Hollister, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BERTUCCIO FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 82-CE-67-SAL 82-CE-79-SAL 82-CE-139-SAL 10 ALRB No. 52

DECISION AND ORDER

On October 5, 1983, Administrative Law Judge (ALJ) Barbara D. Moore issued her attached Decision in this proceeding. Thereafter, Respondent and the Charging Party each timely filed exceptions and a supporting brief, and General Counsel timely filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm her rulings, findings and conclusions, as modified herein, and to adopt her recommended remedial Order, with modifications.

The Failure to Rehire Returning Strikers

On November 17, 1978, the Board certified the United Farm Workers of America, AFL-CIO (UFW or Union) as the exclusive

[1/] All section references herein are to the California Labor Code unless otherwise specified.

bargaining representative of Bertuccio Farms' (Bertuccio) agricultural employees. Negotiations began in early 1979, but no agreement was reached, and the Union called a. strike on July 10, 1981. Picketing occurred almost daily until the middle of June 1982, when many of the striking employees sought to return to work.

General Counsel's complaint in this matter alleged that Respondent discriminatorily refused to rehire six returning strikers, Ramiro Perez, Javier Ceja, Alfredo Vasquez, Carlos Haro, Felix Rodriguez, and David Soliz, because of their Union and other protected concerted activities.

On June 18, 1982, a group of striking employees presented to Tina Bertuccio a petition offering unconditionally to return to work. The petition, signed by 36 employees, was handed to Bertuccio by Ramiro Perez, who acted as the group's spokesperson and translator.

Bertuccio testified that she asked Perez why his name was not on the petition. According to her, he answered that he did not know if he was going to return to work because he was still working on a Union boycott.[2/] In his testimony, Perez admitted not signing the petition because of the boycott, but claimed he wanted to work for Respondent and work in the boycott as well. He denied telling Bertuccio that he was not sure when

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[2/] Javier Ceja testified that the Union started a boycott of Bertuccio products in October 1981 in San Francisco, Oakland and Los Angeles. Workers would talk to owners of markets and warehouses to see if they would remove Bertuccio products from their places of business; if the owners refused, the workers would picket.

or if he would return to work.

David Soliz testified that he did not sign the petition because he was not present when it was circulated among the workers. However, while Perez was discussing the petition with Bertuccio, Soliz (through Perez) asked for his own job back. Bertuccio testified that she told Perez that Soliz could not have his job back because of felony charges filed against him for alleged strike misconduct. Bertuccio stated that at the same time, she named other employees who would not be rehired for the same reason: Alfredo Vasquez, Javier Ceja, Carlos Haro, and Felix Rodriguez.[3/]

Javier Ceja did not sign the petition because at the time it was circulated he was working on the UFW boycott against Respondent. However, Ceja separately signed an offer to return to work and presented it to Tina Bertuccio on July 21, 1982.

Carlos Haro, who had gone to Mexico, did not sign the petition and there was no evidence that he communicated to anyone a desire to return to work.

Under established precedent of this Board and the National Labor Relations Board (NLRB) economic strikers who unconditionally apply for reinstatement have a right to immediate reinstatement unless the employer can show that its refusal to reinstate the strikers was due to a legitimate and substantial business justification. (NLRB v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375 [66 LRRM 2737]; Frudden Produce, Inc. (1982)

[3/] Ramiro Perez testified that she called out his name also; Bertuccio denied having done so.

8 ALRB No. 42.)

One such justification recognized by the NLRB and this Board is that the jobs claimed by returning strikers are occupied by permanent replacements hired during the strike. (NLRB v. Fleetwood Trailer Co., Inc., supra, 66 LRRM at 2738.) That defense is not applicable herein, since Respondent made no claim that it had hired permanent replacements for the strikers, and in fact it did rehire many of those who petitioned for rehire.

Another recognized legitimate and substantial business justification for refusing to reinstate returning strikers is a good faith belief by the employer that the strikers have engaged in serious strike misconduct. (Dallas General Drivers, Etc., Local Union No. 745 v. NLRB (1968) 389 F.2d 553 [67 LRRM 2370]; NLRB v. Plastic Applicators, Inc. (5th Cir. 1968) 369 F.2d 495 [63 LRRM 2510]; Capital Rubber & Specialty Co., Inc. (1973) 2O1 NLRB 715 [82 LRRM 1321]; Jai Lai Cafe. Inc. (1973, 200 NLRB 1167 [82 LRRM 1126].) The fact that an employer in good faith believed that a striker engaged in misconduct is no defense to an unfair labor practice finding if the misconduct in fact did not occur. (NLRB v. Burnup and Sims, Inc. (1964) 379 U.S. 21 [57 LRRM 2385]; Armour Oil Company (1981) 253 NLRB 1104 [106 LRRM 1127].) However, once an employer has shown a good faith belief that a striker has engaged in substantial misconduct, the burden of showing that the misconduct did not occur shifts to the General Counsel. (Dallas General Drivers, Etc., Local Union No. 745 v. NLRB, supra, 389 F.2d 553; NLRB v. Plastic Applicators, Inc., supra, 369 F.2d 495; Armour

Oil Company, supra, 253 NLRB 1104; Eagle International, Inc. (1975) 221 NLRB 1291 [91 LRRM 1088].)

Tina Bertuccio's testimony regarding her reason for not rehiring some of the returning strikers was somewhat confused. First, she stated that her reason was "the felonies." Later, she said that she would not have rehired workers who had any charges against them relating to the strike. Finally, she re-stated that her reason was the felony charges, and that if workers had non-felony charges against them she would give them back their jobs.

We affirm the ALJ's conclusion that Respondent refused to rehire Alfredo Vasquez, Felix Rodriguez and David Soliz because of Tina Bertuccio's good faith belief that they had engaged in serious strike misconduct, and we conclude that her belief constituted a legitimate substantial business justification for not rehiring those employees. Although there was no direct testimony concerning the alleged strike misconduct of the three employees, we find that Bertuccio's knowledge of felony charges pending against them showed a good faith belief that they had engaged in serious misconduct. Once Bertuccio's good faith belief was established, the burden of proof shifted to General Counsel to demonstrate that the three employees did not engage in such misconduct. We find that General Counsel failed to meet that burden, and therefore we will dismiss the charges relating to those employees.

We also affirm the ALJ's finding that Carlos Haro did not apply for rehire, and that no evidence showed his failure

to make an offer was excused. Thus, we will dismiss the charge relating to Haro.

