Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC., Respondent, and MARGARITA SANCHEZ, Charging Party.	}	Case No. 81-CE-35-EC 8 ALRB NO. 81

DECISION AND ORDER

On March 30, 1982, Administrative Law Officer (ALO) Thomas Sobel issued the attached Decision in this proceeding, recommending that the complaint be dismissed. Thereafter, General Counsel timely filed exceptions and a supporting brief arguing that the ALO's conclusions that Margarita Sanchez was not discriminatorily discharged in November 1980 or discriminatorily laid off in December 1981[1/] were contrary to the evidence.

Pursuant to the provisions of California Labor Code section 1146, the Agricultural Labor Relations Board (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 ALO's rulings, findings, and conclusions.

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[1/] In his Decision, the ALO erroneously refers to Sanchez' layoff date as November 1981. The correct date of her layoff is December 1981.

ORDER

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

Dated: November 3, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Bruce Church, Inc.
(Margarita Sanchez)

8 ALRB No. 81
Case No. 81-CE-35-EC

ALO DECISION

The ALO concluded that Respondent had not violated Labor Code section 1153(c) or (a) by discharging employee Margarita Sanchez in November 1980 or by issuing Sanchez a layoff notice in December 1981. The ALO found that although Sanchez engaged in union activity, General Counsel did not show a causal connection between the activity and her termination or layoff, and thus failed to establish a prima facie case.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO, and dismissed the complaint.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case No. 81-CE-35-EC
BRUCE CHURCH, INC., Respondent, and MARGARITA SANCHEZ, Charging Party.	

Appearances:

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DECISION OF THE ADMINISTRATIVE LAW OFFICER

THOMAS SOBEL, Administrative Law Officer: This case was heard by me on February 10, 11, and 12, 1981 at El Centro, California. It involves two allegations of discrimination against employee Margarita Sanchez, one in November of 1980 -when she was discharged; the other, approximately one year later, in November of 1981, when she was briefly "laid off."[1/] The November 1980 incident was the subject of *a* charge filed March 13, 1981. A complaint was issued on August 6, 1981, alleging Respondent violated sections 1153(c) and (a) in discharging Margarita Sanchez. Respondent timely filed an answer denying that it violated the Act in any manner. The November 1981 incident was the subject of oral amendment to the complaint which, pursuant to 2 California Administrative Code section 20222, was reduced to writing and filed on February 22, 1981.

According to General Counsel's theory, the actions taken against Margarita Sanchez in this case had their origin in a strike against Respondent begun in February 1979, and in which Margarita Sanchez was an active participant. It is General Counsel's theory that the treatment of Margarita Sanchez to be detailed below can best be seen as part of a larger design to retaliate against reinstated strikers. According to this theory, Respondent's retaliatory design continued after the strike, through successive periods of Sra. Sanchez' re-employment with the company, and was further- invigorated by her testimony in an unfair labor practice hearing in March

1. General Counsel's amendment actually alleges that Respondent violated the Act by "issuing" a layoff notice to Margarita Sanchez, rather than by actually laying her off. As will be discussed below, Respondent rescinded the layoff action.

of 1981. Respondent denies the existence of any such scheme, as well as any acts of discrimination specifically directed at Margarita Sanchez.

For evidence bearing on the existence of such pattern or scheme, and as background for my consideration of the case, the parties stipulated to incorporating into the record of this hearing the following portions of an earlier hearing involving the same Respondent, In the Matter of Bruce Church, Case Nos. 79-CE-87-SAL, et seq.[2/]:

Testimony of	Volume/Page
Ramon Robledo	XIII:57-78 and XL:95-129
Maria Ramos	XIX:1-62
Gabino Conchas	XIX:63-73
Ramona Torres	XIX:73-78
Maria Torres	XIX:78-84
Hector Diaz	XIX:91-139 XX:1-58
Jose Bravo Herrera	XXXIX:42-58
Cesario Cabrera	XXXIX:104-128
Pedro Vasquez	XXIX:129-140
Francisco Garcia	XL:31-43
Patricio Garcia	XL:44-94
Robert Shuler	XL:130-169 XLVI:39-40, 48-51

At the hearing all parties were given full opportunity to participate. Respondent Bruce Church and the General Counsel both filed post-hearing briefs in support of their respective positions.

Based upon the entire record, including my observation of the witnesses, I make the following:

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2. Exhibits introduced into evidence during examination of the listed witnesses were also stipulated into the record of this case.

FINDINGS OF FACT

It is admitted that Respondent is an agricultural employ under the Act; I find that Charging Party is an agricultural employee. For background, purposes, I shall summarize the evidence presented at the earlier hearing which principally concerns the alleged discriminatory treatment of a number of reinstated strikers, and includes testimony by a former foreman that he was ordered "to get" the strikers.

Maria Ramos went out on strike in February of 1979; in March she returned to work in Parker, Arizona. Assigned to Jose Bravo's crew, she testified that she was "harassed" there and that Bravo told her this was on the orders of Raraon Robledo, the harvest crew coordinator. After she was transferred to Hector Diaz' machine crew, she participated in a work stoppage in January or February 1980 when workers in her division felt that they had not been given a good field to pick. According to Maria Ramos, she and another woman named Angelica confronted Ramon Robledo about the bad field.

