Calexico, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 86-CE-47-EC 16 ALRB No. 1

DECISION AND ORDER

On June 20, 1988, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision and Recommended Order in this matter. Thereafter, Mario Saikhon, Inc. (Respondent or Employer) timely filed exceptions to the ALJ's Decision along with a supporting brief, and General Counsel filed an answering brief .

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions, subject to the observations in Footnote 1, and to issue the attached Order.[1/]

[1/]In affirming the ALJ's findings and conclusions we do not place the same degree of emphasis on the extent of Respondent's prior history of anti-union animus. Contrary to the impression that may be left by the ALJ's statement at Footnote 52 of her decision, anti-union animus cannot be inferred from the mere existence of prior unfair labor practice charges that were not brought to complaint by the General Counsel. Moreover, evidence of a prior history of anti-union animus based on conduct actually

(fn. 1 cont. on p. 2)

ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Mario Saikhon, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, depriving of seniority, or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or with respect to any term or condition of employment because he or she has engaged in concerted activity protected by the Agricultural Labor Relations Act (Act).

(b) Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO or in any labor organization by unlawfully discharging, depriving of seniority, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of

---

(fn. 1 cont.)

found to have violated the Agricultural Labor Relations Act is but one factor to be considered in determining whether the employer has the present discriminatory intent that is inherent in any section 1153(c) violation. It is not a substitute for the causal connection between the employee's union activity and the adverse action taken by the employer. (Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal.App.3d 826, 834-835 [161 Cal.Rptr. 870].) We find that irrespective of the extent of Respondent's history'of anti-union animus, the ALJ's analysis of the testimony provided a more than adequate basis for concluding that such causal connection did exist in this case.

Finally, we note that Respondent failed to demonstrate bias or prejudice warranting disqualification of the ALJ and that its dissatisfaction from having lost prior cases before this ALJ is not sufficient to justify disqualification. (Cf. NLRB v. Pittsburgh Steamship Company (1949) 337 U.S. 656 [24 LRRM 2177]; and Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 791-794 [171 Cal.Rptr. 590].)

employment, except as authorized by section 1153(c) of the Act.

(c) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer Andres Reyes full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other employment rights and privileges, and make him whole for all losses of pay and other economic losses he has suffered as a result of his being discharged or deprived of seniority, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms (1988) 14 ALRB No. 5. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since its unlawful acts.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying and otherwise copying, all payroll and social security payment records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of back pay and interest due under the terms of this Order.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order.

(d) Upon request, provide the Regional Director or

his designated Board agent with the dates of the next peak season. Should the peak season have already begun at the time those dates are requested, inform the Regional Director of when the present peak season began and when it is anticipated to end and inform the Regional Director of the anticipated dates of the next peak season.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from May 17, 1986, the first day of the 1986 spring melon harvest, to May 17, 1987.

(f) Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicuous places on its property, including places where Notices to Employees are usually posted, the exact period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy of the Notice which has been altered, defaced, covered, or removed.

(g) Arrange for a Board agent or representative of Respondent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to

compensate them for time lost at the reading and question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: March 9, 1990

GREGORY L. GONOT, Member[2/]

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[2/] The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board members in order of their seniority. Chairman Janigian and Member Ramos Richardson did not participate in this case.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW or Union), the General Counsel of the ALRB issued a complaint which alleged that we, Mario Saikhon, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging employee Andres Reyes from all company operations and by later discharging him from or depriving him of seniority in our melon harvests. The Board found we took these actions against Andres Reyes because he had participated in union activities and spoken to the company on behalf of other workers regarding the terms of their employment. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other *workers* to help and protect one another; and
6. To decide not to do any of these things.

BECAUSE YOU HAVE THESE RIGHTS, 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.

WE WILL NOT discharge or refuse to rehire any employee because he or she participated in union activities, spoke with us on behalf of other workers regarding the terms of their employment, or participated in ALRB processes or proceedings.

WE WILL offer to reinstate Andres Reyes to his previous position as a lettuce harvest worker and we will reimburse him with interest for any loss of pay or other economic losses he suffered because we discharged and refused to rehire him.

DATED: MARIO SAIKHON, INC.

By: _____
Representative Title

If you have a question about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor

Relations Board. One office is located at 319 Waterman Avenue, El Centre, California 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

16 ALRE No. 1
Case No. 86-CE-47-EC

Background

The complaint alleged that the Employer, through its agents, discharged Andres Reyes from all company operations, and thereafter modified the discharge to a loss of seniority in the melon operations, because of his union and other concerted activities. The Employer, who admitted taking such adverse actions, asserted that it was justified in doing so because Reyes had taken time off without permission and/or later took time off after having been denied permission. Reyes had been granted a one-day leave of absence, but was admittedly absent from work for more than one day as a result of his incarceration in Mexico.

ALJ Decision

The ALJ found the Employer's absence policy to be rather lenient such that unexcused absences for whatever periods of time were frequently tolerated so long as "good" reasons were provided therefor, and that incarceration was not necessarily a "bad" reason for being absent from work. In applying the absence policy to the facts of this case, the ALJ concluded that Reyes was unlawfully terminated and the Employer's reasons therefor were pretextual. In reaching her conclusions, the ALJ discredited the testimony of the Employer's witnesses over that of the General Counsel's witnesses.

On two procedural matters raised by the Employer, the ALJ dismissed as without merit (1) the contention that the ALJ was biased from having decided unfavorably prior cases against the Employer; and (2) the Employer was denied due process when the ALJ permitted one of General Counsel's witnesses in her case in chief to later provide rebuttal testimony.

Board Decision

The Board affirmed the ALJ's rulings, findings and conclusions and ordered that the discriminatee be reinstated and made whole for losses incurred. In its analysis, the Board did not place the same degree of emphasis on the Employer's prior history of anti-union animus, noting that such evidence is but one factor to be considered in determining whether there was a violation of section 1153(c) of the Act. The Board was satisfied that the ALJ's analysis of the testimony provided a more than adequate basis for finding a causal connection between the employee's union activity and the Employer's corresponding adverse action. The Board also noted that the Employer failed to demonstrate bias and prejudice warranting disqualification of the ALJ.

* * *

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: MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	**Case** No. 86-CE-47-EC

Appearances:

Stephanie Bullock, Esq.
ALRB El Centre Regional Office
for the General Counsel

Leopoldo Trevino
United Farm Workers of America, AFL-CIO
for the Charging Party

Scott A. Wilson, Esq.
Littler, Mendelson, Fastiff & Tichy
for the Respondent

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge:

This case was heard by me in El Centre, California, on December 15, 16, 17, 18 and 22, 1987.[1] Briefs were filed in February 1988. The complaint, dated August 24, 1987, is based on a charge filed by the United Farm Workers of America, AFL-CIO hereafter UFW or Union) on August 1, 1986, with the Agricultural Labor Relations Board (hereafter ALRB or Board). Both documents were duly served on Respondent, Mario Saikhon, Inc. (hereafter Respondent, Saikhon or the company).

The First Amended Complaint issued on August 27, 1987, and alleges that Respondent, through its agents Adolfo Rodriguez and Isaac Pelayo, on June 28, 1986, discharged Andres Reyes from all company operations, and, on August 8, 1986, modified the discharge

---

[1]At the start of hearing, Respondent made an oral motion to disqualify me, arguing that I had presided over prior hearings involving the Respondent and had made extensive findings against Respondent and therefore could not objectively evaluate the evidence in the instant case. (I: 2-3.) I assured counsel that I had not prejudged the case and would evaluate the evidence with an open mind. I then denied the motion.

The law is clearly opposed to Respondent's arguments. (Bob's Casing Crews, Inc. (1971) 192 NLRB 1 [78 LRRM 1060] aff'd (5th Cir. 1972) 458 F.2d 1301 [80 LRRM 2090] To demonstrate bias or prejudice warranting disqualification, a party must show more than mere disgruntlement at having lost prior cases. (Bilmax, Inc. d/b/a Ellis Toyota (1983) 266 NLRB 442 [112 LRRM 1380]; N.L.R.B. v. Pittsburgh Steamship Company (1949) 337 U.S. 656.) Respondent did not follow its oral motion with a written motion, under oath, setting forth specific facts warranting disqualification, as required by our rules. Such a motion must be made within 24 hours. (Cal. Code Regs., Tit. 8, section 20263(c).

to a loss of seniority[2] in Saikhon's melon operations[3] and that both actions were taken because Mr. Reyes engaged in protected union and other concerted activities. The complaint further alleges that Respondent, by the above cited acts, violated sections 1153(c) and 1153(a) of the Agricultural Labor Relations Act (hereafter Act or ALRA).[4] Respondent filed an answer on September 4, 1987, which it amended at the prehearing conference held on December 8, 1987.