We find that Respondent did not have a good faith belief that Javier Ceja had engaged in serious strike misconduct, and we conclude that Respondent violated 1153(c) and (a) by denying him rehire. Ceja testified that when he handed Tina Bertuccio his written offer and asked to come back to work, she went into her office, came back out and said she had no more work for him. When he asked why not, she merely shrugged. In her testimony, Bertuccio admitted not giving Ceja a reason for denying him work on July 21, 1982, and admitted that Ceja was not convicted of a felony, but said she did not rehire him because he was "an instigator," had been "guiding people on the picket line," and, along with Ramiro Perez, was the most vocal and the loudest instigator of her "union problems." When she denied Ceja rehire, she did not refer to any alleged strike misconduct or to his misdemeanor convictions, which in any case did not fit within her stated policy of denying rehire only to those employees charged with felonies. We conclude, therefore, that Respondent; did not show a legitimate and substantial business justification for refusing to rehire Ceja, and that he is entitled to reinstatement as a returning striker.[4/]

[4/] In its supplemental authority in support of its exceptions, filed August 27, 1084, Respondent argued that we should deny reinstatement to all of the alleged discriminatees herein under the authority of Clear Pine Mouldings, Inc. (February 22, 1984) 268 NLRB No. 173 [115 LRRM 1113]. In that case, the National Labor Relations Board (NLRB) held that verbal threats made by

(fn. 4. cont. on p.7)

The ALJ found that Ramiro Perez was not seeking rehire on June 18, 1982 because he was still working in the boycott. However, she found that Perez was relieved of the obligation to make an application thereafter, because of the futility doctrine expressed by the Board in J. R. Norton Company (1982) 8 ALRB No. 76. In that case, we held that an employee is not required to apply for work where the employee's knowledge of the employer's discriminatory hiring practice would reasonably lead the employee to believe that further efforts to seek employment would be futile. We overrule the ALJ's finding that Perez was not required to apply for work, since we find the ALJ's analysis under the futility doctrine to be inapposite. In J. R. Norton Company, members of a clearly defined group of employees were told by the employer that they would' not be rehired because of their protected concerted activities (participation in a work stoppage). The Board limited reinstatement and backpay to those group members who testified at the hearing that they applied for and were available for work, or that their failure to apply was based on a reasonable belief that application would be futile. Here, the ALJ made a demeanor-based credibility finding

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(fn. 4 cont.)

strikers may be sufficient to justify an employer's refusal to reinstate strikers if the threats reasonably tended to coerce or intimidate nonstrikers. We find that case inapplicable here, where Respondent denied consideration of reinstatement to Ceja because of his protected concerted activities, not because of his alleged strike misconduct. Moreover, since Respondent agreed to and actually did rehire employees charged only with misdemeanors, the Board cannot allow that facially nondiscriminatory policy to be discriminatorily applied so as to deny reinstatement only to vocal union activists similarly charged with misdemeanors.

that Perez did not apply for rehire on June 18, 1982. Further, Perez did not testify that he was discouraged from applying -- then or at any later time -- because of Tina Bertuccio's statement that she would not rehire employees charged with felonies.[5/]

We conclude that General Counsel failed to establish all the elements of a prima facie case of refusal to rehire Perez, because there was no showing that Perez made a proper application for work. Therefore, we will dismiss the charges relating to the failure to rehire Perez.

The Unilateral Change in Working Conditions and the One-Day Suspension

General Counsel's complaint also alleged that Respondent unilaterally implemented a new work rule requiring employees to harvest lettuce in the rain, and discriminatorily suspended for one day the employees who had refused to work in the rain.

On November 18, 1982, about fifteen workers in foreman Eduardo Villegas' lettuce cutting crew refused to continue cutting because it was raining. Several workers testified, and crew supervisor Jose Duran acknowledged, that 1982 was the first year the workers were required to cut lettuce in the rain. Prior to that year, if it started raining while the crew was working, the foreman would wait a reasonable length of time to see if

[5/]Even if Perez had been so discouraged, Bertuccio merely expressed her lawful intention not to rehire employees with felony charges against them. Therefore, the ALJ's analysis under Abilities and Goodwill, Inc. (1979) 241 NLRB 27 [100 LRRM 1470] is also inappropriate. There was also no evidence that Perez was discouraged from applying for work because of Bertuccio's unexpressed intention of never hiring him back because he was one of the two top "instigators" of union problems.

the rain stopped. If it continued, he would check with the office and send the workers home. If it had rained at night, and in the morning the rain continued, the foreman would almost never take the crew out to the work site.

When the crew reported for work the next day, November 19, Duran told them there was no work for those who had stopped in the rain, and that only those who had continued to work in the rain could work that day. The following day, November 20, all workers were allowed to work.

A number of workers testified that when they worked in the anise and cardoni crops they did continue working when it rained. Santiago Barajas explained that because of the height of the anise plants (about three feet) and the cardoni (almost as tall as he is) a worker gets soaking wet from the morning fog or dew in those crops anyway, and it makes no difference whether or not it is raining. On the other hand, the lettuce plants are only six to eight inches tall, and the workers do not get wet walking in the lettuce rows because they wear boots. Crew member Ignacio Soltero testified that the workers can cut anise and cardoni while standing, but they must continuously stoop over to cut the lettuce. Thus, he claimed, the rain bothered workers more in the lettuce because they would be warm from working and the cold rain would hit their backs.[6/]

[6/] Duran stated that the anise and cardoni workers were supplied with special clothing when it rained, consisting of a jacket, hat, plastic pants and boots. Duran testified that the same rain gear was furnished to the lettuce workers when it rained

(fn. 6 cont. on p. 10)

A second incident occurred on November 29, 1982, when 6 or 7 lettuce workers refused to continue working because of the rain. That afternoon, Duran told Tina Bertuccio that something would have to be done about the situation because there were a lot of lettuce orders to be filled. At Bertuccio's request, Duran prepared a document which he showed to her and read to a meeting of about 30 workers on November 30. The document stated that the work stoppages could not continue, and that Respondent had an obligation to supply rain gear and not to hire new workers if the present workers could meet the lettuce demand. Duran testified that he explained to the workers that they were not exactly compelled to work in the rain, but it was an obligation, and if the workers continued not to work in the rain, the company would probably bring in others to do the work. Two workers testified that Duran told the workers at the meeting that if they stopped working a third time they would be fired; Duran denied saying this.

We affirm the ALJ' s conclusion that by imposing a new-requirement that workers cut lettuce in the rain, Respondent made an unlawful unilateral change in its employees' working conditions in violation of section Il53(e) and (a).