Maria Ramos further testified that, after her conversation with Robledo, she overheard Robledo tell Diaz to fire her because she was a striker and a Chavista. According to her, she overheard the two men talking while she was in one of the bathrooms at the back of a bus. She also testified that later, when Pedro Vasquez substituted for Hector Diaz, Vasquez, too, told her that Robledo had ordered him to give her warnings so he could fire her. In fact, Sra. Ramos received only one warning during the time the foremen were supposedly instructed to build a case against her -- and the warning she received was an automatic one for missing work on a Saturday.

In October 1980, Maria Ramos took a leave from work in order to rest, expecting to re-join the harvest in Yuma. When the harvest began in November of 1980, she went to Ramon Robledo to obtain work. Robledo told her to wait for a letter which she never received. She went to see him again and he told her she had been terminated.

Gabino Conchas is Maria Ramos' husband. He, too, went on strike in February 1979, returning to work in March with his wife. In November 1979, he went to Yuma with Hector Diaz' crew. He worked in Yuma until January 1980 when he became ill. According to Sr. Conchas, Hector Diaz gave him a written leave of absence for 15 days and, when he was still too ill to work, he received a written extension for 15 days more. Since Sr. Conchas was too ill to personally seek the extension, the second leave was given to his wife, Maria Ramos. By the time of the hearing, he had lost his copy of the written extension. In any event, when the harvest returned to Yuma in the next season, Sr. Conchas sought work from Robledo who told him he would not be rehired because he had not finished the harvest in Yuma. Sr. Conchas objected that he had been given leave.

Hector Diaz also testified. No longer employed by Bruce Church, Diaz was a Bruce Church foreman for three years. Sr. Diaz testified that, during the work stoppage, Ramon Robledo told him "to find a way to give warnings or to fire" Maria Ramos. According to him, this conversation took place by the side of one of the machines. Later, in both Huron and Salinas, Robledo asked him how many warnings he had given Sra. Ramos; Diaz told Robledo that he had not given any because he did not feel that he could. In Salinas,

Robledo also asked him to find a reason to give warnings to three other reinstated strikers/ Maria Murillo, and Ramona and Maria Torres.[3/] sr. Diaz gave no warnings to any of the four women, as a result of which, he contends, he was terminated.[4/] Sr. Diaz also confirmed that he extended Gabino Conchas' medical leave.

In cross-examination, Respondent explored numerous details of Diaz' testimony. With respect to Maria Ramos' opportunity to overhear the conversation between him and Robledo, Sr. Diaz was asked to describe the locations of the machines, near one of which the conversation with Robledo was supposed to have taken place, relative to any of the busses where Sra. Ramos might have used the bathroom. According to Diaz, his own machine was approximately 200 feet inside the field; the busses were on the edges of the field,[5/] so that if the conversation with Robledo took place at his machine it would strain credulity to believe that Sra. Ramos could have overheard it. Similar difficulties of scale attend Sra. Ramos' ability to overhear a conversation between Robledo and Diaz that

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3. General Counsel introduced into evidence the personal notebook of Hector Diaz in which arrows appear next to the names of the four people Robledo supposedly asked him to keep special watch on. The arrows were put there, Diaz testified, to remind him whom he was supposed to watch.

4. General Counsel also presented testimony by reinstated strikers, Ramona Torres and Maria Torres that Hector Diaz was a lenient foreman, presumably to corroborate Diaz[1] testimony that he was fired for being too good to workers.

5. G.C. 213 is a nap drawn by Diaz showing the relative locations of the machines and the busses. The busses are indicated by Nos. 5 and 6; the machines by numbers 1-4?' Diaz machine is No. 1 and marked with an "X".

took place at any of the other machines.[6/] During this examination, Sr. Diaz placed the site of the conversation away from any of the machines and approximately 15 feet from one of the busses.

Sr. Diaz showed similar confusion in details concerning the written extension of leave he gave to Sr. Conchas. As noted earlier, Gabino Conchas testified that he did not personally receive the extension from Diaz, that it was handed to his wife. Sr. Diaz, however, originally testified that he was in the field when Conchas returned for an extension, that Conchas looked very ill, and that he handed Conchas the extension. Also, contrary to Sr. Conchas' testimony, Sr. Diaz testified that the period of both the original leave and the extension was for 30 days, rather than for 15 days each, as originally testified to by Sr. Conchas.

When recalled the day after his original testimony, Sr. Diaz changed his testimony to conform to that of Sr. Conchas: after talking to several people, he clarified his testimony regarding to whom he gave the extension (Sra. Ramos and not Sr. Conchas), and the number of days for which he gave Sr. Conchas leave; he was convinced by Sr. Conchas that he had given him a 15-day leave. The company had only one leave for Sr, Conchas on file and it was for 30 days.

Respondent also attacked Sr. Diaz' credibility by introducing, as inconsistent statements, a form from the Employment Development Department indicating that Sr. Diaz applied for unemployment insurance on the grounds that he had been laid off due

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6. Although counsel for Intervenor argued about the difficulties in drawing to scale, he did not explore the accuracy of the scale with the witness.

to lack of work; and a charge filed with the California Department of Pair Employment and Housing in which Diaz alleged he had been discharged because of his age.

In rebuttal, Respondent presented testimony from each of the supervisors and foremen, alleged to have admitted the scheme "to get" the reinstated strikers, that they knew of no such purpose. Thus, Jose Bravo, Pedro Vasquez and Ramon Robledo all denied any conversations among any of them about being out "to get" Chavistas. Bravo and Vasguez also denied telling Sra. Ramos that anyone was out "to get" her.

