the time of the 1975 Pre-Election Conference. Morton of course at times, dealt with Rigoberto as the Union negotiator.

While employer implies in his Post-Hearing Brief that Rigoberto's activities for the UFW during the election and subsequent thereto were similar to other employees, the record indicates otherwise. Rigoberto Nava was not just another employee supporting the Union. He was the spark that spurred the Union campaign in 1975. He was President

of the Ranch Committee. He was a negotiator for the Union. It is difficult to conceive of a more active role for a Union adherent.

General Counsels reliance on the small plant doctrine to circumstantially imply knowledge is not needed. Rigoberto Nava was central to employee support for the Union at Madera and the Company -through its supervisors and General Manager - knew it.

2. General Counsel Has Met His Burden That the Union Activities of Rigoberto Were the "Motivating Cause" of the Termination

In NLRB v. Entwistle Manufacturing Co., (1941, 4th Cir.) 120 F. 2d 532, the Federal Court of Appeals philosophized that:

> We do not lose sight of the fact that our inquiry is centered upon the motivating cause of the employer's action. The task is a difficult one. It involves an inquiry into the state of mind of the employer. Such inquiry is laden with uncertainties and false paths. Obviously our chief guide is the words of the witness under oath who undertook to disclose the workings of his mind. If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of his explanation and the truth of its own interpretation. At 535.

General Counsel correctly perceives that direct evidence of intent to show causation is often a difficult commodity to obtain and, thus, circumstantial evidence of the state of mind of the employer is helpful in the search for the truth. NLRB v. Putnam Tool Co., 290 F. 2d 663, 48 LRRM 2263, (6th Cir., 1961).

Our own Board in Kuramura, Inc., 3 ALRB No. 49 has articulately addressed the legal requirements to make out a discriminatory discharge in violation of the Act.

> ... Of course, the General Counsel has the burden to prove that the Respondent discharged the employee because of his or her union activities or sympathies. It is rarely possible to prove this by direct evidence.
>
> Discriminatory intent when discharging an employee is "normally supportable only by the circumstances and circumstantial evidence". Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 302 F. 2d 186, 190 (C.A.D.C. 1962), citing NLRB v. Link-Belt Co., 311 U.S. 584, 597, 602, 61 S. Ct. 358, 85 L.Ed. 368 (1941). The Board may draw reasonable inferences from the established facts in order to ascertain the employer's true motive. Even though there is evidence to support a justifiable ground for the

> discharge, a violation may nevertheless be found where the union activity is the moving cause behind the discharge or where the employee would not have been fired "but for" her union activities. Even where the anti-union motive is not the dominant motive but may be so small as "the last straw which breaks the camel's back", a violation has been established. NLRB v. Whitfield Pickle 374 F. 2d 576, 582, 64 LRRM 2656 (5th Cir. 1967). At page 12.

For the reasons stated below, I find that the record supports the acticulation of the Board in Kuramura, supra.

Employer presses two theories to justify the discharge of Rigoberto. Employer claims that Rigoberto failed to comply with a clearly stated leave of absence policy and his failure to comply justified his termination. A second theory, pressed with far less tenacity, is that Rigoberto was not a good employee but rather an employee involved in misdeeds against Respondent and an employee with a spotted record of attendance. Neither Respondent theory is supported by the record.

The latter theory must be discussed at the outset since it is potentially prejudicial to Rigoberto and could, if supported by the evidence, lend credence to the former.

The record does indicate that during the election campaign in 1975 Rigoberto was alleged to have been involved in vandalism (damaging company sprinkler heads) and threats to other Madera employees. The evidence, however, is the rankest form of hearsay. No employee was produced to substantiate any of the charges. In fact, at the time they were alleged to have occured, Rigoberto himself was never directly confronted with charges. As indicated in the record herein, the evidence was admitted solely as circumstantial evidence of the state of mind of Yamashita to whom the threats were reported and not for the truth of the threats or vandalism themselves. See CEC Section 1200. Surely, there is nothing in the record that would support this as a basis for discharge.