This Board has the primary responsibility for determining the scope of the statutory duty to bargain and of

(fn. 6 cont.)

in November 1982. Apparently the workers felt that despite the rain gear, working in the lettuce in the rain was mere uncomfortable because of the continuous stooping that was required.

deciding which are mandatory, and which permissive, bargaining subjects. (1 Morris, The Developing Labor Law (2d ed. 1983) pp. 761, 766; Labor Code § 1148.) Generally, "plant" rules are considered subjects of mandatory bargaining under the National Labor Relations Act (NLRA). (1 Morris, The Developing Labor Law, supra, at p. 809.) These include rules pertaining to lunch breaks, dress codes, parking regulations, and overtime work. (Id., at p. 809.)

Thus, in Tenneco Chemicals, Inc. (1980) 249 NLRB 1176 [104 LRRM 1347] the NLRB held that an employer unlawfully failed to notify the union before unilaterally announcing to employees that it expected them to raise their work output to certain levels. In RAHCO, Inc. (1982) 265 NLRB 235 [112 LRRM 1398] the NLRB found that an employer acted unlawfully when it unilaterally changed working conditions by denying employees access to the plant until five minutes before starting time. In Little Rock Downtowner, Inc. (1964) 145 NLRB 1268 [55 LRRM 1156], enf'd 341 F.2d 1020 (8th Cir. 1965) [58 LRRM 2510] the employer violated the NLRA by unilaterally promulgating a rule requiring its waitress employees to remain standing at their stations unless on regular relief periods.

We find that Respondent's institution of a new rule requiring employees to cut lettuce in the rain, when formerly the lettuce cutters were not required to work in the rain, is similarly a mandatory subject of bargaining. Respondent did

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not argue that it was required by an emergency[7/] immediately to institute the change, and did not show why it could not have timely notified the Union and offered to bargain about the change.

We further conclude that the lettuce workers' work stoppage on November 18, 1982 to protest the rule change constituted protected concerted activity, and that Respondent's one-day suspension of workers on November 19, 1982 was an unlawful interference with such activity. Both the NLRB and this Board have frequently held that worker protests over physical working conditions constitute protected concerted activity.

For example, in Martori Brothers (1982) 8 ALRB No. 23, review den. by Court of Appeal, Fourth District, Division One, September 3, 1982, hg. den. September 29, 1982, a crew of lettuce harvesters refused to continue working one afternoon because they were tired and hot and were making less money than usual because of the poor quality of the lettuce, much of which had to be discarded. The Board held that the work stoppage was protected concerted activity in protest of working conditions, and that the employer violated section 1153(a) by discharging the protesters.

In NLRB v. Washington Aluminum (1962) 370 U.S. 9

[7/] There may be occasions when, because of the peculiarities of agriculture, such changes would not require bargaining. For example, unanticipated climatic conditions might require that, for the protection of the crop, employees work a somewhat longer or shorter day (as in inclement weather) until the emergency has passed. This kind of change we would not consider to be a mandatory subject of bargaining. In other situations, NLRB precedent which calls for bargaining would have to be evaluated in terms of its applicability in the agricultural setting. (Lab. Code § 1148.)

[50 LRRM 2235] the employer discharged seven employees for leaving their work in a machine shop because of their claim that the shop was too cold. The Court of Appeals had held the walkout to be unprotected because the workers had summarily left without giving the employer an opportunity to avoid the walkout by granting a concession to their demand. However, the U.S. Supreme Court reversed the Court of Appeals, ruling that the walkout was protected as a protest over conditions of employment, and that the discharges were unlawful.

The Ninth Circuit Court of Appeals decision in NLRB v. Robertson Industries (1976) 560 F.2d 396 [93 LRRM 2529] demonstrates that a determination of the protected or unprotected status of a work stoppage does not necessarily depend upon whether the activity is a one-time occurrence. In that case, workers first engaged in a one-day work stoppage to protest problems caused by a heavy workload. Two or three months later, the workers attended a meeting during regular working hours at a union hall to discuss work-related problems. The Ninth Circuit upheld the NLRB's decision that the Robertson employees' walkouts were not part of a recurring pattern of half-work, half-strike activities, and ruled that the workers had engaged in protected concerted activities for the purpose of protesting the company's working conditions.

Although the November 18, 1982, work stoppage in the instant case was followed by another stoppage on November 29, there was no evidence that either stoppage was part of "a plan or pattern of intermittent action which is inconsistent with

a genuine strike or genuine performance by employees of the work normally expected of them by the employer." (Polytech, Inc. (1972) 195 NLRB 695 [79 LRRM 1474].) No evidence indicated that the protesting employees intended to continue to refuse to work every time it rained, which tactic might have been considered an attempt to dictate the terms and conditions of their employment. (See Valley City Furniture Co. (1954) 110 NLRB 1589 [35 LRRM 1265], enf' d 230 F. 2d *947* (5th Cir. 1956) [37 LRRM *2^40];* C. G. Conn, Ltd, v. NLRB (7th Cir. 1939) 108 F.2d 390 [5 LRRM 806].) Thus, the circumstances herein do not show recurrent, random work stoppages nor a partial strike, but rather a protected concerted activity to protest against specific working conditions.[8/]

Therefore, *we* affirm the ALJ's conclusion that Respondent's one-day suspension of the employees who participated in the November 18 work stoppage was a violation of Labor Code section 1153(a). We also affirm the ALJ's conclusion that the suspension was not a violation of section 1153(c), since the Union was not involved in the work stoppages and the employees appeared to be acting on their own rather than in support of the Union.

We overrule the ALJ's finding of an unalleged section 1153(a) violation in Jose Duran's purported threatening employees with dismissal if they again protested working

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[8/] We note, moreover, that Respondent's discipline of its employees was imposed on November 19, 1982, after the occurrence of only one work stoppage the previous day.

conditions in the same manner. If the employees had engaged in a third work stoppage to protest the same working condition, their conduct may well have lost its protected status. (Valley City Furniture Co., supra, 110 NLRB 1589; C. G. Conn, Ltd, v. NLRB, supra, 108 F . 2d 390.) Thus, Duran's warning that another stoppage would result in the workers being replaced or discharged did not constitute an interference with protected activity.

We also overrule the ALJ's conclusion that Respondent violated section 1153(e) and (a) by instituting a new, general disciplinary rule that employees missing work three times (for any reason) would be fired. Duran's warning was not the announcement of a general, new rule regarding three-time work stoppages, but simply a warning that another walkout in this particular instance (i.e., a third refusal to work in the rain: would result in replacement or discharge.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Bertuccio Farms, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Making unilateral changes in its employees' terms or conditions of employment without giving prior notice to and opportunity to bargain with the United Farm Workers of America, AFL-CIO (UFW) concerning such proposed changes.