Additionally, Respondent's witnesses, tracing the movements of Ramon Robledo and Hector Diaz during the work stoppage, disputed General Counsel's witnesses' version that Robledo even talked to Diaz that day. Thus, Patricio Garcia testified that Robledo appeared at the fields twice, that Diaz remained on his machine, and that Robledo did not enter the fields to talk to him. Ramon Robledo, too, denied talking to Diaz.

Finally, Respondent presented evidence to the effect that Sra. Ramos[1] termination was a mistake. According to Respondent, Maria Ramos had been terminated because her failure to respond to a late August recall notice in Parker came to the attention of the payroll department just as she was laid off at the end of the season. The payroll department issued her a T18 termination notice, which entailed loss of all her seniority, because it erroneously construed her October layoff in Salinas as bearing upon her availability for work at the time of the August recall. She should have been issued a T-19 termination notice which would have entailed

her losing seniority in Parker only; had the correct notice been given, lack of seniority would not have prevented her from going to Yuma.[7/]

With this testimony *as* background, we may turn to consideration of specific events which are the subject of this case. As noted earlier, General Counsel contends that, like the other strikers, Margarita Sanchez was the victim of a retaliatory scheme which led to her termination on November 1980 for having gone on strike and for being a Chavista, and that she was discriminated against in November 1981 in continued pursuit of the same unlawful design, and in further retaliation for her having testified about her November 1980 termination before the Board.[8/]

THE NOVEMBER 1980 TERMINATION

Several weeks before the strike began, Margarita Sanchez was a visible participant in a series of work stoppages which culminated in the strike call. The first such incident, which took place sometime in late January or early February, was in Yuma.

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7. Respondent's witnesses testified that reinstatement of strikers had given rise to a complex system of seniority, including a type of seniority called classification seniority which refers to seniority in particular operations in particular areas. There are over 50 types of classification seniority.

8. At the earlier Bruce Church hearing, General Counsel introduced evidence of the November, 1980 incident as background evidence of Respondent's animus. Respondent objected to its introduction on the grounds that it would be the subject of subsequent litigation; at this hearing, Respondent urged that the complaint be dismissed because the matter had been litigated in the earlier hearing. Prom my examination of the record of the earlier hearing I was satisfied that evidence relating to the November, 1980 incident was not received for the purpose of making a finding on the merits, but only to provide background. Accordingly, I refused to dismiss the complaint.

Sra. Sanchez testified that the workers began to talk among themselves about the problems the company and the union were havi in contract negotiations. As a result of this talk among the crews, some workers — Sra. Sanchez among them — left their machines. Sra. Sanchez exhorted remaining workers to join the work stoppage. There was a second work stoppage the next day in which Sra. Sanchez also took part. The strike began about a week later. Margarita Sanchez testified that she was one of the first to leave the field. While on strike she was on the picket line, carried a UFW flag, and hollered "Viva Chavez."

In September of 1979 she accepted an offer of reinstatement with the company. She wore a union button in her cap while she worked, thinning and weeding, first, in Francisco Garcia's crew and, next, in Jesus Sanchez[1] crew. Garcia asked her to take off the button; she refused, and responded, instead, that she would buy a red jacket and put a black eagle on it. In December of 1979, she was assigned to Cesario Cabrera's machine crew where she worked until March 1980 when she was laid off. She returned to work in Cabrera's crew in June or July of 1980. Sometime after she began to work in Cabrera's crew, Sra. Sanchez complained that he ran his machine too fast, and told him that Chavez wouldn't let him do that. According to Sra. Sanchez, Sr. Cabrera replied: "That's what you think. Who is Chavez . . . What Chavez really wants is the money. . . . You'll see your Chavez, because it's the Chavistas we are firing first." Approximately a week later, Cabrera referred to a group of workers as "a bunch of fools, sons of bitches, Chavistas."

Two other incidents were adduced by General Counsel to

demonstrate Cabrera's anti-union animus. When one of the members of her crew died, Sra. Sanchez asked "Alfonso"[9/] for leave to attend the funeral without receiving a warning. Although Alfonso gave her permission to attend the funeral, Cesario gave her a warning. Of all the crew members who attended the funeral, only she received a warning. When she protested that she had been assured by Alfonso that no warnings would be given, Cabrera replied: "Who is Alfonso. Alfonso is no one here." Cesario also scolded Sra. Sanchez for being responsible for the worst lettuce when, according to Sra. Sanchez, it was impossible for him to know who was responsible for the sub-grade lettuce.

Apparently, there were no further incidents of note between her and Cabrera until she was terminated. In early November 1980, during the time when the crew was in Huron, Sra. Sanchez visited San Luis, Mexico in order to see her children. On Sunday, November 9, the day before she was due back at work, she slipped and hurt her foot while shopping. She went to Dr. Oscar Garcia in Mexicali, who advised her to rest. Respondent has a policy to terminate, on the fourth day of absence, any employee absent for three days in a row without explanation.[10/] Sra. Sanchez testified she understood that policy.

According to Sra. Sanchez, she first attempted to contact the company about her injury on Tuesday morning. She called the

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9. Presumably, "Alfonso" is Alfonso Guzman, the company's personnel representative.