Similarly, the record is devoid of any evidence as to Rigoberto's poor attendance. In his Brief at page 32, employer supports his poor attendance theory by stating that Rigoberto worked less than one week before being absent for an unexcused reason. But that is substantially the issue in this case. If employer is attempting to support discharge for poor attendance by merely bringing into question the period of absence that is the subject of this hearing, without more, he certainly should not prevail.

It is Respondent's theory of violation of Company rules to justify Rigoberto's termination that requires the most serious examination. Employer contends that Rigoberto was required to seek written permission to leave and that his failure to do so warranted his discharge. A corollary of employer's argument is that the Company actually was willing to bend the requirement of written permission by

permitting Rigoberto five (5) days to verify his otherwise unexcused absence. It was only after Rigoberto's flaunting of the rules and his failure to comply with the reasonable company request for verification, concludes Respondent, that Rigoberto was terminated.

Respondent's argument cannot prevail. First, the evidence reflects, and I so find, that there as no straight forward Company regulation that Rigoberto should have complied with prior to leaving for Mexico. It is true that several documents in the record e.g. Employer's 8, 9, and 10, and General Counsel 2, indicate a policy of the Company that leaves for "personal reasons" [See p.3. General Counsel 2] would only be granted where request for the same was made in writing. Similar language is reflected in Employer 8, 9, and 10.

Nonetheless it is clear that the procedure was often applied in a discretionary and arbitrary manner. Ron Yamashita admitted that the policy was arbitrary to the extent that if he "knew" someone he would excuse an absence made without written permission. He candidly admitted that actual application of the policy was discretionary.

The facts reflected at the hearing partially reflect this arbitrary and discretionary procedure. The facts need not be stated again, but it is clear that employees Jesus Silva, Jesse Silva and Santiago Gonzalez all, at one point or another benefited from the arbitrary application of the so called leave of absence policy. See pp. 14-15, supra.

In fact, Rigoberto's case itself provides some insight into the arbitrary way in which the "policy" has applied. Morton, Allinson and Yamashita met to discuss whether Rigoberto should be terminated. Morton argued for leniency - the discretion was being exercised. The fact Rigoberto was given five (5) days supports the view that there was no "set policy". Each case was viewed on its own facts.

Rigoberto's experience also indicates that the Company itself did not comply with its own rules and regulations in regard to unexcused leaves. Thus, Respondent admitted through Yamashita that the report contemplated in Paragraph 2 b. of the Schedule of Control was never completed in the case of Rigoberto

It is also unclear to what extent the employees had notice of this so called "leave of absence" policy. There is no evidence that Employer's 8 and 9 were distributed after 1970. In regard to General Counsel 2, Yamashita testified to a belief that Ranch foreman distributed a document like it to employees and that Grissom discussed its contents with employees. At best, the record is vague as to employee knowledge of a policy which was not strictly enforced.

Finally, employer's attempt to bolster the existence of a leave of absence policy and employee knowledge thereof and compliance with it through the use of Employer Exhibits 20 - 22 is not persuasive.

These exhibits by Employers own admission are incomplete. Whether the large number of files not produced would have produced other evidence about the existence or non existence of the policy and compliance therewith, we will never know. The small portion of the whole which was produced cannot paint the complete picture. In fact, as indicated above, all other evidence considered in its totality indicates that the distribution of the policy was questionable and its actual application arbitrary and discretionary.

If the Company's major premise that Rigoberto failed to comply with a uniformly enforced absentee policy, is faulty so is their corrollary assumption that they afforded Rigoberto a reasonable alternative by allowing him five (5) days in which to verify the alleged cause for his absence. The five (5) day rule, which Morton said was never used before was both, on its face and in light of the surrounding circumstances, patently unreasonable.

The evidence as it is now reflected in the record is uncontradicted that Rigoberto's mother lived in a small town in Mexico which was difficult to reach. Yamashita and Morton both claimed that they would have accepted written, telegraphic or telephonic verification of the reason for the unexcused leave.