(b) Refusing to rehire, suspending or otherwise discriminating against any agricultural employee in regard to

hire or tenure of employment or any term or condition of employment because she or he has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(c) In any like or related manner interfering with, restraining or coercing any agricultural employees in the exercise of the rights guaranteed them 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 to Javier Ceja immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Javier Ceja for all losses of pay and other economic losses he has suffered as a result of his denial of rehire, such losses to be computed from July 21, 1982, the date of his application for rehire; such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Upon request of the UFW, rescind the work rule adopted in November 1982 requiring employees to harvest lettuce in the rain and, thereafter, meet and bargain collectively in good faith with the UFW, at its request, as certified exclusive bargaining representative of its agricultural employees, regarding such changes.

(d) Make whole each of the employees it refused to allow to work on November 19, 1982, because of their refusal to cut lettuce in the rain on November 18, 1982, including, but not limited to, Ignacio Soltero, Pedro Galindo, Jose Zendejas, Sergio Zendejas, Samuel Zendejas, Tomas Martinez, Gelacio Munoz, Jaime Lopez, Gil Corona, and Lupe Ramos, for all losses of pay and other economic losses they have suffered as a result of their discriminatory one-day suspension by Respondent, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(e) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying and otherwise copying, all payroll records, 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 amount of backpay due under the terms of this Order.

(f) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereafter.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent between June 18, 1982 and June 18, 1983.

(h) Post copies of the attached Notice, in all

appropriate languages, for 60 days in conspicuous places on its property, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(i) Arrange for a representative of Respondent or a board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and company 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 and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance, is achieved.

Dated: December 28, 1984.

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, Bertuccio Farms, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by making changes in working conditions without bargaining with your certified exclusive bargaining representative, United Farm Workers of America, AFL-CIO (UFW), by suspending lettuce cutters who had refused to work in the rain, and by refusing to rehire a worker because of his union and other protected activities.

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 farm workers 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 to obtain a contract covering 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 or protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT suspend, fail to rehire, or in any other way discriminate against, interfere with, or restrain or coerce you because of your exercise *of* your right to act together with other workers to help and protect one another.

WE WILL offer Javier Ceja his old job back if he wants it and will pay him any money he lost because we unlawfully failed to rehire him.

WE WILL meet and bargain in good faith with the UFW about changes in your working conditions and new work rules because it is the representative chosen by our employees.

WE WILL NOT change your terms or conditions of work without first meeting and bargaining with the UFW about such matters because it is the representative chosen by our employees.

WE WILL pay the workers who refused to cut lettuce in the rain on November 18, 1982, for the day's wages they lost when we

refused to let them work on November 19, 1982. Those workers include but are not limited to Ignacio Soltero, Pedro Galindo, Jose Zendejas, Sergio Zendejas, Samuel Zendejas, Tomas Martinez, Gelacio Munoz, Jaime Lopez, Gil Corona and Lupe Ramos.

Dated: BERTUCCIO FARMS

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

BERTUCCIO FARMS

10 ALRB No. 52
Case Nos. 82-CE-67-SAL
82-CE-79-SAL
82-CE-139-SAL

ALJ Decision

The ALJ concluded that the Employer refused to rehire returning economic strikers Alfredo Vasquez, Felix Rodriguez and David Soliz because of a good faith belief that they had engaged in serious strike misconduct, and that the Employer's belief constituted a legitimate substantial business justification for not rehiring those employees. The ALJ recommended dismissal of the charge relating to the failure to rehire Carlos Haro, as there was no evidence that he made an offer to return to work. The ALJ concluded that the Employer had discriminatorily refused to rehire Javier Ceja and Ramiro Perez because of their union and other protected concerted activities, and recommended that these two employees be reinstated with backpay.

The ALJ concluded that the Employer had violated section 1153(e) and (a) of the ALRA by requiring lettuce harvest employees to cut lettuce during the rain, because the Employer did not first offer to bargain with the UFW about the change from its prior practice of not requiring the lettuce workers to harvest during the rain. The ALJ also found that the lettuce workers' work stoppage to protest the unilateral change in working conditions was protected concerted activity, and that the Employer's one-day suspension of employees who had engaged in the protest was unlawful.

Board Decision

The Board affirmed the ALJ's conclusion that the Employer refused to rehire Alfredo Vasquez, Felix Rodriguez and David Soliz because of a good faith belief that they had engaged in serious strike misconduct, and that such a belief constituted a legitimate substantial business justification for not rehiring those employees. The Board also affirmed the ALJ's finding that Carlos Haro did not apply for rehire, and it dismissed the charge relating to him. The Board concluded that the Employer did not have a good faith belief that Javier Ceja had engaged in serious strike misconduct, and that the Employer had unlawfully denied him rehire without any legitimate substantial business justification. The Board overruled the ALJ's conclusion that the Employer had unlawfully refused to rehire Ramiro Perez because the Board found that Perez had failed to make a proper application for work and that his failure was not excused.

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The Board affirmed the ALJ's conclusion that the Employer had made an unlawful unilateral change in working conditions by requiring lettuce harvesters to work in the rain, and that the Employer had unlawfully suspended the workers for protesting the change.

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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: BERTUCCIO FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 32-CE-67-SAL 82-CE-79-SAL 82-CE-139-SAL

APPEARANCES:

Jose B. Martinez Salinas,
California for the General
Counsel

Ned Dunphy
United Farm Workers of
America, AFL-CIO
for the Charging Party

Lewis P. Janowsky Dressier,
Quesenbery, Laws
& Barsamian
for the Respondent

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, ADMINISTRATIVE LAW JUDGE

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This matter was heard before me in Hollister, California, on May 23, 24 and 25, 1983. The Complaint, issued on January 7, 1983, was based on two charges (82-CE-67-SAL and 82-CE-79-SAL) filed by the United Farm Workers of America, AFL-CIO (hereafter Charging Party, UFW or the Union). Both charges were duly served on the Respondent, Bertuccio Farms (hereafter Respondent, the Company or Bertuccio).

The General Counsel issued a First Amended Consolidated Complaint on May 3, 1983, based in part on the third charge (82-CE-139-SAL) filed by the UFW and duly served on the Respondent.[1/] At the hearing, I allowed General Counsel to further amend the complaint.[2/]

As amended, the complaint alleges that Respondent discriminatorily refused to rehire striking employees Javier Ceja, Ramiro Perez, Carlos Haro, David Soliz, Alfredo Vasquez and Felix Rodriguez in violation of subsections (c) and (a) of section 1153 of the Agricultural Labor Relations Act (hereafter ALRA or the Act).[3/]

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1. The allegations in paragraph 9(b) regarding Samuel Zendejas and Jose Zendejas, which were among the amendments, were dropped by the General Counsel at the Pre-Hearing Conference held on May 18, 1983.