10. The exceptions to this policy and its particular application to Margarita Sanchez' case will be discussed below.

office in Salinas and a woman who spoke no Spanish answered. Unable to communicate with her, Sra. Sanchez hung up. When she tried ag half an hour later, no one answered. That evening she asked her mother, Maria Luisa Sanchez/ to ask supervisor Tranguilino Beccera to notify Cesario that she was ill. Tranquilino was unable to contact Cesario and he advised Maria Luisa accordingly.[11/] Sra. Sanchez testified she twice tried to call the company on Wednesday, but no one answered either time. On Thursday, Sra. Sanchez and Raul Pacheco, her common-law husband, went to the office in Yuma to tell the people she could not work. She stayed in the car and he went into the office to advise them of Margarita's illness. No one was present who spoke Spanish. General Counsel presented testimony from Sra. Sanchez, Raul Pacheco, and Lourdes Chavez that it was not uncommon for workers to have difficulty reaching the office by phone, or, if someone did answer the phone, for that person to be unable to speak Spanish.

On Monday, November 17 she sent a note (G.C. 3) with her husband, Raul Pacheco. The note said:

> Please hand this check to Paul Pacheco. ... I have not been able to present myself to work for reasons of illness. The reasons that *I* have not notified were I have not been able to communicate with the office in Huron and they did not answer there.

On Tuesday, Sra. Sanchez herself went to see Ramon Robledo with a copy of Dr. Garcia's note. Robledo was not interested, and

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11. Tranquilino Beccera testified that Maria Luisa asked him to notify Patricio Garcia of Margarita Sanchez' absence; he als placed the date of the request about a week later than Maria Luisa did.

merely told her she was terminated. She also went to see Patricio Garcia who took the note from her and promised to see what he could do about it and asked her to bring a doctor's release, which she did next week. Much of the rest of Sra. Sanchez' testimony details her numerous attempts to speak to various people in the company regarding the loss of her job, the facts about which are not of great relevance in determining the motivation behind her discharge.

Respondent not only sought to demonstrate that it terminated Margarita Sanchez for a nondiscriminatory reason - - her failure to comply with company policy regarding unauthorized absences from work - - but also, by attacking her credibility, it went further and sought to establish that Sra. Sanchez' story of her injury and the reason for her absence from work was a fabrication.

In the first place, Respondent sought to dispel any inference that Sra. Sanchez had been singled out for harsher treatment by Cesario Cabrera. With respect to her receiving a warning for attending the funeral, Margarita Sanchez first insisted that she was the only member of the crew to receive one; later she admitted that one other worker, Paula Ramos, a friend of hers, also received a warning notice. Respondent presented testimony by Cesario Cabrera that every worker who attended the funeral received a warning notice. RX 7, 8, and 9 are copies of these notices. Respondent also elicited testimony from Sra. Sanchez that she. had not had a great deal of experience in wrapping prior to 1980 and she admitted that she was not wrapping as fast as the others. She also testified that her crew would receive more money the greater the number of boxes they produced. Cesario Cabrera testified that he

did not object to the quality of her work more than he objected to that of any other member of his crew. Sra. Sanchez also revealed that sometime before her injury in November, 1980 she had requested a leave of absence from Cesario Cabrera who denied it.[12/] At the time she requested her leave, she mentioned to Cesario Cabrera that she was going to invite him and her fellow crew-members to her sister's wedding to be held November 22. Cabrera also denied the anti-union comments attributed to him by Margarita Sanchez.

Much of the rest of Respondent's cross-examination was devoted to exploring the details of her injury, her visits to the doctor, her role in her sister's wedding, and her efforts to contact the company, all in pursuit of Respondent's theory that Sra. Sanchez used the excuse of injuring herself in order to take the leave she had been formally denied. Although, for reasons to be explained below, I do not think it necessary to determine whether Margarita Sanchez merely feigned injury so that she could prepare for her sister's wedding after her requested leave for this purpose was denied, Respondent's cross-examination of Sra. Sanchez did reveal her to be less than a straightforward witness.

I have already adverted to the fact that she changed her testimony regarding whether any other members of Cabrera's crew received warning notices for attending the funeral; what is not apparent from my relating the simple fact that she changed her testimony, is the extent to which she elaborated details designed to

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12. Cesario Cabrera confirmed both the fact o£ the request and his denial. He denied the leave because the harvest was approaching its end and it was company policy to deny leaves except in case of an emergency.

lend plausibility to her original version before admitting it was erroneous. Thus, when originally asked whether any one else had been given a warning for attending the funeral she stated:

> I know that he did not . . . because when he gave me mine, I paid attention to see if he had – if he was going to give the others some.

When questioned further about whether she might not have missed his giving a warning to other workers, she testified that she observed Cesario vigilantly: even while she was behind the machine, cutting lettuce, she kept a watchful eye on him. Another example of her tendency to proliferate details in order to buttress her testimony until it makes no sense is the account of her initial visit to Dr. Garcia's office. According to her, the entire visit took more than two hours. The first fifteen minutes was spent waiting for the doctor since he was not at the clinic when she arrived. When the doctor came he examined her foot, he moved it around, he asked her how she felt, he put some ointment on the foot, he wrapped it in an elastic bandage and, finally, he gave her a prescription – tasks which, even considering her having waited for him for fifteen minutes, don't seem likely to have consumed at least the remaining hour and a half which, according to her, the visit took. Perhaps aware of this, she explained that the doctor would leave her suddenly, to go inside his office and then come back to treat her.[13/]

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13. Sra. Sanchez at first testified there were no other patients waiting for the doctor; she also testified that there was another patient there.