Rigoberto claimed that telephonic communication was vertually impossible. There is nothing in the record to contradict his statement. To expect that he could receive written verification within five (5) days is to lend a belief in the reliability of the mails of the United States and Mexico that probably neither deserve.

Rigoberto stated he mailed a letter to his mother the day following imposition of the five (5) day rule. He testified that he did not receive a response for some weeks thereafter, while it may be argued that this is not to be believed since it is merely the bold assertion of Rigoberto, I find that there is evidence in the record to corroborate Rigobertos attempts to gain verification to meet the demands of the newly imposed five (5) day rule.

This is to be found most clearly in General Counsel Exhibits 4; 4a; 5 and 5a. While the alleged letters from Rigoberto's mother and Doctor are hearsay, the markings on the envelopes, and the verification of the signature as Rigobertos mother lends some cred the testimony of Rigoberto that he tried as deligently as possible to obtain the requested verification. Having heard Rigoberto testify and having observed his demeanor I cannot conclude that he prejured himself by fabrication of these documents which by their mere existence -- rather than their contents — tend to corroborate Rigoberto's thesis.

Also, Rigoberto is supported by the fact that nothing in the record indicates he went anywhere other than Mexico. Rigoberto's statement that he left in a hurry because of the emergency and that he had his father so inform the Company (through Manuel Hernandez) is cooroborated by virtually every witness including Respondents. [See e.g. testimony of Lou Morton]

Of course, there is no conclusive proof that Rigoberto was in Mexico. The letters as they exist in General Counsel 4 and 5 are insufficient. There are no receipts for transportation nor is there complete clarity as to why Rigoberto would travel via Los Angeles, when there were faster routes to Mexico. Yet, viewing the evidence in its totality, viewing Rigoberto as a witness and there being no evidence to the contrary, I find entirely credible Rigoberto's whereabouts and his reasons therefore during his absence.

It is clear from Respondent's own exhibits that the reason Rigoberto had to leave, emergency illness in the family, is one which .the company condones (See Employer exhibit 8). It appears to me, and I so find, that Rigoberto attempted as best he could to notify the Company of the reasons for his absence both before he left and thereafter. I further find that the company imposed a novel procedure -the five day rule - on Rigoberto for him to maintain his employment. The rule, for the reasons indicated, supra, was unreasonable. Given the fact that Rigoberto was the most active spokesperson for the Union among employees, given the fact that the Company knew this, and given the fact that the evidence shows that the strength of the Union at Madera tended to fluctuate with the presence or absence of Rigoberto - former president of the Ranch Committee and negotiator at the time of his discharge — I can only conclude that the discharge of Rigoberto was motivated for improper reason lation of the Act.

Employer in his post hearing brief cites numerous cases in support of the contention that Rigoberto's discharge was not a violation of the Act. While it is not necessary to argue with Respondent over all his citations, several of the cases he cites are misleading and I so note. For example, in Whitfield Pickle, 64 LRRM 2656 the situation is in no way analogous to the case at bar. Therein, the discharge was not a violation of the Act since the employee was only minimally involved in Union activities; the employee had a long documented history of unexcused absences; and, "there was a good deal of evidence" indicating that this was the reason for the discharge. Similarly, in Browning Manufacturing Co., 91 LRRM 1288, the evidence indicated that the employee had been suspended once in the past, there was good reason for his second suspension and the evidence indicated that the Company had never retained anyone who had been suspended twice before.

B. The Failure to Rehire Antonio Nava does not Constitute a Violation of the Act

The statement of the law in regard to Rigoberto is essentially applicable for the case in regard to Antonio and will not be repeated here. Suffice it to say that a refusal to rehire is only improper where it is motivated for improper reasons. That is, where it can be shown - either directly or circumstantially - -that an employer with knowledge of the union activities of the employee, refused to rehire the employee because of those activities, a violation of the Act will be found. See discussion at pp. 16-18, supra.