2. On May 26, 1983, the General Counsel filed an amendement to the complaint, and as required by Title 8, California Administrative Code, section 20222.

3. All section references herein are to the California Labor Code unless otherwise specified.

It further alleges that Respondent unilaterally implemented new work rules requiring employees to work cutting lettuce in the rain and unilaterally instituted sanctions for failure to comply with the new work rules in derogation of its duty to bargain, thereby violating subsections (e) and (a) of section 1153 of the Act. Respondent also allegedly discriminatorily suspended for one day employees who had refused to work in the rain.

Respondent filed its answer to the First Amended Consolidated Complaint denying it had committed any unfair labor practices and asserting various affirmative defenses. Respondent contends that several employees it allegedly refused to rehire did not offer to return to work, and thus it could not have refused to reinstate them. Further, Respondent asserts that it was under no obligation to rehire any of the six alleged discriminatees since it had a reasonable good faith belief that they had engaged in serious strike misconduct.

Respondent's counsel mistakenly failed to respond to an amended portion of the complaint which alleged that Respondent had refused to bargain. At the Pre-Hearing Conference, *I* allowed Respondent time to file an amended answer. Respondent did so on May 18, 1983. Counsel at that time inadvertently included the wrong paragraph number from the complaint in his denial and thus failed to deny the refusal to bargain charge. Both General Counsel and the Charging Party were on notice as of the Pre-Hearing Conference that Respondent did contest this charge, and this issue was fully litigated at the hearing. Therefore, I find that they have not been prejudiced by Respondent's mistake, and I have accordingly treated

Respondent as having denied the refusal to bargain allegation.

On July 20, 1983, Respondent filed a motion to re-open the record. That motion is hereby denied. Counsel for Respondent asserts that the Board attorney representing the General Counsel in the instant case and in a prior related proceeding, Case No. 81-CE-75-SAL, may have acted improperly. Additionally, Respondent's counsel asserts the record should be reopened since such action would not result in any prejudice.

Respondent cites the recent case of Multimatic Products, Inc. (1983) 263 NLRB No. 49 [111 LRRM 1025] as authority for its position. In that case the National Labor Relations Board (hereafter NLRB) did not order reopening the record primarily because there were allegations of improper conduct on the part of its regional personnel. Rather, the NLRB was concerned that the record was "far from complete" (at p. 3) and that the Administrative Law Judge (ALJ) had failed to make certain findings. The NLRB stated that at the point it ordered the record reopened, it was ". . . dealing with allegations and testimonial assertions, not credited evidence." (At p. 3.)

Such is not the case here. Ramiro Perez and other General Counsel witnesses testified regarding the issue of whether or not Perez made an unconditional offer to return to work. Mrs. Bertuccio also testified on the issue. There is a sufficient record upon which to make a decision.

Reopening the record and taking testimony from the trial attorney for the General Counsel is not the appropriate method for dealing with this issue. The Board has an external complaint

procedure for dealing with such matters. That is the proper mechanism' if Respondent desires to pursue this issue.

Respondent's counsel also argues that the record should be reopened because no prejudice would result and otherwise Respondent's case might suffer from a lack of clarity in the record. The Board has not adopted a regulation setting forth a standard for reopening the record as the NLRB has. In Foster Poultry Farms (1980) 6 ALRB No. 15, cited by Respondent, the Board adverted to the general standard of reopening the record only to admit evidence which is newly discovered or was previously unavailable through the exercise of reasonable diligence, citing Victor Otlans Roofing Co. (1970) 182 NLRB 898 [74 LRRM 1447] enf'd (9th Cir. 1971) 445 F.2d 299 [77 LRRM 2893].

While the Board found that the ALJ did not abuse his discretion in reopening the record although there was sufficient evidence in the original record, there is no intimitation that such practice is to be encouraged. The standard is a stringent one since there are strong policy reasons to insist on finality to administrative and judicial processes.

As Witkin notes, "Because of the possibility that the moving party may have been guilty of neglect, this ground [newly discovered evidence] is looked upon with "distrust and disfavor,' and a strong showing of the essential requirements must be made." [Citations omitted.] (Witkin, California Procedure 2d ed. 1971, at p. 3606. See also Horowitz v. Noble (1978) 79 Cal.App.3d 120.)

Respondent's counsel makes no assertion that he could not with the exercise of reasonable diligence have raised this issue

earlier. (Thomas Mezger, d/b/a Farmers Grain Elevator (1976) 226 NLRB 564 [93 LRRM 1447]; General Mercantile and Hardware Co. (1971) 191 NLRB 20 [77 LRRM 1474].)

The simple statement that Respondent's counsel was recently reviewing the transcript is clearly insufficient to meet the standard of reasonable diligence which has been described as requiring a "strict showing" or a "high degree" of diligence. (Witkin at p. 3609.) He was the attorney representing Respondent at the hearing in November 1982 when the amendment regarding Mr. Perez was made and was present when General Counsel's attorney made the statement he now wishes to explore.

There must be a satisfactory explanation for the failure to produce the evidence at an earlier time. (Blue Mountain Development Company (1982) 132 Cal.App.3d 1005.) Inadvertence of counsel is not sufficient. (Polis Wallcovering Co. (1982) 262 NLRB No. 169 [111 LRRM 1051].)

Neither Ipco Hospital Supply Corp. (1981) 255 NLRB 819 [107 LRRM 1075] nor Stone & Thomas (1976) 221 NLRB No. 115a [92 LRRM 1228], cited by Respondent, compel a different conclusion. In the first case, the record was reopened to allow Respondent to introduce evidence which was not litigated at the hearing and which it had no indication would be part of the hearing. In the second, the position of the parties had changed, and the NLRB allowed Respondent to introduce evidence demonstrating hardship in complying with the NLRB's order and a willingness to negotiate the issue with the union.

In this case, the issue of whether Perez offered to return

to work has been litigated, and there is a sufficient record upon which to make a decision. There is no showing by Respondent that it possesses newly discovered evidence which could not have been discovered earlier, with the exercise of due diligence. Thus I do not find a sufficient basis for reopening the record. As noted earlier, to the extent Respondent's counsel complains of the conduct of the General Counsel's attorney, there is another more appropriate forum.