The record also evidences simple contradictions. For example, when originally questioned about whether she had danced her sister's wedding, she denied it; at first she identified Respondent's translator as having been present at a conversation she soon quickly admitted he was not present at - - a gratuitous piece of testimony which has the appearance of a spontaneous fabrication. Sra. Sanchez was also adamant in denying that she ever discussed her pending case with anyone in her family; a denial, which in light of her apparent tendency to complain about perceived injustices done to her, seems quite out of character.

According to Robert Shuler, Respondent's Support Services Manager,[14/] it was doubts about whether Sra. Sanchez had injured herself that led to his turning down her appeals to be reinstated. As noted earlier, a good deal of testimony concerns Sra. Sanchez' efforts to obtain relief from Respondent's policy of terminating an employee for missing three consecutive days of work without notifying the company. Sooner or later, because of Sra. Sanchez' appeals, her case came to the attention of Robert Shuler. Mr. Shuler testified that, in considering whether to excuse violations of its otherwise automatic termination policy, Respondent requires both an adequate explanation for the absence itself as well as for the employee's failure to notify the company. Because relief from

14. Mr. Schuler's department includes the Employee Relations Division which appears to be the company's personnel department.

the rigor of Respondent's policy is not automatic, Mr. Shuler conducted an investigation into Sra. Sanchez[1] case. According to him, several factors caused him to doubt both the story of Sra. Sanchez' injury and of her subsequent efforts to contact the company.

According to Mr. Shuler, GCX *2,* the medical receipt from Dr. Garcia, appeared to him to have been altered so that it read_ 9 of November, instead of (2)9.[15/] Also, Mr. Shuler thought it curious that, if the note were executed on the 9th of November as GCX 2 in its present form purports to have been,[16/] that Dr. Garcia would have known at the beginning of treatment exactly how long Sra. Sanchez would be under his care. Also, when Mr. Shuler continued to investigate, he discovered that Sra. Sanchez had been to a wedding during the time she was supposed to have been injured and under a doctor's care. Finally, Mr. Shuler checked to see if Sra. Sanchez had filed an insurance claim and she hadn't. To him, this confirmed his suspicion that there had been, in fact, no injury.[17/]

In addition to his doubts about whether she had been injured, Mr. Shuler did not believe that Sra. Sanchez had tried to

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15. In fact, fibers do appear to have been scratched from the space before the 9 on GCX 2 and a phantom *2* can be made out. General Counsel makes the curious argument that by withdrawing its objection to the admissibility of GCX 2, Respondent admitted that Sra. Sanchez was injured. See GC Brief, p. 29. The question, whether GCX 2 was admissible as a business record and, therefore, for its truth, is different from the weight to be accorded it.

16. In fact, Margarita Sanchez testified that the note was not executed on November 9, but the day after, on November 10.

17. General counsel presented testimony from Margarita Sanchez that she does not always file medical claims.

notify the company. He testified that Respondent has four people in the Salinas office from 8:00 a.m. to 5:00 p.m. who are available answer the number Sra. Sanchez was supposed to have called; two of these people speak Spanish and alternate their lunch hours in order to insure that someone is always available to answer the phone in Spanish. The two women who do not speak Spanish are instructed to advise in Spanish any Spanish-speaking person who calls in to "call back later." In view of the efforts Bruce Church had taken to insure that a Spanish-speaking worker could always communicate with the company, Mr. Shuler did not believe that Sra. Sanchez had tried to call in. For all of these reasons, Mr. Shuler did not recommend rescinding her termination.

THE NOVEMBER 1981 LAYOFF

Following these events, in March of 1981, Margarita Sanc testified against Bruce Church in another case. Nevertheless, she was rehired in October 1981. She went to work for Tranquilino Beccera, thinning lettuce for about three weeks before she was laid off for lack of seniority. A few days later, she was put to work in Pedro Vasquez' machine crew in Parker, Arizona. When she started work for Vasquez her husband was in Huron; shortly thereafter, however, his crew, too, came to Parker. Sra. Sanchez and her husband were together in Parker for two or three weeks before his crew was transferred to Yuma.

Anxious to stay with her husband, Sra. Sanchez asked Maria Almanza if she could remain in Parker when her machine moved to Yuma. Maria Almanza called Julian de la Paz who made arrangements for Sra. Sanchez to work in one crew and then another so that she

and her husband could be together. Besides seeking to stay with her husband when he was in Parker, Sra. Sanchez also asked Julian if she could transfer with her husband to Yuma. According to her, Julian said this was alright.

When Raul Pacheco was transferred to Yuma, Sra. Sanchez was not transferred with him. At the time that Sr. Pacheco was transferred, Sra. Sanchez was told by Julian that he could give her a leave of absence so that she could follow her husband to Yuma, but that he could not transfer her because she did not have seniority. Sra. Sanchez continued to work in Parker after her husband went to Yuma. According to Sra. Sanchez, Sr. de la Paz told her Ramon Robledo told him that he was not to transfer her.