The evidence is in conflict as to the number of times that Antonio requested work for the harvest. The testimony of Antonio is that he requested work on four occasions whereas Respondent testimony limits the requests to two. The issue need not be resolved. It appears to me, that whether Antonio requested work two times or four times, I cannot conclude that the General Counsel has met his burden in showing by a preponderance of the evidence that the failure to rehire was because of the Union activities of the discriminatee.

There can be no question that Antonio supported the Union and that Respondent was aware of this support. Yet, it is conceeded by all parties that Antonio's role was less than that of either Rigoberto's or Alejandro's. Yamashita noted that Antonio was "among them" and Antonio himself stated that Rigoberto was more active than he.

While knowledge may be assumed, the causation for the failure to rehire Antonio may not. Several factors lead me to this conclusion:

(1) Of his own volition, Antonio left work in 1975. In 1976, he did not even attempt to return to Madera Ranch. In essence, he had no continuing relationship with Respondent whatsoever.

(2) The treatment given Antonio prior to the 1977 harvest was no different than that accorded other potential employees. The record appears uncontradicted that Yamashita had, no specific procedure for notifying potential employees in regard to the start of the harvest. It was largely a hit and miss affair with employees "keeping in touch" to determine when work would be available. It is true, as General Counsel notes in his brief, that 5 employees were notified of the start of the harvest in 1977. These five employees, however, explained Yamashita, were laid off earlier in the year and Yamashita stated that he felt a special obligation to inform them when work was available.

It is also true that two other employees were also notified in regard to the start of the 1977 harvest. These two were Alejandro and Rigoberto both of whom were to be brought back pursuant to a previously entered into settlement agreement.

As to the rest of the employees for the 1977 harvest, they were either transferred from other Respondent ranches in the area, or they were hired as they dropped in on Yamashita. Notification of employees about the start of the harvest was the exception rather than the rule and it appears to me that there was absolutely no viable reason to place Antonio — who had left in 1975 and not returned in 1976 — within the exception.

(3) Finally, the acknowledged lesser role of Antonio in Union affairs further leads me to the conclusion that the failure to rehire was not motivated by his Union activities. It was Alejandro and Rigoberto who were the officers for the Union on the Ranch Committee; it was Alejandro and Rigoberto who negotiated for the Union and incurred the wrath of Yamashita for these activities; and, finally, it was Alejandro and Rigoberto who were only brought back to Respondent because of the aforementioned settlement agreement. Antonio, on the other hand, who had previously left and failed to return,

neither negotiated for nor ever was an officer on any Ranch Committee. In fact, it appears that in 1975, when Union organization was at a peak, it behooved Antonio to leave employer.

General Counsel argues at page 32 of his brief that the cause for the failure to rehire Antonio was his support for the Union. He writes:

> Ron Yamashita did not want Antonio Nava working for him at the Madera ranch — despite the fact that Nava had been a satisfactory worker during four previous years.

Of course, it would be simple to reason that because his last name was Nava, that because his brothers were active in the Union, and because Rigoberto was discriminated against by the company (see conclusions in regarding Rigoberto, supra) therefore Antonio must have also been the victim of the Company's illegal behavior. While such reasoning would be facile, such speculation and conjecture have no place in this record. Because Antonio's situations in regard to Respondent was so entirely different from that of his brother Rigoberto, I cannot conclude, for the reasons set forth above, that his failure to be rehired was violative of the Act and I would order the allegations in regard to him dismissed.

V. REMEDY

First, it is ordered that Paragraph 6a of the Complaint herein be dismissed.

Second, in regard to paragraph 6b of the Complaint, having found that Respondent violated Sections 1153 (a) and (c) of the Act, pursuant to Section 1160.3 of the Act, I hereby order Respondent, their officers, their agents and representatives shall:

1. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Forthwith offer to Rigoberto Nava employment and full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and priviledges, and make him whole for any losses he may have suffered as a result of being unlawfully discharged. Additionally, the employer shall pay him an interest rate of 7% on any sum of such back pay due (Valley Farms and Rose J. Farms, 2 ALRB No. 41).

(b) preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of unconditional reinstatement under the terms of the Board's Order.