All the parties were given a full opportunity to participate in the hearing, and, after its close, the General Counsel and Respondent each filed briefs in support of their positions. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent, as admitted in its answer, is an agricultural employer within the meaning of subsection (c) of section 1140.4. The UFW is a labor organization within the meaning of subsection (f) of section 1140.4. The UFW is the certified representative for Respondent's agricultural employees, and there was no contract in effect during the time period covered by the complaint in the instant case.

II. Background Facts

Paul Bertuccio owns Bertuccio Farms. Tina Bertuccio, his wife, has numerous responsibilities on the ranch. She operates the sheds, performs office work including keeping the payroll, and

generally oversees the operation. The Bertuccios grow a number of crops including lettuce, cardoni, anise, garlic, bell peppers, onions and tomatoes.

Both Mr. and Mrs. Bertuccio are admitted supervisors as is Jose Duran their crew supervisor. Mr. Duran hires and directs the work of employees. Inez and Eduardo Villegas, also admitted supervisors, are crew foremen supervised by Duran. (R.T. III 20.)

On November 17, 1978, the ALRB certified the UFW as the exclusive bargaining representative of the Bertuccios' agricultural employees. In early 1979, the UFW began negotiations with Bertuccio Farms, but no agreement was reached.[4/]

The UFW called a strike against Bertuccio Farms on July 10, 1981. Picketing occurred on a almost daily basis until approximately the second week of June 1982. At that point strike activity effectively ceased, and numerous striking employees sought to return to work. General Counsel alleges that Respondent discriminatorily refused to rehire Ramiro Perez, Javier Ceja, Alfredo Vasquez, Carlos Haro and Felix Rodriguez because of their union and other protected concerted activity.

III. Failure to Rehire

Five of the six alleged discriminatees[5/] were among some

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4. Respondent was found to have bargained in bad faith by this Board in Paul W. Bertuccio & Bertuccio Farms (1978) 4 ALRB No. 91.

5. Carlos Haro had gone to Mexico. He did not sign the petition, and there is no evidence he communicated to Respondent or anyone else that he wanted to return to work.

30 to 40 strikers who, on June 18, 1982, presented a petition (G.C. Ex. 3) to Tina Bertuccio offering to return to work. Ramiro Perez presented the petition to Mrs. Bertuccio and acted as spokesperson for the workers. The workers who signed the petition had done so prior to the 18th . In fact, the petition had been given to Mr. Bertuccio a few days earlier, and he had told the workers to come back when Mrs. Bertuccio would be there. Thus, they returned a few days later on the 18th.

Alfredo Vasquez and Felix Rodriguez signed the petition, and Respondent does not dispute that they unconditionally offered to return to work. Javier Ceja did not sign the petition because he was working on the UFW's boycott against Respondent. (R.T. I: 13.) He separately signed a petition (G.C. Ex. 2.) offering to return to work and presented it to Mrs. Bertuccio on July 21, 1982.[6/] (R.T. I: 17-18.)

David Soliz testified he was not present when the petition was being passed around for workers to sign and thus did not sign it. He testified, however, that while Mrs. Bertuccio was going over the petition with Ramiro Perez, he asked if he could have his job back.[7/] Mrs. Bertuccio said he could not because he had felony

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6. Ceja gave Mrs. Bertuccio the petition at the ranch office. She went inside for some 10 to 15 minutes and came back out and told him there was no more work for him. She shrugged when he asked why not. (R.T. I: 42.) Mrs. Bertuccio acknowledges that she did not then give Ceja a reason for not allowing him to return to work. (R.T. III: 124-125.)

7. Soliz was among the employees gathered around and was standing behind Mrs. Bertuccio at the time the petition was presented to her. Perez was translating for the workers and, through Perez, Soliz asked for his job back. Mrs. Bertuccio asked who was speaking, and Perez said it was Soliz. There is no evidence Mrs. Bertuccio doubted it was Soliz, and she did not turn around to see who was speaking. (R.T. III: 121.)

charges[8/] against him arising out of allegedly violent conduct during the strike. (R.T. II: 84; III: 121.) She said the same thing to Vasquez who also asked for his job back even though he had already signed the petition.

Perez neither signed the petition nor specifically asked for his job back. Mrs. Bertuccio testified that she asked Perez why he had not signed the petition, and he replied that he didn't know whether he wanted to return to work because he was still working on the boycott. (R.T. III: 120.) He testified he worked on the boycott from May to December 1982 although he later testified that for some two or three weeks in July he did not work on the boycott and was, in fact, out of work. (R.T. II: 71, 91.)

I find that Perez did not seek to return to work at the time he presented the petition. Mrs. Bertuccio's testimony is consistent with Perez's own testimony. General Counsel asked Perez why he had not signed the petition, and he replied because he had intended to work on the boycott. (R.T. II: 76.) Elsewhere he testified that he and David Soliz were going to sign the petition, although it had already been given to Mrs. Bertuccio, but did not do

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8. Witnesses testified variously that Mrs. Bertuccio said certain workers could not return to work because of "criminal charges" (R.T. I: 43-44), "legal charges" (R.T. II: 75), and "felony charges" (R.T. II: 79). On direct examination, Mrs. Bertuccio said she told Soliz and Vasquez they could not return to work because they had felony charges against them. (R.T. III: 121.) She said the same with regard to Haro, Rodriguez, and possibly Ceja. On cross-examination, Mrs. Bertuccio testified inconsistently on this issue. When pressed, however, she said she did not rehire the six workers because of the felonies. (R.T. III: 134-135.) She did not call Ramiro's name and identify him as one of those who she would not rehire, but she was aware that he had felony charges against him. (R.T. III, pp. 135-136.) Thus, she would not have given him his job back even if he had asked for it. (R.T. III p. 136.)

so because they had felony charges, and she had said she would not rehire them because of that fact. Perez' answer was in response to a leading question asking whether he had made an oral offer to return to work to Mrs. Bertuccio. (R.T. II: 79.)

Perez never gave any reason for not having signed the petition prior to presenting it to Mr. Bertuccio and later to Mrs. Bertuccio even though he had the petition and had ample opportunity to do so. Moreover, his testimony was inconsistent and contradictory.

He testified that he was representing the workers and was seeking work not only for those who had signed the petition but for everyone who was present on June 18, including himself. When questioned about Carlos Haro who was neither present nor a signatory to the petition, Perez said well, he meant everyone who had been out on strike. (R.T. II: 83.) His testimony thus includes Javier Ceja among the applicants, and Perez in fact said that Ceja was asking for his job back that day. (R.T. II: 87.) Yet Ceja testified that he was not because he was still working on the boycott.