Julian de la Paz corroborated some, and contradicted some of Sra. Sanchez' testimony. He confirmed that he transferred her from crew to crew in order to keep her in Parker and that Sra. Sanchez had requested to follow her husband to Yuma. However, he denied that he assured her she would .be able to go to Yuma. He testified that in general there was a company policy to permit husband and wives to transfer with each other, but that in the case of Margarita Sanchez he had been told by Ramon Robledo not to permit her to transfer because she had no seniority. This discussion took place at the time she was placed on his crew, before he had any conversations with Margarita Sanchez. When his crews were ready to go to Yuma, he was told to layoff two people which he did. At the time he laid off Sra. Sanchez, he didn't know what boxes to check so he checked "refused to move with crew" because it was the closest to to the general subject matter even though he knew she wanted to go

to Yuraa. He also wrote down "lack of-seniority" as another reason for her layoff.

Bob Shuler testified that lack of seniority was not a reason to deny Margarita Sanchez permission to move to Yuma in order to be with her husband. If there were a crew ready to go to Yuma and there were an opening on that crew the company would try to accomodate a worker in Sra. Sanchez' position. For the same reason, when Margarita Sanchez' crew finished in Parker, she would be permitted to go to Yuma because, even without seniority, she would be temporarily assigned until people with more seniority replied to the recall notice. Thus, she should not have been laid off on the grounds of lack of seniority.[18/]

It is not clear why Julian de la Paz' supervisors thought seniority was a criterion for deciding whether Sra. Sanchez could to Yuma. However, Sr. de la Paz testified that, in general, he was told to apply seniority criteria in determining who would make the move to Yuma and that he denied transfers not only to Sra. Sanchez, but to others as well. Bob Shuler testified two other employees were also denied transfer to Yuma and laid off on the grounds of lack of seniority.

Margarita Sanchez was laid off on a Friday and went to the ALRB where she contacted Tony Barbosa, the attorney of record for this case. Mr. Barbosa called Mr. Shuler sometime around 12:30 and Mr. Shuler returned his call sometime that afternoon to tell

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18. As a matter of fact, when she was laid off Margarita Sanchez had acquired seniority; however, according to the only seniority list that was available at the time, she had not. The list was in error.

Mr. Barbosa that Sra. Sanchez should come back to work. Sra. Sanchez testified she did not receive this news until late Sunday evening by which time she was unable to make babysitting arrangements. She did not return to work until Tuesday. However, she also testified that she had a 5:00 p.m. conversation with Mr. Barbosa, although she placed the conversation the day before the layoff. She also testified that she only found out about the layoff the morning before she was to be laid off.[19/]

ANALYSIS AND CONCLUSIONS

Labor Code section 1153(c) makes it an unfair labor practice for an employer to "discriminate in regard to the hiring or tenure of employment, or any term and condition of employment, to encourage or discourage membership in any labor organization." Labor Code section 1153(d) makes it an unfair labor practice "to discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony [before the Board.]" To make out a violation of Labor Code sections 1153(c) or (d) the General Counsel must show that a Respondent was motivated by anti-union reasons.

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19. In view of Sra. Sanchez' testimony that she had a 5:00 p.m. conversation with Mr. Barbosa, it appears likely that she was informed that the company rescinded its termination on Friday afternoon, rather than on Sunday, as she testified.

In Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, the Supreme Court said:

> In the absence of union discrimination, the purpose of labor legislation does not vest in the administrative board any control over an employer's business policies. (Citation) The mere fact that an employee is or was participating in union activities does not insulate him from discharge for misconduct or give him immunity from routine employment decisions. (Martori Bros., supra, at 728-29)

Until the recent decision of Wright Line, a Division of Wright Line, Inc. (1981) 251 NLRB 1083, 105 LRRM 1169, there was disagreement between the national Board and some circuits over the quantum of evidence needed to prove unlawful motivation, with the national Board generally holding that if *a* discharge was even partially motivated by an employee's protected activity, the Act was violated, and some circuits insisting that such a test placed an employee who was engaged in protected activities, but who otherwise offered jus cause for discipline, in a much stronger position than an employee who engaged in no protected activities at all. See generally Wright Line, 251 NLRB 1038, at 1084. Since Wright Line both our Supreme Court and our Board have articulated their approval of the so-called "but for" test, according to which "when ... an employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained 'but for' his union membership or his performance of other protected activities." Martori Bros'., supra at 730; Nishi Greenhouse (1981) 7 ALRB No. 18, Martori Brothers Distributors (1982) 8 ALRB No. 15.

Before examining whether General Counsel met his burden of proof, I must consider Respondent's contention that this Board has

no jurisdiction to consider the November, 1981 incident because it took place in Arizona. Respondent cites a number of authorities for the proposition that even "the NLRB has recognized that its jurisdiction is not all-encompassing and must stop at the territorial boundaries of other countries." Resp. Brief, p. 52.[20/]