At the prehearing conference, Respondent admitted it discharged Mr. Reyes from all company operations (Tr.p.2)[5] and thereafter limited the discharge to the sack melon operation. Respondent denied that it took these actions because of Mr. Reyes' protected union and other concerted activity and asserted he was discharged because he took time off without permission and/or

---

[2]Mr. Reyes did not work in the 1987 spring melon harvest, the only melon harvest in which the ground crew operated between the time of Respondent's actions at issue herein and the instant hearing. In the fall of 1986, the company had only a melon machine harvest. The melon sack crews did not work the 1987 fall melon harvest.

[3]Mr. Reyes was number 17 on the 1986 sack crew seniority list with a seniority date of 6/77. (G.C. Ex. 16.) His name is not on the 1987 seniority list (G.C. Ex. 17.)

[4]A11 references herein are to the California Labor Code unless otherwise noted.

[5]References to the transcript of the Prehearing Conference are cited as Tr. page number. References to the hearing transcript are cited volume ; page number.

thereafter took time off after having been denied permission to do so. (Tr. p. 11.) Respondent denies that it violated the Act in any respect.[6]

The General Counsel, Respondent and Charging Party were represented at the hearing and were given a full opportunity to participate in the proceedings.[7] General Counsel and Respondent filed briefs after the close of the hearing[8] pursuant to Title 8, California Code of Regulations, section 20278.

Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted, I make the following findings of fact and conclusions of law.

I. Jurisdiction

As admitted by Respondent, Saikhon is a California corporation which is, and at all times material to the instant proceeding was, an employer within the meaning of section 1140.4(c) of the Act; the UFW is a labor organization within the meaning of section 1140.4(f); and Andres Reyes is an agricultural

---

[6]The company asserted several affirmative defenses all of which were either withdrawn or struck with the exception of the 3rd Affirmative Defense; to wit, that the instant action is barred by estoppel, waiver, laches and unclean hands. Respondent did not argue this matter in its brief.

[7]I granted the UFWs oral motion to intervene pursuant to Title 8, California Code of Regulations, section 20268.

[8]Also after the hearing, Respondent filed a "Motion to Strike Rebuttal Testimony of Elias Piceno," dated January 11, 1988. General Counsel filed a response thereto on January 20, 1988. Respondent's motion is denied. Effectively, it requests me to

employee within the meaning of section 1140.4(b). Further, Adolfo Rodriguez and Isaac Pelayo were both supervisors at all times material herein.

II. Background

Respondent has been involved in prior proceedings[9] before this Board including several unfair labor practice proceedings wherein its operations have been described. For purposes of this case, I note merely that the company has a lettuce harvest, a melon harvest, and a thin/weed operation which occur at various times of the year in the Imperial Valley, and that prior to his discharge Mr. Reyes worked in each of these operations.

(Footnote 8 Continued)

reconsider my ruling on Respondent's objection to Mr. Piceno's testimony. The appropriate course is to file exceptions to my ruling with the Board on appeal not to reargue an evidentiary ruling three weeks after the close of hearing. Further, Respondent bases its motion on an inaccurate premise. Respondent states it objected on the grounds that "this was evidence that was testified to or could have been testified to on direct examination." [emphasis added] (motion, p. 3) Respondent's sole objection was that Mr. Piceno had already testified on the issue. (V: 69, 11. 19-20: 22.) He had not. An objection to inadmissible evidence or a motion to strike same must be made on the correct ground and must state the specific ground. (Cal. Evid. Code, section 353; Jefferson, California Evidence Benchbook, (2d Ed. 1982) Vol. I: section 20, p. 459.) Finally, there is no denial of due process. Respondent said nothing after Mr. Piceno testified indicating it needed an opportunity to counter his testimony.

[9]See, 2 ALRB No. 2; 4 ALRB No. 72; 4 ALRB No. 107; 5 ALRB No. 30; 5 ALRB No. 44; 8 ALRB No. 88; 9 ALRB No. 50; 10 ALRB No. 36; 10 ALRB No. 46; 12 ALRB No. 4, 13 ALRB No. 8 and the compliance proceeding in 8 ALRB No. 88 which is pending before the Board.

III. Reyes' Employment at Saikhon

Mr. Reyes began working at Saikhon in 1968. Like many other Saikhon employees, Mr. Reyes went on strike against the company in the Imperial Valley lettuce strike of 1979. This Board found that those strikers were unlawfully locked out by Saikhon, and ordered the employees reinstated.[10] Mr. Reyes, along with other employees who struck, was offered reinstatement by the company in 1983 and returned to work.

He worked in the spring 1986[11] melon harvest which ran from May 17 through June 28. Mr. Reyes worked in the sack or ground crew which is so called because the employees pick the melons and place them in sacks which they carry. Saikhon also has a harvest where melons are harvested by machine. Mr. Reyes did not work in the machine harvest.

IV. Union Activity

It is undisputed that Mr. Reyes was a leading UFW activist at Saikhon and that Respondent was well aware of his activities. (Resp. brief p. 38) It is important, however, to show the extent of his union and other concerted activity.

---

[10]Mario Saikhon, Inc. (1982) 8 ALRB No. 88; appeal dismissed by Ct App., 4th Dist., Div. 1, March 7, 1983; hrg. den. April 28, 1983, same case dismissed by Ct. App. 4th Dist., Div. 1, November 28, 1984; same case 10 ALRB No. 46; modified 12 ALRB No. 4.)

[11]All dates hereafter are 1986 unless otherwise noted.

Mr. Reyes has been active in the UFW at Saikhon since at least 1975. He attended negotiation sessions in which Mr. Adolpho Rodriguez[12] and Respondent's counsel also participated. Mr. Reyes was president of the UFW Ranch Committee and acted as liaison between the workers and the UFW.

Further, Mr. Reyes helped locate workers in connection with cases brought to the ALRB, and Mr. Rodriguez and various company foremen were aware of this fact. (I: 43-44.) He testified at an ALRB hearing in opposition to the company's interest a few years before the instant hearing.

On a regular basis, he discussed with company foremen problems which occurred at work and, if matters were not resolved at that level, he took the issue to Mr. Rodriguez. By virtue of their responsibilities, Mr. Rodriguez and Mr. Reyes were in frequent contact.

Mr. Reyes described several specific instances of protected activity which occurred in 1986. He intervened on behalf of a worker, Nazario Mendes, regarding a leave of absence. In a second incident, Mr. Reyes protested to a foreman, Jesus Castro, during the 1986 spring melon season - the same season

[12]Mr. Rodriguez was the Employee Relations Director at Saikhon, and it is he who fired Mr. Reyes. Mr. Rodriguez was himself later fired by Respondent and was not employed by Saikhon at the time of the hearing. He nonetheless appeared to be a cooperative witness.

Reyes was discharged-about a crew not being given a break. In a third instance, he testified at an Unemployment Insurance Appeals Board hearing in June on behalf of a worker, Jorge Pelayo, who was discharged at Saikhon and was seeking employment benefits. The UIAB decision favored the worker. (III: 134-135.)

V. Company Policy on Leaves of Absences

Mr. Rodriguez testified that the company had over 700 employees and had a serious absenteeism problem. (IV: 173.) Initially, Mr. Rodriguez and foreman Pelayo[13] testified to a set of clearly defined policies at Saikhon regarding absences. Through modifications and contradictions in their testimony and comparing their admissions to the testimony of several workers, it became apparent that those policies as initially stated do not comport with the day to day realities at Saikhon.

Mr. Rodriguez testified he instituted a policy whereby the foremen could approve workers' requests for leaves of absence for up to two days but that longer leaves had to be approved by him. (IV: 51, 203.)[14] Mr. Pelayo corroborated Mr. Rodriguez'

[13]Issac Pelayo, as distinguished from Jorge Pelayo referred to above, was the foreman of crew number 1 in the 1986 spring melon harvest which was Mr. Reyes' crew.

[14]He said he instituted the policy to curb favoritism by foremen who allowed their friends to be absent without permission. This practice was particularly problematical on Saturdays and Mondays when workers were especially prone to skip work. (IV: 51-52.) Since the foremen could grant leaves up to two days, it is not clear how his policy corrected this problem.

testimony and stated that if an employee wanted more than 2 days off from work, he would send the worker to see Rodriguez. (V: 16.)