Additionally, based on the demeanor of Mr. Perez and Mrs. Bertuccio, I credit her. She was definite and consistent in her testimony on this point. She was not at all hesitant and answered questions forthrightly. Perez, on the other hand, appeared uneasy and evasive. He modified his answers to fit the facts as they emerged during his testimony.

Thus, I find that on June 18 Perez was representing the other workers and was not at that time asking for his own job back. David Soliz, however, I find did ask for his job and was not:

permitted by Respondent to return to work.

IV. Union Activity

Ramiro Perez and Javier Ceja, as admitted by Mrs. Bertuccio, were the two leading union activists at Bertuccio Farms. (R.T. III: 158.) Mr. Perez began working at Bertuccio Farms in approximately 1973. Perez was president of the negotiating committee and attended negotiating sessions with the company (R.T. II: 73-74). Perez has also been involved in taking access at Bertuccio Farms and has filed various grievances with Bertuccio foremen regarding working conditions of other employees. Perez was also involved in work stoppages in 1980 against Bertuccio and has testified against Respondent in prior ALRB hearings (R.T. II: 72).

Perez went on strike against the company in July of 1981 and was a strike coordinator. He regularly participated on the picket line. (R.T. II: 68.) He was also involved in the boycott during the strike against Bertuccio. (R.T. II: 71.) He attended various court hearings regarding criminal charges which arose out of the strike and on several such occasions Mrs. Bertuccio was in the courtroom. (R.T. II: 77.) Respondent was well aware of Perez' union and other concerted activity.

Javier Ceja has worked at Bertuccio Farms doing field work and packing for several years. On or about July 9, 1981, he left Bertuccio Farms to join in the strike against Respondent. Ceja was a picket captain for 2 or 3 months. During the strike, he also participated in the boycott against Bertuccio Farms which began about October 1981. Respondent was aware both of Ceja's strike activity and his involvement, in the boycott.

Ceja was a member of the negotiating committee during 1979 and 1980 and attended various negotiating sessions. Ceja has testified three or four different times against Bertuccio Farms in prior ALRB proceedings. (R.T. I: II.)

Ceja was the field representative of foreman Inez Villegas' crew and, in that capacity, complained to the foreman or the supervisor when there were problems with working conditions. (R.T. I: 12.) Also, Ceja was an organizer during 1980 for several work stoppages that occurred at Bertuccio. (R.T. I: 12-13.) He sometimes distributed flyers to other crews and was observed doing so by a Bertuccio foreman. (R.T. I: 14.) Mr. Ceja was also observed by Paul and Tina Bertuccio at times when he was distributing leaflets and taking access. Mr. Ceja also gathered signatures during 1981 to petition for a paid holdiay. (R.T. I: 15.) Ramiro Perez, Jesus Perez, and Mr. Ceja presented the petition to Tina Bertuccio. (R.T. I: 15, 16.)

After Mr. Ceja was a crew representative in 1979 and 1980, he went to Mexico and returned in March of 1981. In May of that year he was re-elected crew representative for Inez Villegas' crew, and he remained the crew representative until the strike started on July 10, 1981. (R.T. I: 16.) As admitted by Mrs. Bertuccio, Ceja was a well known leading union activist at Respondent's ranch.

Alfredo Vasquez has been working at Bertuccio Farms since 1979 cutting and packing lettuce in Eduardo Villegas' crew. Mr. Vasquez picketed until only a few days before he requested his job back. Besides participating in the strike, Mr. Vasquez was a crew representative for approximately one year preceding the strike.

Felix Rodriguez began working for Bertuccio Farms in 1977 hoeing, weeding and cutting lettuce. His union activity consisted Of joining the strike and picketing until about 5 days before the end of the strike. (R.T. I: 61.)

David Soliz worked for Respondent from approximately 1979 as a caterpillar driver and hoeing lettuce. His union activity consisted of participating in the strike and picketing. {R.T. I: 75.)

Javier Ceja testified that Carlos Haro went on strike about two days after the strike began. He said Haro participated on the picket line "Until he was thrown in jail and then he went to Mexico." (R.T. I: 22-23.) Felix Rodriguez also testified that Haro picketed. (R.T. I: 67-68.)

V. The Employees Who Were Rehired.

It is uncontested that Respondent rehired a number of employees who signed the petition and who were active in the union. Thus Respondent rehired picket captains,[9/] crew respresentatives,[10/] members of the negotiating committee(s),[11/] workers who engaged in the boycott [12/] and employees who took access.[13/] It should be noted that several employees were involved in more than one form of union

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9. Carmen Lezama, Jose Carmen Romero and Antonio Escalante. (Escalante's name does not appear on the petition.) (R.T. I: 40.)

10. Carmen Lezama, Anselmo Delgado. (R.T. I: 41.)

11. Jesus Perez and Maria Jimenez. (R.T. I: 40.)

12. Jose C. Romero, Antonio Escalante, Jaime Romero and Ruben Martinez. (R.T. I: 40.)

13. Jesus Perez and Maria Jimenez. (R.T. I: 41.)

activity and that some, such as Jesus Perez, were previously involved in ALRB proceedings against Respondent.[14/]

Ociel Prado Canela is presently employed at Bertuccio Farms. He began work there in 1976. Since 1978, he has worked in the lettuce crew of Eduardo Villegas. In July of 1981, he joined the strike against Respondent and participated on the picket line. He went back to work with Respondent in late May 1982 while picketing was still going on. (R.T. II: 13-14.) Canela was found guilty of a misdemeanor arising out of the strike. (G.C. Ex. 9.)

Tomas Martinez is currently employed by Respondent. He began working at Bertuccio Farms in 1974. He joined the strike against Respondent in July 1981 but returned to work in early or mid-May of 1982 while picketing was still continuing. Martinez pled "no contest" to a misdemeanor charge arising out of the strike. (G.C. Ex. 16.)[15/]

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14. Bertuccio Farms (1982) 8 ALRB No. 39.

15. There was extensive testimony as to whether Respondent rehired Canela and Tomas Martinez knowing of the misdemeanor charges against them. I find it unnecessary to resolve the testimonial disputes since Mrs. Bertuccio said that she would rehire employees who had charges of strike violence against them so long as the offenses were not felonies. (R.T. III. 135.) Thus, even assuming she rehired Canela and Martinez knowing of their misdemeanors, she would have done no more than act in conformity with her stated policy. The issue is whether that policy was discriminatorily developed or applied.