(c) mail a Notice to all employees of Respondent, to be printed in English and Spanish, along with a copy of the Board's Order to all of its employees, listed on its master payroll for the payroll period ending with the end of the 1977 harvest.

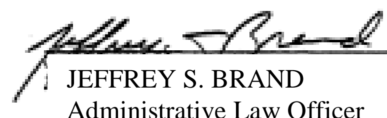
(d) the same Notice to all employees in English and Spanish shall be posted a period of 60 days in prominent locations next to employer work areas, at the time of the next harvest.

(e) the same Notice in Spanish and English shall be read in both languages on company time to all those then employed, by a company representative during the next harvest. A Board agent shall be present at the reading of the speech and shall be given the opportunity at that time to meet with the employees for, a time certain in the absence of the company's representatives to answer questions regarding the contents of the Notice and to explain employee rights under Section 1152 of the Act.

2. Cease and desist from:

(a) discouraging membership of any of its employees in the Union, or any other organization, by discharging employees because of their Union activities.

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



JEFFREY S. BRAND
Administrative Law Officer

DATED: 12/5/78

NOTICE TO EMPLOYEES

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

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

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

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

this is true, we promise that:

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

Especially:

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

WE WILL offer Rigoberto Nava his old job back, and we will pay him any money he may have lost because we discharged him, plus interest thereon computed at seven percent per year.

Dated: TENNECO WEST 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: TENNECO WEST, INC., Respondent , and ~~UNITED FARM WORKERS OF AMERICA,~~ AFL-CIO, Charging Party.	))))))))))))	case No. 77-CE-47-F

ERRATA

On December 5, 1978, I issued my Decision in the above-captioned matter. Since that time, certain errors in the Decision have come to my attention, necessitating the following corrections in the text of the Decision:

1. Page 1, paragraph 1, line 2: The dates of the hearing are hereby corrected to read: May 8, 9, 10, 11, 18, and 19, 1978.

2. Page 5, paragraphs 4 and 5, and footnote 2; page 7, paragraph 4; page 8, paragraph 6; and page 22, paragraphs 2, 4 and 5: References here and elsewhere in the Decision to the mother of Rigoberto Nava are hereby corrected to refer to the grandmother of Rigoberto Nava. The last two words on page 8 are hereby corrected from this mothers to his grandmother. All testimony regarding Rigoberto Nava's trip to Mexico involved his grandmother, not his mother.

3. Page 11, paragraph 3: The reference to the sus-

pension of Rigoberto [Nava] is hereby corrected to refer to the suspension of Alejandro Nava.

4. Page 8, paragraph 6: Delete reference to General Counsel's Exhibit No. 5 (i.e. 5, 5a, and 5b) as "a part of this record". This exhibit (comprising an alleged letter in Spanish from a Doctor, an English translation thereof, and the envelope in which it was allegedly received) was not offered by the General Counsel and not received in evidence. (R. T. V: 181)

5. Page 8, paragraph 6, lines 1 through 3, are hereby corrected to read: "Secondly, General Counsel's Exhibits 4 and 4a, a part of this record, appear to be a letter to Rigoberto, consistent with his claims, from his grandmother.

6. Page 22, paragraph 5, lines 1 through 4, are hereby corrected to read: "This is to be found most clearly in General Counsel's Exhibits 4 and 4a. While the alleged letter from Rigoberto's grandmother (Exhibit 4) is hearsay, the markings on the envelope (Exhibit 4a) and the verification of the signature as Rigoberto’s grandmother's lends some credence to..."

7. passim; All references to General Counsel's Exhibits 4b, 5, 5a, and 5b on pages 8 and 22, and wherever any reference to said exhibits appears in the Decision, are hereby deleted, as said exhibits were not received in evidence.

The above corrections in no way reflect a change in my findings, conclusions, or reasoning, but are offered solely to remedy inadvertent inaccuracies in the Decision heretofore issued in this matter.

DATED: April 18, 1979

JEFFREY S. BRAND
Administrative Law Officer