Other testimony by Mr. Rodriguez, however, contradicted that of Pelayo. Rodriguez recounted a situation where Pelayo informed him that a worker, Alfredo Viejas, needed to be off work for a couple of weeks. Mr. Rodriguez testified he did not know whether Pelayo talked to him before Viejas left. (IV: 141.) He also said Pelayo did not give him a reason why Viejas needed to be gone. His demeanor as well as his testimony indicated that this incident did not reflect an unusual situation and also that it was not a source of concern to Mr. Rodriguez.

I draw two conclusions from this testimony. First, if the typical practice was as Rodriguez and Pelayo described, it is highly implausible that Mr. Rodriguez would not remember whether Pelayo gave Viejas permission to be gone for two weeks and only later informed Rodriguez. Second, the testimony undercuts Mr. Rodriguez' prior assertions that under his policies the foremen had very limited authority regarding absences.

In fact, Mr. Rodriguez later modified his original testimony by admitting that it was really the foreman who decided if a worker could have time off. He acknowledged that he simply ratified the foreman's decision. This admission comports with Mr. Reyes' testimony that when he saw workers ask their foreman for permission for time off, the foreman gave his answer on the spot. (III: 29.)

Mr. Reyes testified that he had never heard of the policy that foremen could only give two days off. (II: 127.) He and two co-workers, Valentin (Valente) Valdez and Elias Piceno, testified that if a worker wanted time off, all the worker had to do was notifiy the crew foreman. (I: 64-65; 70; III: 41-42; 126.) The practices at the company were such that, as Mr. Rodriguez acknowledged later in his testimony, the workers believed all they had to do was "come tell you they are going to be off." (IV: 213.) As actually implemented, Respondent's policy comports with the workers' perception, not the policies first articulated by Mr. Rodriguez.

Not only was the 2 day rule not observed, Mr. Rodriguez admitted that if a worker were simply absent without prior notice, all the worker need do was provide an acceptable excuse upon returning to work, and no disciplinary action would be taken. The same was true if a worker obtained a leave of absence and did not return at the end of the time specified.[15] Thus, discipline depended not on how long an employee was absent but on whether the employee had a "good" reason. (IV: 54.)

Mr. Rodriguez acknowledged that he and the foremen usually did not ask workers specifically about the reasons for their absences because the workers "got touchy" when asked about

---

[15]testimony contradicts his testimony elsewhere that company policy was that an employee who failed to report back from a leave of absence at the specified time would lose seniority. This policy was reflected in the collective bargaining agreement (Resp. Ex. 1) and was one basis asserted by Mr. Rodriguez for discharging

such matters. He testified that so long as a worker said the time off was for family problems, financial problems, health problems or "any kind of leave they need," that constituted a sufficient reason. (IV: 203-204.) Especially where a worker was rarely absent, the practice was not to inquire beyond the stated reason. (IV: 151.)

Respondent apparently was very accommodating about granting workers' requests for leaves. Not only was a general statement of need sufficient to justify time off, Mr. Rodriguez said he could not think of an occasion where he refused a request for a leave.

In keeping with his efforts to show that the company had set policies regarding absences, Mr. Rodriguez first testified that the regular practice was for the crew foremen to tell him if a worker were absent for "a couple of days" without permission. (IV: 169.) He then admitted he did not know if the foremen actually followed his instructions, and even went so far as to admit that the foremen told him about absences whenever they remembered "or

---

(Footnote 15 Continued)

Mr. Reyes. (IV: 161.) Article 4(B)(4) provides for loss of seniority where a worker does not report at the end of a leave of absence unless the worker has an approved extension pursuant to Article 11. Article 11 requires that leaves for more than three days, and extensions of any leaves, must be in writing. Respondent admits that the "in writing" requirements were not regularly enforced, and does not contend Reyes needed a written extension.

whatever (sic) the hell they felt like it . . . ." (IV: 169-170; 172.) He also conceded that he never made any notation of any information reported to him by the foremen regarding workers' absences. (IV: 174.)

Several times Mr. Rodriguez emphasized that if a worker were gone three days without an excuse, the worker would have to talk to him before s/he could return to work. (IV: 62, 64-65.) Later, he changed his testimony and acknowledged that it was not necessary for the worker to talk to him. The worker could talk to the foreman who could tell Rodriguez why the worker had been absent. (IV: 57.)

Mr. Reyes testified that in his 20 years of working at Saikhon it was his experience that the foremen decided if a worker who had been absent without permission could return to work. This was the practice whether the worker was absent with no prior notice or did not return from a leave of absence at the specified time. The bottom line was the employee could return if s/he had an acceptable reason. (II: 60, 65; III: 7.) Mr. Reyes' testimony is essentially corroborated by that of Mr. Rodriguez as his testimony unfolded with the modifications of his initial description of company policies.

Mr. Rodriguez' testimony regarding obtaining extensions of leaves of absences was also marked by inconsistencies. He first testified that if a worker were granted a leave and wanted an extension beyond the time granted, the worker could not send

someone else but would have to come in personally. (IV: 163-164.) After further probing during cross-examination, however, he acknowledged that a member of the worker's family could obtain an extension. (IV: 164-165.) Still later in his cross-examination, he acknowledged that a non-family member could notify the foreman, and the worker could bring an excuse when s/he returned. (IV: 165.) Finally, he acknowledged that a worker would not be disciplined if the worker simply brought an acceptable excuse upon returning even though the worker had not obtained an extension.
(Id.)

Mr. Piceno and Mr. Valdez who have worked at Saikhon since 1977 and 1973, respectively, both testified that it was permissible for a worker to notify the foreman through a co-worker that s/he would not be reporting for work. (III: 80; 109.) Their testimony, coupled with that of Mr. Reyes and even that of Mr. Rodriguez, establishes that if a worker notified the foreman in advance that s/he was going to be absent and did not return at the end of that specified time, it was the practice at Saikhon that the worker could either personally appear and tell the foreman s/he could not be at work or could send word through a co-worker or family member.

I have detailed the testimony regarding company policies for two reasons. First, the numerous modifications by Mr. Rodriguez and the fact that, as modified, his testimony corroborates that of the workers, are important considerations in

evaluating their relative credibility. Second, it is important to determine the actual practices at Saikhon in order to evaluate their application to the absences of Mr. Reyes.

From the foregoing testimony, two critical points emerge. One, if a worker were absent without permission, providing an acceptable reason to the foreman was sufficient to allow the person to return to work without any disciplinary action being taken. Two, a need to attend to personal or family affairs or any such general statement was a sufficient reason. Virtually no inquiry was made into the reasons given by workers. This was especially true where the worker had no history of chronic absenteeism.

VI. Andres Reyes' Absences

On Thursday, June 19, Mr. Reyes told his foreman, Isaac Pelayo, that he needed the day off to attend to personal business involving his son. He said he would return the next day if he could resolve the matter. Otherwise, he would send word through his brother or his co-workers Valdez or Piceno.[16] (I: 61.) Mr. Reyes did not work the next day, and this absence was excused.

The following day, Saturday, June 21, Mr. Reyes went to the Double A gas station in Calexico which served as a central pick-up point for Saikhon's workers. Since Pelayo was not there,

---

[16]Respondent stresses the discrepancy between Reyes' account and that of Pelayo who testified Reyes asked for one day only. In the first place, I am not convinced their different recollections mean one is lying. It is quite possible that both are telling the truth as they remember it. In such an exchange, it would not be

Mr. Reyes informed his co-worker, Valentin Valdez,[17] that he could not come to work because he had not yet resolved his personal affairs.

Mr. Reyes asked Mr. Valdez to relay this message to Pelayo. Valdez did so, and Pelayo told him to get another worker so the crew would be complete.[18]

That same Saturday evening, Mr. Reyes was arrested in Mexicali and was not released from jail until Tuesday the 24th about midnight. His wife came to see him and contacted his brother, Felix Reyes, and told Felix that he should notify the company that Andres would not be able to come to work. Felix worked in the same crew as Andres.

(Footnote 16 Continued)

at all unusual for someone in Pelayo[1] s situation to remember the reference to one day and to have paid little attention to the qualifying part of the statement. There is no indication he or Reyes focused on the time period in their conversation. Nor is there any evidence that, at that time, the one day was significant to Pelayo. Second, to the extent there is a credibility issue, I credit Reyes over Pelayo. As discussed elsewhere, Mr. Reyes answered questions fully, was generally consistent, and presented a sincere demeanor. Mr. Pelayo gave very spare answers, his responses were virtually by rote, and his testimony was marked by more inconsistencies than Mr. Reyes'.