Cases concerning the reach of the national Board's jurisdiction into foreign countries do not seem entirely apposite to the question of our Board's jurisdiction over acts committed in another state by an employer subject to our jurisdiction since such cases, in the words of Mr. Justice Clark, raise "public questions particularly high in the scale of our national interest because of their international complexion . . . ." McCulloch v. Sociedad Nacional de Marineros 372 US 10, 17. Even considering the more exacting scrutiny such cases might call for, they do not stand for the proposition relied upon by Respondent, that an instrument created by one sovereign can never exercise extra-territorial jurisdiction. To the contrary, RCA Oms Inc., infra at n. 21, and GTE Electric Inc., infra, at n. 21, rely upon Benz, et al. v. Compania Naviera Hidalgo, SA (1957) 353 US 137, which appears to make jurisdiction of the kind contested by Respondent here depend upon Congress' intention to confer it. Since the Board's answer to a question of statutory interpretation is entitled to great deference, unless and until its decision in Mario Saikhon (1978) 4 ALRB No. 72 is overruled, I am bound to regard Hario Saikhon as

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20. See RCA Oms Inc. (1973) 202 NLRB 228, GTE Automatic Electric, Inc. (1976) 226 NLRB 1222, International Air Service Co., Ltd. (1975) 216 NLRB 782.

conclusive on the jurisdictional question. This case appears to fit within the rule announced by the Board in Mario Saikhon; General Counsel is alleging that Margarita Sanchez was discriminated against in retaliation for her protected activities in Calif ornia.[21/]

Respondent also cites the recent case of United Farm Workers v. Arizona Agr. Employment, (9th Cir. Jan 7, 1982) No. 80-5226, for the proposition that Arizona law controls while employees work in Arizona. However, the question in United Farm Workers was whether the Board's certification of the UFW as the representative of Respondent's employees[22/] would preclude Arizona from holding an election among Respondent's Arizona employees. That question entirely concerns whether Arizona, either as a matter of its own labor policy or pursuant to the full faith and credit clause, must defer to our Board's certification; it does not all concern the different question of whether this Board may assert jurisdiction over extra-territorial actions alleged to be in retaliation for the exercise of rights this Board was created to

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21. As Respondent points out, the Board's contact-analysis in Saikhon contains two elements which are missing from this case: unlike the discriminatee in Saikhon, who has hired and worked in California, Sra. Sanchez was hired, and worked exclusively in Arizona so far as the November, 1981 incident is concerned. I do not regard this difference as fatal to Margarita Sanchez' claim to the protections of the Act. Where/ as here, the proof shows that Arizona employment is but part of a continuous cycle, which regularly takes agricultural employees in and out of California, the situation does not seem so different from that confronted by the Board in Saikhon,

22. The Board's certification did not cover Respondent's employees who work exclusively in Arizona. See Bruce Church (1976) 2 ALRB No. 38.

implement. For these reasons, I reject Respondent's contention that *I* cannot consider the November, 1981 incident.

In order to make out a prima facie case of violation of the Act, General Counsel must introduce sufficient evidence "to support the inference that protected conduct was a motivating factor in [Respondent's] decision" (Wright Line, supra, at 1089), to terminate Sra. Sanchez in November 1980 and to lay her off in November of 1981. So far as the discharge goes, General Counsel's prima facie case consists of (1) evidence that Respondent had knowledge of Sra Sanchez' union activities, (2) evidence of purported anti-union statements, and of disparate treatment of Sra. Sanchez, by her foremen, and (3) evidence from the previous Bruce Church case that other reinstated strikers were discriminated against by Respondent's supervisors or foremen after the strike.

I shall consider the effect of the evidence from the previous case first. It is argued that the treatment of Margarita Sanchez is but a piece of a larger design, revealed in the prior case, to discriminate against reinstated strikers. There are several difficulties with the argument.

As a general matter, those events which are supposed to reveal a pattern are so small in number as to appear random rather than related. Mr. Shuler testified that Respondent has approximately 1200 employees; Ramon Robledo testified that he supervises approximately 700 of those employees. General Counsel presented specific evidence of alleged discriminatory treatment of only two reinstated strikers, Maria Ramos and Gabino Conchas; in the absence of evidence that only those two strikers were reinstated, or

that they constituted a significant percentage of the returned strikers -- by itself, a highly dubious supposition, - - so that Respondent's treatment of them might be considered representative, it is difficult to perceive any design against strikers emerging from consideration of the treatment of so few. This conceptual difficulty exists even before one considers the quality of the evidence of discrimination adduced by General Counsel.

Of course, Hector Diaz' testimony that he was ordered "to get" the strikers would be proof that a thread of design linked the apparently isolated episodes brought out by General Counsel - - if I were to credit it. Since I encounter his testimony without the benefit of having observed the witness, I can only evaluate it on the basis of those kinds of elements inherent in the testimony itself as might bear on its credibility. On the basis of these sorts of factors, I do not credit Hector Diaz' testimony. In the first place, there are the contradictions in his testimony concerning the location of his conversation with Ramon Robledo; secondly, there is his admission that, after speaking with Sr. Conchas and representatives of the UFW and General Counsel, he conformed his testimony to that of Sr. Conchas, an admission which, at the least, shows extreme suggestibility. Finally, there are Diaz' several versions as to why he was fired by Respondent, depending upon which agency might provide him relief. Of course, if I cannot believe Diaz had such a conversation, I cannot believe Sra. Ramos overheard it.