[17]Valdez was the crew, captain for crew No. 1 in the melon sack harvest which was Mr. Reyes' crew.

[18]crew captain, Mr. Valdez was responsible for getting together a full crew. The daily procedure was that he checked to see whether all the regular members of the crew were present and, if not, he obtained workers from people who came to the pick-up point seeking work by filling in for absentees.

The following day, Sunday the 22nd, Felix went to work and informed Mr. Valdez that Andres would not be at work because he was still attending to his personal affairs. (III: 38.) Felix was with Valdez when Valdez relayed this message to Pelayo who responded that it did not matter, to just take another worker but not the one he had chosen the day before. (III: 38; 70-72.) Felix heard Pelayo respond to Valdez' message by saying, "Fine."

Valdez testified that Pelayo did not seem angry, nor did he in any way express disapproval when informed of Andres' absence. I credit this statement. In general, I found Valdez credible, and nowhere did Pelayo testify that he indicated he was disturbed about Andres being absent or that he in any manner expressed concern or disapproval.

On Monday the 23rd, Felix alone spoke to Pelayo and told him Andres would not be at work because he still "had problems."[19] (III: 98.) Pelayo responded he had already given Andres permission, ". . . . so now what?" (III: 98) A co-worker, Elias Piceno, overheard the conversation and heard Pelayo respond to Felix that it was "okay." (III: 108, 118.)

---

[19]Respondent seeks to discredit the testimony of Felix Reyes and Piceno by raising the issue of whether Felix told Pelayo that Andres was in jail and then, at hearing, denied having done so. Pelayo, however, never testified anyone told him Andres was in jail and, in fact, said he was never given a reason why Andres was absent.

Mr. Pelayo testified that all of the conversations he had concerning Mr. Reyes' absences were with Mr. Valdez, that he did not recall anyone else being present and that Valdez never gave him a reason why Reyes was absent. Pelayo acknowledged that he told Valdez to get another worker, but testified he never told Valdez that Andres could have the day off. Respondent's counsel questioned Pelayo regarding each of the four days Andres was absent (June 21-24), and each time Pelayo reiterated virtually verbatim the same phrases regarding his conversation each day Reyes was absent. He repeated that every day Valdez said "He [Andres] did not come" and he, Pelayo, responded, "Take somebody else."[20] (V: 28-30; 33.)

Observing Pelayo"s demeanor, his answers created not the impression of a consistent, truthful account but rather delivery of a memorized script. He repeated virtually the same words, his manner was wooden, and he showed very little affect. He did not vary his manner of expressing himself even slightly as a person actually remembering and retelling events typically would do. His manner was that of a reluctant witness who knows the line he is supposed to follow and does not stray from it for fear of making a mistake.

---

[20]Neither Valdez Valdez nor Felix Reyes testified that he spoke to Pelayo on the 24th. Pelayo, however, reflexively repeated his testimony regarding the conversations on prior days. General Counsel aptly characterizes Mr. Pelayo's responses as mechanical (Brief, p. 34.)

I credit Valdez' and Felix Reyes' accounts of what happened. They gave more complete responses to questions than did Pelayo and generally displayed a sincere demeanor.[21]

I find that Pelayo expressed acquiescence in Andres' absence based on the reasons I have already given for crediting Valdez and Felix over Pelayo, because of Pelayo's demeanor when Felix and Valdez spoke to him, and because of the unrebutted testimony that Pelayo told Andres after Andres was fired that he did not think the company could fire Andres because he (Pelayo) had given Reyes permission.[22] (I:57.)

VII. Pelayo's and Rodriguez' Response to Reyes' Absence

Mr. Pelayo and Mr. Rodriguez testified that during the time Mr. Reyes was absent, there was ongoing communication between them on this subject. Both testified that Mr. Pelayo approached Mr. Rodriguez on June 22nd and told him Andres was absent. Each

[21]Further, Andres personally came to tell Pelayo he would be absent and asked Valdez to deliver a message. Watching Valdez testify, he presented an image of being a careful, conscientious person who would convey the message he was asked to give.

[22]Pelayo may be telling the literal truth when he testified he did not tell Valdez that Andres could have the day off. His behavior certainly would have conveyed that it was all right that Andres did not come to work. This is especially so considering that it was an accepted practice for co-workers to notify the foreman that a worker would be absent.

referred to this as the third day,[23] and Mr. Rodriguez characterized Mr. Pelayo as complaining to him because he (Pelayo) knew that "after three days with no excuse a person should be not (sic) allowed to work until [Rodriguez] talked to him...."[24] (IV: 62.) Rodriguez testified Pelayo asked him what he should do, and Rodriguez instructed Pelayo to let Mr. Reyes go to work,[25]

---

[23]since Mr. Reyes was excused from work on the 20th, the 22nd was in reality only the second day. Respondent's counsel recognized this fact and began to lead Rodriguez saying "Okay, well, on Sunday the 22nd, he'd only been off two days." (IV: 62.) Rodriguez continued to maintain it was the third day but did not explain his reasoning. Soon thereafter, he acknowledged it was only the second day. (IV: 63.)

[24]I have not credited the testimony that the regular practice was to require workers absent for three days to speak to Mr. Rodriguez. Moreover, later, Rodriguez gave a different explanation for Pelayo's focus on Mr. Reyes' absence. He said he and Mr. Pelayo discussed rumors circulating that Mr. Reyes had been arrested in Mexicali for carrying a gun into the police station. (IV: 175.) He said it was these rumors which caused "a lot of the problems" Pelayo had with Reyes' absence.

Mr. Pelayo, however, testified he did not hear rumors about Mr. Reyes being in jail or about an arrest for carrying a gun. Obviously, therefore, he did not corroborate Rodriguez' testimony. In fact, at first he testified that he did not tell Rodriguez about any problems. Later, he altered his testimony and said he told Rodriguez that Reyes "had problems in Mexicali." Pelayo did not testify he complained to Rodriguez. In fact, he said he did not tell Rodriguez that Andres was absent without permission. It was Rodriguez who raised the issue.

[25]Rodriguez said the usual practice was a worker had to talk to him first. He gave Reyes more leeway because he was a union leader. (IV: 74, 81.) I have not credited his first statement since he later testified to the contrary, (p. 12, supra), and, elsewhere he gave other reasons for letting Reyes work.

and he (Rodriguez) would wait for an explanation.[26] (Iv: 62.)

Mr. Rodriguez stressed that before he could act on a matter he would have to talk to the worker directly. He was careful to "always" weigh both sides.[27] (IV: 198.) Thus, he said the reason he needed to hear from Andres, and instructed Pelayo to let Andres to to work, was "what if Andres were to come down with an excuse that he was sick. I couldn't decide what was going to happen without knowing what was going on."[28] (Iv: 204.)

At first, Rodriguez testified that after his initial conversation with Pelayo, Pelayo came to him each day to report that Mr. Reyes had not yet returned and asked what he should do. Each time, he repeated his first response and told Pelayo to let Reyes work and wait for an explanation. (IV: 62-66.) Later, however, Mr. Rodriguez testified that after the first

---

[26]In contrast to Mr. Rodriguez, Mr. Pelayo testified that on two occasions Rodriguez said not that he would wait to hear what reason Reyes would bring, but rather that he (Rodriguez) would go talk to Reyes when Reyes returned. (V: 19-20.)

[27]As part of his responsibility of handling unfair labor practice charges, he always got both sides of the story. He made it a practice to confront all the witnesses. (IV: 33.) He tried to "bend over backwards" to avoid unfair labor practices. (IV: 65; 181.)

[28]Mr. Rodriguez gave two other different reasons for allowing Mr. Reyes to go to work. Once, he said it was because of the focus on the rumors about jail. (IV: 71.) At yet another point, he said the reason was that Andres was the union representative, and he wanted to bend a little extra to avoid problems. (IV: 65.)

conversation, it was he who asked Pelayo every day if Reyes was back at work. (IV: 173.)

I find Rodriguez' initial testimony highly implausible. Pelayo and Rodriguez by this time had been working together for some three years. It seems very odd that Pelayo for four days running would ask what he should do after receiving the same answer every day. I credit Rodriguez' later statement that he went to Pelayo to check on Andres' absence.

Rodriguez testified that "generally" after being told an employee was absent for a "couple or three days," he would ask the foreman every day whether the worker had returned. (IV: 169-173.) This testimony contradicts his statement elsewhere that normally he would wait for the worker to return and explain his/her absence. Only where the worker was habitually absent would he go and check on the worker. It was the exception rather than the rule for him to inquire about a worker's absence.[9] (IV: 209-210.) It is undisputed that Mr. Reyes was rarely absent in the nearly 20 years since he began work at Saikhon. (V: 25.)

---

[29]The company had over 700 employees, absenteeism was a problem, and Rodriguez testified that when he checked attendance at the crews he did not identify the workers but simply counted to see that the number of workers matched the number listed in the foreman's crew book. Further, as noted earlier, he acknowledged that the foremen did not necessarily report absences in a timely fashion and that he never made any notation of the foreman's report. (IV: 172.) All of these factors cause me to disbelieve Rodriguez' original testimony. I credit his later testimony that it was the exception rather the rule for him to check on a worker's absence.

Mr. Pelayo testified at first that it was customary for foremen to report absences to Mr. Rodriguez on a daily basis. He later acknowledged that the only absence he reported to Mr. Rodriguez during that melon season was Mr. Reyes[1] absence. (IV: 39.)

VIII. Reyes' Return to Work and Subsequent One Day Absence

Wednesday, June 25, was the first day Mr. Reyes was able to report for work, and he did so. Pelayo said nothing to Andres when he returned to work, but Andres told him he had been unable to come to work because he was in jail. (II: 110.) Pelayo said it was okay.[30] He did not tell Andres to talk to Rodriguez. (II: 109; 112-115.)

Pelayo, on the other hand, testified that when Andres reported to work, he told Andres he could work but to go see Rodriguez.[31] (V: 15.) Pelayo first testified that Andres said

---

[30]Respondent's counsel sought to impeach Andres by showing him his declaration and inquiring why he did not state therein that Pelayo said "okay." In the declaration, Andres stated that he returned to work with no problems. (II: 112.) I find the tenor of that statement consistent with his testimony at trial.

[31]Although he said he told Andres to talk to Rodriguez, as noted previously, Pelayo twice testified that Rodriguez told him that he (Rodriguez) would talk to Andres when Andres returned. (V: 19-20; 37.) Rodriguez, in fact, testified that he told Pelayo several times to let Andres go to work and to wait for an explanation. He did not tell Pelayo to tell Andres to talk to him (Rodriguez). (IV: 68-69.) Based on the inconsistencies in the testimony of Pelayo and Rodriguez here and my evaluation of their overall credibility as compared to Reyes, I credit Reyes and find that Pelayo did not at any time tell him to talk to Rodriguez and gave him permission for the absence on the 26th. (See pp. 23-24.)

he would do so. (V: 16; 42.) Later, he changed his testimony and said Andres made no response. (IV: 66-67.) He further testified that he did not ask Andres about his absence, and Andres did not say anything about being gone. (V: 15.)

Mr. Reyes testified that when work ended about 8:30 that morning, he told Pelayo he needed to be off the next day to appear before a judge in Mexicali to sign some documents. Pelayo told him it was fine; that he should go straighten out his affairs. (I: 60, 63, 70-71; II: 109.) Reyes said other workers heard this conversation. He specifically recalled his brother Felix, Valentin Valdez, Elias Piceno and Nazario Mendez being present.[32] (II: 116.)

Pelayo, on the other hand, testified that Rodriguez gave him no reason for wanting the day off. He stated when Andres raised the subject, (he) Pelayo told him to talk to Rodriguez. (V: 16.)

I credit Mr. Reyes. Mr. Reyes was rarely absent during the nearly 20 years since he began working at Saikhon. The one or two times he was absent in the 1986 spring melon season prior to the events in question here, he obtained permission.

---

[32]Piceno testified on rebuttal that he overheard the conversation. He recalled that Mr. Reyes said he had to fix some papers and that Pelayo replied, in effect, "Okay. Go take care of your business." (V: 69-70; 77.) He did not hear Pelayo mention Adolpho Rodriguez[1] name. (V: 76.) Andres Reyes testified early on that Piceno was present at this conversation, so I draw no adverse inference from the fact that General Counsel presented Mr. Piceno as a rebuttal witness.

He also sought permission for his absence on June 20. When he

found he needed more time to resolve his affairs, he personally came to work on the 21st to tell Pelayo he could not work because he still needed time to resolve matters. Not finding Pelayo there, he did not simply leave but instead sought out the crew captain, informed him and asked him to relay his message to Pelayo. When he was put in jail, he had his wife tell his brother Felix to notify Pelayo that Andres would be absent.

Reyes' behavior regarding his absences attests that he took his responsibilities seriously. I do not believe that he suddenly changed his manner, went to work after being absent four days, said nothing to his foreman, and, then, giving no reason, asked for the next day off. Such behavior is inconsistent with his prior actions.

IX. The Decision to Fire Reyes

Rodriguez testified that Pelayo spoke to him on the 25th and told him that when Andres asked for the next day off he (Pelayo) had told Mr. Reyes that he needed to talk to Rodriguez in order to take the day off and that Andres had not responded. (IV: 67-68.)[33]

[33]Respondent's counsel did not ask Mr. Pelayo any questions regarding what he said to Mr. Rodriguez after Mr. Reyes' return work; nor did the General Counsel. Only Mr. Rodriguez testified on this point, and his testimony was not admitted for the truth but only to show its effect on Rodriguez.

It will be remembered that elsewhere Pelayo testified Andres

said he would go talk to Rodriguez. At various points in his testimony, Mr. Rodriguez gave different reasons regarding his decision to fire Mr. Reyes. He first stated there were two reasons: (1) there were rumors circulating that Mr. Reyes had gone to the police station in Mexicali to see about his son and was arrested for carrying a gun;[34] (2) Reyes did not come talk to him after Pelayo told Reyes to do so but just took the next day off. (IV: 71.) Later, he gave a more expanded list: (1) Reyes took more time than he had permission for; (2) he gave no explanation for his absence; (3) the rumors he was in jail; (4) the rumors he took a gun into the police station in Mexicali;[35] (5) he asked for another day off when he returned, and (6) he did not talk to Mr. Rodriguez when Mr. Pelayo told him to do so. (IV: 74, 181, 214, 233.)

Rodriguez decided to fire Mr. Reyes on the 26th, the day Reyes was absent. He testified he told Pelayo he had decided to fire Reyes because Reyes gave no explanation for his absence, and

---

[34]Mr. Rodriguez admitted he did not know whether the rumors were true.

[35]Mr. Rodriguez repeatedly stressed his concern about the rumors. In fact, when Respondent's counsel stated that the ground for the firing was the days Reyes was absent, Mr. Rodriguez interjected that it was also the rumors. (IV: 206.)

he did not talk to Rodriguez. (IV: 207.) Pelayo recalled that Rodriguez told him Reyes was being fired "because he did not tell us about his absences." (V: 45.)

Rodriguez instructed Pelayo to give Andres his check, tell him he was terminated and, if Andres wanted to know anything about it, he should talk to Rodriguez. (IV: 72.) He told Pelayo not to discuss the matter with Andres.[36] (IV: 73.)

X. The Firing of Reyes

As noted earlier, Mr. Reyes had notified Pelayo at the end of work on the 25th that he could not work the next day and was absent June 26. He reported to the Double A station on the 27th, and foreman Jesus Castro told him there was no work at the company that day. The next day, Saturday, June 28, Mr. Reyes again reported to work at the Double A pick-up point.

He saw Pelayo and Castro and greeted them. Castro returned his greeting, but Pelayo did not. Pelayo handed him his check saying "El Pitujo" has fired you. (Mr. Reyes explained that "El Pitujo" is a nickname meaning a person of short stature such as Mr. Reyes and Mr. Rodriguez. There was no implication the term is perjorative.)

Reyes asked "why" since he had asked Pelayo for permission. Pelayo responded that they were orders from the office and that

[36]He testified his general instructions to all the foremen were that they should not discuss anything regarding the union so as to avoid unfair labor practices. (IV: 73.)

Reyes should go talk to the union to see if he could fix it because Pelayo didn't know anything else. (I: 56-57; II: 117.)

Mr. Reyes had brought the papers from the judge (Public Administrator), whom he had appeared before on the 26th, to prove why he was absent. But Pelayo and Castro would not let him show the papers. (I: 60; II: 109.)