I am left, then, with no picture of an emerging pattern "to get" strikers, but with two terminations, which, even assuming they

were the products of discrimination, would not relieve General Counsel of his burden of proving that Margarita Sanchez' "protected activities played a role in [Respondent's] decision" to terminate her. As the court noted in NLRB v. Dan River Mills Inc. (5th Cir. 1960) 274 F2d 381, 384

> A discharge becomes forbidden only if motivated by an unlawful purpose to discriminate against the Union or its adherents. A general bias or a general hostility or interference, whether proved or conceded, does not supply the element of purpose. It must be established with respect to each discharge.[23/]

Whatever happened in the case of Maria Ramos and Gabino Conchas, General Counsel has failed to meet his burden of showing a causal connection between Margarita Sanchez' termination and her union activities.

As noted earlier, other than the evidence of unlawful design, General Counsel relies on the purported anti-union statements, and discriminatory treatment of Margarita Sanchez, by Cesario Cabrera for his prima facie case. For the reasons stated above, I cannot credit Sra. Sanchez' testimony regarding Cesario Cabrera's anti-union statements. Besides my already expressed doubts about Margarita Sanchez' veracity, from Cesario Cabrera's conduct as a witness, it seems highly unlikely that he would indulge whatever anti-union feelings he had to the extent of revealing them to Margarita Sanchez. An extremely reluctant witness, Cabrera seems

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23. This is not to say that evidence of the disproportionate treatment of an identifiable class could not satisfy General Counsel's burden, see Kawano, Inc. v. Agricultural Labor Relations Board (1980) 106 Cal. App. 3d 937; but we have no such evidence here.

even more reticent a man. Margarita Sanchez' testimony about his singling her out for discipline after she attended the funeral is simply contradicted by the record evidence and her opinion that he subjected her work to more critical scrutiny than that of others appears little more than griping on this record.

I find that Margarita Sanchez was initially terminated for missing three consecutive days or work without notifying her foreman or supervisor. Robert Shuler testified that, on the fourth day of absence without explanation, the foremen routinely prepare a termination which, after signature by the supervisor, is passed on to harvest department. It is absolutely undisputed that Margarita Sanchez did not notify anyone of her injury. The only evidence that anyone in Respondent's hierarchy was informed of it is her mother's testimony that she told Tranquilino Beccera about it, and not only did Sr. Beccera put this conversation well after the three day "grace" period permitted by Respondent's policy,[24/] but there is no question that Beccera was outside the chain of communication, as described by Mr. Shuler, which was responsible for the decision to terminate Margarita Sanchez.

Thus, there is simply no causal connection between Respondent's union activities and her initial discharge. Similarly, General Counsel has failed to prove that in reviewing Sra. Sanchez' termination, Robert Shuler applied a different standard to her than he did to any other employee. It is unnecessary for me to decide whether Sra. Sanchez was actually injured; it is enough for me to

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24. I credit Tranquilino Beccera's version,

consider whether Respondent acted reasonably in doubting that she was. See Tenneco West (1981) 6 ALRB No. 3. If Mr. Shuler's conclusions, based on what he knew at the time were unreasonable, their unreasonableness could support an inference that they were merely pretextual.[25/] However, the note does appear to be altered; Respondent took business precautions to insure that Spanish speaking employees could reach the office; and it is not unreasonable to conclude that an employee who was denied a leave, and who claimed injury during the period for which she had sought it, might have feigned the injury. Moreover, I credit Mr. Shuler's testimony that these were the grounds he relied on in not rescinding her termination.

The November, 1981 incident is less clear because as Respondent itself admits, it was a mistake not to permit Margarita Sanchez to transfer to Yuma. However, the question before me is not whether Sra. Sanchez should have been allowed to go to Yuma, but whether Respondent was unlawfully motivated in not permitting her to go there. On this record, I cannot conclude the General Counsel has met his initial burden of proving that to be the case.

General Counsel's argument is this: the practice of permitting temporary transfers is simple enough not to produce errors in its implementation and, since the two reasons advanced by the company for not transferring Sra. Sanchez were false, it follows that the real reason has to be a desire to retaliate against her. The classic statement of the principle relied upon by General

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25. Thus, I consider the reasonableness of Mr. Shuler's conduct for the limited purpose of evaluating his credibility.

Counsel to prove *his* case appears in Shattuck Denn Mining Corp. v. NLRB (1st Cir. 1966) 362 F2d 466, in which the court said that, a trier of fact, I may infer that an employer's real motive "is one [it] desires to conceal" Id., at 470, when I find the employer's stated reason for a discharge to be false, but only where " the surrounding facts tend to re-enforce the inference of unlawful motive." Ibid.

In this case, no surrounding facts re-enforce the inference of unlawful motive General Counsel would have me draw: Respondent rehired Sra. Sanchez after she testified; Respondent's foremen accomodated her by transferring her from crew to crew while her husband was in Parker; I have not credited Sra. Ramos' and Hector Diaz' testimony that Robledo instructed Diaz "to get" strikers; and I can find no evidence of a pattern to get them. Respondent contends it made a mistake and it immediately acted to correct that mistake. Although there is nothing on the record to explain why Respondent's supervisors would have made such a mistake, even unexplained mistakes are within management's lawful power to make:

> Management can discharge for good cause, or bad cause, or no cause at all. It has, as master of its own business affairs, complete freedom with but one, specific, definite qualification it may not discharge when the real motivating purpose is to do that which [the statute] forbids. (N.L.R.B. v. McGahey (5th Cir. 1956) 233 F2d 406)

For all the above reasons, *I* recommend that the complaint be, and hereby is, dismissed.

DATED: March 30, 1982

THOMAS SOBEL
Administrative Law Officer