Pelayo testified at first that he told Reyes only that he was fired and that Reyes should talk to Rodriguez. (V: 20.) On cross-examination, however, he said he told Reyes he was fired because he was absent several days without advising the company. (V: 44.)

I credit Reyes' account. He impressed me as a truthful witness. He answered questions fully on both direct and cross-examination. He was consistent without appearing to testify by rote.

Approximately five days after being fired, Mr. Reyes went to talk to Pelayo at Pelayo[1]s home. He asked why Pelayo had fired him. Pelayo responded that he had not fired Mr. Reyes, that he had given him permission. He said it was Rodriguez who had fired Reyes, and Pelayo referred to Mr. Rodriguez using "a bad word." (I: 57.) Mr. Pelayo did not deny that this exchange took place.

Rodriguez testified he was surprised that Reyes did not come to see him after he was fired because they had a co-operative working relationship, and he expected Reyes to explain what had

happened.[37] Respondent's counsel asked Rodriguez if he would have changed his decision to fire Andres if Rodriguez had spoken to Reyes. Rodriguez replied in a manner and tone best described as sanctimonious, "I think I would have, yes."[38] (v: 74.) Respondent's counsel tried to provide Rodriguez a chance to salvage the situation by querrying; "Well, wouldn't it have depended on what [Andres] told you?" (IV: 74.)

This is one of several instances where while Mr. Rodriguez was focused on shaping his testimony to prove one point, his statements undermined his testimony on other issues. Here, his focus was on portraying himself as an open-minded, reasonable person not on defending the reasons he fired Reyes. Obviously, if he were truly as troubled by the rumors as he repeatedly stressed, he would not have made the response he did.[39]

---

[37]Reyes testified he did not go talk to Rodriguez because Rodriguez "doesn't listen or understand reasons."

[38]His response is particularly incredible in view of his repeated emphasis about his concern regarding the rumors. At one point, he stressed that there was something seriously wrong with someone who would take a gun into the police station as Mr. Reyes was rumored to have done. Observing him testify, I am convinced Rodriguez very much exaggerated his concern over the rumors and that his main reason for repeatedly stressing them was to reflect negatively on Mr. Reyes and to enhance the bases for firing Reyes.

[39]Another such instance again occurred when Rodriguez' focus was casting himself in a good light. He said he had to wait for an explanation from Reyes because "suppose Andres was sick." The picture of him waiting for Reyes' explanation with an open mind in view of his repeated statements of his concern over the rumors rings hollow. His manner was insincere.

On several occasions he made self-serving statements which were contradicted by. his testimonial demeanor or by objective facts. He described himself as a fair, even-handed person who always got all sides of a story before taking action. He described his relationship with Mr. Reyes as co-operative, noting it was helpful to have an on-the-spot union representative with whom to resolve labor problems.

His demeanor at trial is inconsistent with both assertions. Mr. Rodriguez frequently displayed a belligerent, argumentative attitude, and he did so not after lengthy questioning or argumentative questions or other conduct reasonably likely to irritate someone. His temper flared mildly only minutes after General Counsel began to cross-examine him. His tone of voice was sharp and his manner challenging. There was nothing about General Counsel's tone of voice, attitude or questions which should have occasioned such a reaction.[40]

Even though Respondent's counsel took. Rodriguez aside and cautioned him about his behavior, his challenging manner and

---

[40]Mr. Reyes, on the other hand, displayed irritation on only a few occasions during cross-examination. My reaction in watching him was that he showed appropriate affect. By this I mean he showed annoyance at times where one might reasonably expect a person to display annoyance e.g., argumentative questions (II: 66-67); being questioned insistently about minor points (II: 112-115; 120-126); being questioned repeatedly on the same subject from different angles. (II: 80-81.) I imply no impropriety on Respondent's counsel's part. He simply conducted an intensive, vigorous cross. I found the directness and naturalness of Reyes[1] responses convincing.

obstinancy were even more pronounced on other occasions. (IV: 105-108; 182-186; 232-233.) Mr. Rodriguez' behavior was sufficiently inappropriate that Respondent's counsel attempted to mitigate its effect by arguing in its brief that it is irrelevant whether I believe that Mr. Rodriguez was "egotistical, arbitrary and unreasonable." (Resp. brief, p. 41.) To the contrary, his behavior while testifying is relevant to a number of issues in this case.

His manner clearly evidenced a person who does not like to be questioned and who reacts negatively to challenges to his authority. These behavior patterns do not square with several elements of his testimony. For example, he stated that he and Mr, Reyes were always able to work co-operatively together and to settle all issues.

His tone of voice and his manner when he testified on this point early in his testimony on direct examination struck me as false and contrived at the time he said it, and after having the opportunity to observe him on the stand during cross-examination, I found it even more unbelievable.

Observing him testify, I am convinced that he would resent a person such as Mr. Reyes. Reyes' manner at trial suggests he would be assertive in insisting that workers' rights be recognized.

H. Post-Firing Events

Mr. Rodriguez originally fired Reyes from all work with the company. (IV: 97.) After the firing, Mr. Reyes spoke to UFW

representative Esteban Jaramillo who said he would speak to Mr. Rodriguez.

Rodriguez testified that while talking to the UFW approximately a week after the firing, he decided that Mr. Reyes should only have lost his seniority in the melons. (IV: 97.) He said he reviewed what had happened and wanted to be consistent with what the company had done in the past.[41] He said he felt he had overreacted and wanted to be fair to Andres.[42] (IV: 95-98.) So, he changed his decision. He did not say he communicated this fact to the Union.

Mr. Reyes talked to Mr. Jaramillo after the conversation with Rodriguez. Mr. Jaramillo told Reyes that he had spoken to Mr. Rodriguez who said Reyes should "go ahead and file a complaint. That he had fired me, and that was it." (I: 59.) According to Mr. Reyes, the company never specifically told him why he was fired. (I: 58.)

I credit Mr. Reyes on this point. The statement attributed to Mr. Rodriguez is consistent with Mr. Rodriguez' overreacting by firing Mr. Reyes, and it is consistent with the demeanor Mr. Rodriguez displayed at hearing.

---

[41]The example he gave of being consistent with past practice was that someone who did not show up for a recall only lost seniority in that classification. (IV: 98.)

[42]Previously, Mr. Rodriguez testified that he "bent over backwards" to give Mr. Reyes leeway because he was a UFW activist. Yet, he fired Mr. Reyes when, according to Mr. Rodriguez, he and Reyes had talked previously about precisely such a situation, and Rodriguez had taken the position that a worker would only lose seniority.

XI. Absences of Other Workers

Mr. Reyes testified that during the thin/weed season before he was fired, two employees, Susana Montoya and Esperanza Rodriguez, who were in Pelayo's crew took time off without permission and were not fired. Respondent offered no rebuttal evidence.

According to Rodriguez, Andres' son Roberto missed 3 or 4 days of work at the end of 1984 or the beginning of 1985. Andres came to Rodriguez and told him Roberto was in jail and argued that Roberto should not lose his seniority. (IV: 27-28.) Rodriguez told Andres being in jail was not a legitimate reason for missing work and stated that Roberto would lose his seniority. (IV; 29.) Rodriguez acknowledged there was no such policy at Saikhon, and he just decided to institute the policy on his own.

Reyes denies he ever discussed such a matter with Rodriguez. He testified his son Roberto was in jail in 1984, but he (Andres) informed Roberto's foreman, Jesus Arredondo. (II: 13-19; 79.) Roberto went back to work at Saikhon after he was released from jail. Thereafter, Roberto hurt his leg, was absent, and lost his seniority. Rodriguez acknowledged that Roberto did not lose his seniority because he was in jail, but because he did not show up for work.

I credit Reyes. It is more logical to me that he would notify the foreman given his testimony that the foremen determined whether a worker could return to work. Further, Rodriguez stated Reyes argued that the policy at Saikhon was that Roberto should not lose seniority. If that was Reyes' understanding of the policy, I see no reason why he would approach Rodriguez to try to convince him of something he had no reason to believe would be an issue. Finally, overall, Rodriguez[1] tetimony contains so many contradictions and self-serving statements that I credit Reyes' account.

The parties stipulated to the dates Roberto Reyes was absent. (V: 82-83; 85-87.) They are consistent with Reyes account because Roberto was absent five days at the end of 1984, returned to work, was absent for seven days at the end of January and then, beginning February 2, did not return to work the remainder of the season. However, without knowing when Roberto was in jail, it is impossible to be sure what happened.

The time books kept by the foremen in the 1986 sack melon harvest[43] reflect that several workers were absent at least three consecutive days and then returned to work. Mr. Rodriguez could not say whether any of them had permission.[44] (IV: 125-126, 130, 146-147.)

Jesus Maldonado was absent five days the week of May 24 and returned to work the next week.[45] He was in crew 5. Juan Berumen was absent the last three days of the week ending May 31, and he worked each of the following three weeks. Carlos Rodriguez was absent the last six days of the week beginning June 22.[46] Felipe Prado[47] was absent from crew 6 for the last four days of the week ending May 24. He returned and worked in crew No. 7 the

---

[43] c.C. Exs. 7-12; 18-19

[44] As noted earlier, I struck the testimony regarding the absence of Alfredo Viegas because Rodriguez admitted that he had no independent recollection of this matter but had testified based on what Pelayo told him when Rodriguez was preparing for his testimony. (IV: 41, 237-239.)

[45] Rodriguez said the absence was due to the layoff, but the dates of the absence do not correspond to those of the layoff which was from June 6-June 19. (IV: 80-84.)

[46] There are two workers named Carlos Rodriguez. This individual's social security number is [redacted], and he worked in crews 1, 3, and 4. Adolpho referred to a Carlos Rodriguez in crew 1 who was absent because of surgery. That person is apparently the other Carlos [redacted]) since he is listed only in crew 1.

[47] He is erroneously referred to in the transcript as Mr. Trado.

first few days of the next week and was absent the last three days of that same week. Leopoldo Duenas was absent the last three days of the season. His absence was unexplained. (IV: 143.)

All of the above individuals appear on the seniority list for the next melon sack season, that is, the 1987 season. (G.C. Ex. 17) Thus, none of them lost seniority. In addition to these workers who were discussed at hearing, there are at least two other workers absent for at least three consecutive days whose names are on the 1987 melon seniority list.[48]

ANALYSIS AND CONCLUSIONS

In order to prove unlawful discrimination in violation of sections 1153(c) and (a) of the Act, the General Counsel must prove: (1) that the worker engaged in union or other protected concerted activity, (2) that the employer knew of the protected conduct, and (3) that there is a causal relationship or nexus between the adverse action and the protected activity.[49] Respondent then has the burden of proving that it would have taken

---

[48]Librado Arballo in crew 8 did not work May 25, 26 and 27. He returned to work the 29th and worked the remainder of the week. He also did not work June 23-26 or June 28 in the last week. (It will be recalled that the company had no work on the 27th.) Jesus Estrada (crew 3) did not work May 22, 23 and 24 and returned to work the following week.

[49]Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 U.S. 989 [108 LRRM 2779]; Lawrence Scarrone (1981) 7 ALRB No. 13.

the adverse action even absent the worker's protected activity. (NLRB v. Transportation Management Corp. (1983) 462 U.S. 392 [113 LRRM 2857].)

Here, Mr. Reyes' activities in support of the UFW and his role as spokesperson for the employees was visible and continued over a number of years. Respondent concedes his protected concerted and union activity and its knowledge thereof. Thus, the only issue is whether the firing of Mr. Reyes from all company operations, and its subsequent reduction to a loss of seniority in the melons, were occasioned by his protected conduct.

As in most such cases, the evidence is circumstantial. Direct evidence of discriminatory motive is rarely present. (Blue Star Knitting, Inc. (hereafter Blue Star) (1975) 216 NLRB 312 [88 LRRM 1652]

Classic indicators of discriminatory motive are: timing, union animus, prior unlawful acts, no reason or shifting reasons for the disciplinary action, inconsistency, overly harsh treatment, disparate treatment, sudden ctiange in enforcement of policies, and failure to investigate before taking the adverse action.

In Blue Star, supra, the NLRB found an employer illegally discharged an employee because of her union activity. The case was decided prior to Wright Line, supra, but the NLRB applied the same standard. It determined that the employer was motivated "in substantial and controlling part" by its opposition to the

employee's union activities and would not have fired her "'but for [her] role as a prime mover for the union at the company.'" (Blue Star, supra, at pp. 318-319.)

The NLRB relied on several factors including the fact that Respondent had displayed hostility to the union. Union animus and prior unfair labor practices are "proper and highly significant factors" which the national board considers in evaluating employer motivation. (Id. at p. 318.)

Another element in the NLRB's decision was that the employee was the "key employee" in the ongoing union organizing drive. The national board opined that although strong union activism, coupled with an employer's opposition to union activity, does not establish a discriminatory discharge, nonetheless, where the employee discharged is the prime mover for the union, that fact may "'supply shape and substance to otherwise equivocal circumstances.'" (Id. at p. 318, quoting from N.L.R.B. v. Davidson Rubber Co. (1st Cir. 1962) 305 F.2d 166, 169.)

The national board evaluated the employer's other unfair labor practices, the employee's position as the dominant union activist, the timing of the discharge, the fact that the employee was fired for not adhering to a formal policy not previously strictly enforced (and complied with what she should have done regarding her leave), and her past satisfactory performance and attendance. Based on the foregoing, the national board inferred the true reason for the discharge was the employee's vigorous

support for the union and found the Respondent's asserted reasons for the discharge were pretextual.

The NLRB found it especially significant that the leading union activist was fired for non-compliance with the leave of absence policy since she had a good attendance record whereas absenteeism was a major problem at the company. Similarly, Mr. Rodriguez described absenteeism as a major problem at Saikhon, but Mr. Reyes had no history of absenteeism since he began working at the company some 20 years ago. In the season he was fired, he had only one or two absences prior to those at issue, and they were excused.

Respondent contends that Mr. Reyes was discharged, in part, because he was absent beyond the one day he was granted, did not obtain an extension, and did not explain his absences. I have found that he was not granted one day and one day only. Moreover, even if Respondent's version were true, that fact would not support Reyes' discharge. Mr. Rodriguez acknowledged that the determining factor was not how long a worker was absent but whether the employee had an acceptable reason for the absence.

I have found that Mr. Reyes sent word that he would not be at work because of "personal problems." Rodriguez' own testimony established that notice by co-workers was acceptable, and that general statements such as needing to be absent to attend to personal or family business sufficed.

I have already set forth my reasons for crediting Reyes' testimony that when he returned to work, he explained to Pelayo why

he had been absent. He would have provided documentation, but Pelayo and Castro would not let him.

Based on the foregoing, I reject Respondent's defense that it fired Reyes on the above stated grounds. Mr. Reyes' absences through the 24th do not support Rodriguez' decision to fire him, unless he did not provide an acceptable reason for his absence. Based on my credibility resolutions discussed, supra, I also reject the defense that Reyes was fired for his absence on the 26th. I now turn to Respondent's contention that the rumors were a significant element in Reyes' discharge.[50]

Rodriguez repeatedly stressed how significant the rumors were, but he did not mention that reason to Pelayo nor to the UFW. Nor did Respondent assert the rumors as a reason in its answer or at the prehearing conference. If the rumors were truly as significant an element in Rodriguez' decision as he says, it *is* odd that they first arise only at hearing.

Shifting reasons for a discharge justifies inference of an unlawful motive. Respondent's justification for discharging

---

[50]I recognize that Rodriguez testified that his decision to fire Reyes was based on all of the reasons he articulated at trial. Nonetheless, it is important to analyze each facet. This is not a case where the whole is greater than the sum of its parts, but one where some elements assertedly relied on cannot be the true reasons for firing Reyes.

Reyes shifted from the absences to both the absences and the rumors. Rodriguez repeatedly emphasized the latter.

Similarly, providing a false reason also warrants inferring a discriminatory motive. I have found that Rodriguez' assertion that he was motivated by the rumors is false. He exaggerated their significance to him in order to provide an explanation for the unusual attention paid to Reyes' absence which was at odds with the normal procedures at Saikhon and to buttress his discharge.

Deviating from established procedures also indicates an unlawful motive. There are several deviations from normal practice.

If a worker were absent for several days, Mr. Rodriguez normally would not take affirmative action to check on the worker's absence unless there was a chronic problem of absenteeism. Yet, with Reyes who had a good attendance record in a large company plagued with problems of absenteeism, Rodriguez checked on Reyes every single day.

There is another departure from Respondent's usual practice. Pelayo acknowledged Reyes' absence was the only one he reported to Rodriguez that season.

Third, Mr. Rodriguez repeatedly stressed that he <u>always</u> got both sides of a story and confronted the witnesses before he made a decision or took action. Yet, did not talk to Reyes nor to Valdez or Felix Reyes who notified Pelayo of Reyes' absence.

He decided to fire Reyes after talking only to Pelayo. I have discredited Rodriguez' testimony that Pelayo was complaining that Reyes was absent and that Pelayo had "a lot of trouble" with Reyes' absence because of the rumor about jail. Pelayo never testified he told Rodriguez about such rumors.

Finally, Rodriguez testified that the reason a worker was absent was the determining factor. Yet, he discharged Reyes on the basis of rumors which Rodriguez admitted he did not know were true. Such action, coupled with his failure to talk to Reyes or any other worker, is suspicious in view of Rodriguez' usual practice of getting all versions and weighing both sides before acting.

The failure to conduct an investigation before disciplining a worker, especially where the discipline is discharge, is a basis for inferring a discriminatory motive. (Lancer Corporation (1984) 271 NLRB 1426 [117 LRRM 1220] enf'd (5th Cir. 1985) 759 F.2d 458 [119 LRRM 2290]. This is especially true where the normal practice is to conduct such an investigation.

A discriminatory motive also may be inferred from inconsistencies and omissions in Respondent's evidence. (Illini Steel Fabricators, Inc. (1972) 197 NLRB 297 [80 LRRM 1582].) I have set forth numerous inconsistencies in Rodriguez' and Pelayo"s testimony on several issues.

A sudden change in enforcement of policies indicates unlawful motive. Respondent's initial assertion was that Reyes

was fired because of his absences. As discussed previously, Reyes did more than was required by company practices. Rodriguez ultimately admitted as much on several points. Insisting that Reyes should have complied with the initial set of policies Rodriguez detailed amounts to a change in enforcement. Since it was sufficient to simply bring in an acceptable excuse upon returning to work, requiring Reyes to meet stricter standards also constitutes disparate treatment.[51]

Discharge of a vocal union adherent was found unlawful by the NLRB where the employer did not adhere to its usual practice regarding absences. (Rodney Heymann d/b/a Galeton Production Company (1970) 182 NLRB 135 [74 LRRM 1107]. The employee was discharged for being absent for more than three days without reporting in, despite the fact that co-workers had notified appropriate company personnel that the employee was ill and would be absent. In practice, employees were allowed to send word via co-workers, and this was understood to be acceptable by the employees. The NLRB found that, in effect, the discharged employee was subjected to a new rule.

Rodriguez admitted he overacted when he fired Reyes rather than simply eliminating his seniority in the melon. His

[51]In view of Respondent's very lenient policies, the unexplained absences of the other workers described, supra, also suggest disparate treatment.

stated reason for changing his mind does not stand scrutiny. He said he wanted to be consistent with past practice, but the example he gave was that of *a* worker who fails to respond to a recall. That situation has no bearing on Reyes' case.

He overreacted and, initially, took a hard line attitude, telling the UFW he had fired Reyes and that was it. They should file a charge. Overly harsh treatment is another classic indicator that Respondent bears an unlawful motive.

An employer may fire an employee for a good reason, bad reason or no reason at all so long as it does not do so for a prohibited reason. Harsh treatment, like many of the others factors already discussed, standing alone or even together do not necessarily require a finding that Respondent has acted unlawfully. But they are properly used as tools to discover Respondent's true motive for its disciplinary actions.

Added to the above elements is the fact that Mr. Reyes[1'] discharge occurs against the backdrop of a long history of union animus by Respondent, and the fact that Respondent has committed numerous unfair labor practices. The fact that there have been no adjudications of unfair labor practices in the last few years does not eliminate the probative significance of prior unfair labor practices.[52]

---

[52]The mere fact that unfair labor practice charges were dismissed does not prove that no unfair labor practice occurred. There can be myriad reasons for such dismissals. Investigation of charges is manifestly different than adjudication.

I have referred previously to Rodriguez' tendency to forcus on one issue, shape his testimony to that issue, and undermine his testimony elsewhere. Another example is relevant here.

At one point in his testimony, Rodriguez sought to downplay the significance of the UFW and Reyes' concerted activity to obviate an inference that union activity was sufficiently important that it would play a role in his decision to fire Reyes. His professed unconcerned attitude toward the UFW, and Reyes as its representative, is belied by the significant role the UFW played in the way he formulated and implemented his labor relations policies.

On numerous occasions, he stressed his concern to "bend over backwards" where the Union was concerned. He handled union people with "kid gloves". He gave Reyes more leeway.

He instructed Pelayo not to talk to Reyes about the reasons for his being fired. In fact, he told all his foremen not to have anything to do with anything that related to the union.

It is obvious that Rodriguez was very concerned about the Union. The question is if that concern caused him to discharge Reyes.

General Counsel has clearly established a prima facie case. There are numerous factors supporting an inference of unlawful motive. Based on my foregoing findings, I conclude Respondent has failed to rebut General Counsel's case.

I find that it was Andres Reyes' continuing union activism and his continued insistence on employee rights over a period of years, indeed up to the very month he was discharged, which caused Respondent to act precipitously to discharge Mr. Reyes. General Counsel has characterized Mr. Reyes as a "thorn in the side." I am persuaded that Respondent viewed him as just that.

Respondent found a set of circumstances it believed would justify firing Mr. Reyes, and it acted. I find Respondent's asserted reasons for firing Reyes were a pretext.

Its subsequent reduction of the discharge from all company operations to a loss of seniority in its melon operations is similarly tainted. I have discredited Rodriguez testimony that he changed his mind because he wanted to be consistent with past practice and to be fair to Mr. Reyes.

Based on my findings regarding the initial discharge, I find Respondent would not have deprived Reyes of his seniority in its melon operations were it not for his vigorous union and other protected concerted activity. Respondent has violated sections 1153(c) and (a).

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

ORDER

Pursuant to Labor Code section 1160.3, Respondent Mario Saikhon, Inc., its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, depriving of seniority, or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or with respect to any term or condition of employment because he or she has engaged in concerted activity protected by the Act.

(b) Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO or in any labor organization by unlawfully discharging, depriving of seniority, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized by section 1153(c) of the Act.

(c) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer Andres Reyes full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other employment rights and privileges, and make him whole for all losses of pay and other economic losses he has

suffered as a result of his being discharged or deprived of seniority, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms (1988) 14 ALRB No. 5. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since its unlawful acts.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying and otherwise copying, all payroll and social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of back pay and interest due under the terms of this Order.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each languages for the purposes set forth in this Order.

(d) Upon request, provide the Regional Director or his designated Board agent with the dates of the next peak season. Should the peak season have already begun at the time those dates are requested, inform the Regional Director of when the present peak season began and when it is anticipated to end and inform the Regional Director of the anticipated dates of the next peak season.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to

all agricultural employees in its employ from May 17, 1986, the first day of the 1986 spring melon harvest, to the date of mailing.

(f) Provide a copy of the signed Notice to each employee hired during the 12-month period following the issuance of this Order.

(g) Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicious places on its property, including places where Notices to Employees are usually posted, the exact period(s) and places(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy of the Notice which has been altered, defaced, covered, or removed.

(h) Arrange for a Board agent or representative of Respondent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken

to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: June 20, 1988

BARBARA D. MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office of the Agricultural Labor Relations Board [ALRB or Board] by the United Farm Workers of America and by Francisco Amial, the General Counsel of the ALRB issued a complaint which alleged that we, Mario Saikhon, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging employee Andres Reyes from all company operations and by later discharging him from or depriving him of seniority in our melon harvests. The Board found we took these actions against Andres Reyes because he had participated in Union activities and spoken to the company on behalf of other workers regarding the terms of their employment. The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

We also want you to know that the Agricultural Labor Relations Act is a law that gives you and all other workers in California these rights:

1. To organize yourselves;
2. To form, join, and help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

BECAUSE YOU HAVE THESE RIGHTS, 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.

WE WILL NOT discharge or refuse to rehire any employee because he or she participated in union activities, spoke with us on behalf of other workers regarding the terms of their employment, or participated in ALRB processes or proceedings.

WE WILL offer to reinstate Andres Reyes to his previous position as a lettuce harvest worker and we will reimburse him with interest for any loss in pay or other economic losses he suffered because we discharged and refused to rehire him.

DATED: MARIO SAIKHON, INC.

By: _____
(Representative) (Title)

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor

Relations Board. One office is located at 319 Waterman Avenue, El Centre, California 92243. The Telephone number is (619)353-2130.

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

DO NOT REMOVE OR MULTILATE