There was also testimony that Bertuccio foreman Roberto Correa and his brother Tony were kept on the payroll although they assaulted a striker. Without resolving the dispute of whether Roberto was involved in the incident, I find the evidence demonstrates that Mrs. Bertuccio did not know of the incident until the hearing in this case.

VI. The Unilateral Change In Working Conditions

On November 18, 1982, approximately 15 workers, about half of Eduardo Villegas' crew, refused to continue cutting lettuce because it was raining. When these workers returned the next day, they were not alllowed to work because they had walked off the previous day.[16/] They were allowed to return to work the following day, November 20. A similar incident occurred on November 29, 1982, with about 6 of the same workers leaving and refusing to work in the rain.[17/]

Following this second incident, crew supervisor Jose Duran told Mrs. Bertuccio that the workers were not following his orders and that they would have to do something to keep them from leaving when it was raining. (R.T. III: 9.) Mrs. Bertuccio told him to prepare a written statement to read to the workers and to show it to her before he read it to them.

On the evening of November 29, 1982, Duran prepared Resp. Ex. 1.[18/] He testified he read the document to the crews of Inez and Eduardo Villegas and then told the workers that if they refused

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16. The workers specifically named were: Ignacio Soltero, Pedro Galindo, Sergio Zendejas, Jose Zendejas, Tomas Martinez, Gelacio Munoz, Jaime Lopez, Gil Correa, Inez Soltero, Santiago Barajas, Lupe Ramos and a worker named Mario. (R.T. II: 30; 56-57.)

17. Tomas Martinez, Ignacio Soltero, Lupe Ramos and Jaime Lopez were the only workers named.

18. General Counsel and the UFW elicited testimony from witnesses that Resp. Ex. 1 did not reflect everything that Duran said when he addressed the workers. They also sought to show that Resp. Ex. 1. had been altered. Duran himself said he made some comments apart from what was written. Thus I find that it is not necessary to resolve whether the document was altered since the key question is what Duran said to the workers whether it was contained in the document he read or stated by him after he read it.

to work when it was raining, the company would have to get other workers to replace them. He asked several times if there were questions, and one worker said he did not know they were obliged to work in the rain. Duran stated he responded that they were not compelled to do so but that it was an obligation that they had. Duran denied telling them they would be fired if they did not work in the rain or that they had already missed twice and a third such instance would result in their being fired. (R.T. III 32.)

Duran, as well as several workers, testified that prior to 1982, the lettuce workers would stop working when it rained. If it appeared it would rain only a short while, they would wait and resume work after it quit raining. If it rained for a long time, Duran would check with the office and usually the workers would be sent home. (R.T. III: 44.) It is uncontested that the 1982 season was the first time that the workers were required to cut lettuce while it was raining. (R.T. III: 43.)

Duran testified the reason for this change was because it rained a great deal in 1982, and the company had orders to fill. He testified Mr. Bertuccio had purchased waxed cartons which could be used in the rain, but also admitted the company had such cartons, albeit fewer of them, in 1981. He admitted the company could keep lettuce in a cooling shed for up to 48 hours although he said after 24 hours there was a risk of spoilage. (R.T. III: 45-47.) It was not, however, the company's normal practice to store lettuce in the shed.

Both Duran and employee witnesses said the company did not have written rules. The workers said that the exception to this was

the occasion in November 1982 when Duran read the rule that if they missed 3 times because of the rain they would be fired. Duran said there had never been such a rule and there was not now such a rule. At least one employee witness testified it was his understanding that employees had to work in the anise and cardoni when it rained and that if they missed three times they could be fired. (R.T. II: 51.)

There is a significant difference in being required to cut lettuce in the rain versus cutting anise and cardoni. The anise and cardoni season is November or December through January. The plants are several feet high and are usually covered with dew. Thus they are wet even in clear weather and walking through the wet planes causes one to get soaking wet. Therefore, rain gear is needed even in clear weather. Lettuce plants are only 6 to 8 inches high, and the lettuce season usually ends by November. Because of the different heights of the plants and the difference in seasons, a worker does not normally expect to get wet while cutting lettuce. Moreover, one has to bend over to cut lettuce and rain pours down on one's back causing more discomfort than working in the rain while standing.

Duran testified that when the lettuce workers were ordered to work in the rain, they, had been provided the same rain gear as when they worked in the anise and cardoni. (R.T. III: 33.) General Counsel witness Soltero corroborated this fact. (R.T. II: 62.) Barajas, another General Counsel witness, testified inconclusively on the issue saying both that the rain gear was not provided and then contradicting himself. Barajas also testified that Duran said

everything that was written in Resp. Ex. 1. (R.T. (II: 42-43.) That document refers to the company having provided rain gear. I find that Respondent did provide the same rain gear to the lettuce workers as is typically provided for working in anise and cardoni.

The central dispute is whether Duran said it was a rule that workers cut lettuce in the rain and told them that if they did not do so they would be fired after the third refusal, noting that many already had two "faults" stemming from their refusals on the 18th and 29th of November. General Counsel witnesses Barajas and Soltero insisted that Duran had enunciated such a rule with the sanction of firing.

I find that Duran told the employees that if they refused to work in the rain they would be replaced. I also find that he told them if they refused a third time they would be fired. Duran was faced with, a situation where even after he disciplined employees by suspending them on November 19, some again refused to work in the rain. He had orders to fill and was concerned that employees were not following his directions. I credit Barajas and Soltero that Duran reinforced his instruction that employees had an obligation to cut lettuce in the rain with an effective threat. Simply saying that other workers would temporarily replace them would not likely have proved effective since a suspension had already proven ineffective. Barajas and Soltero testified consistently with one another without presenting an impression of being rehearsed.

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ANALYSIS AND CONCLUSIONS

A. The Refusal to Bargain

General Counsel alleges that Respondent violated subsections (e) and (a) of section 1153 of the Act by refusing to bargain over (1) a change in working conditions, specifically, requiring employees to cut lettuce in the rain; and (2) institution of new disciplinary rules for failure to abide by that requirement.

These subsections are analagous to sections 8(a)(5) and 8(a)(l) of the National Labor Relations Act (hereafter MLRA). Thus, it is appropriate to look to decisions of the National Labor Relations Board (hereafter NLRB) for guidance.

Longstanding labor relations precedent requires an employer to bargain in good faith regarding its employees' working conditions. (Morris, The Developing Labor Law (2d ed. 1983) pp. 809-813.) Unilateral changes of bargainable matters may constitute a per se refusal to bargain. (N.L.R.B. v. Katz (1962) 369 U.S. 376 [50 LRRM 2177].)

Any number of working conditions have been found to be required subjects of bargaining. Changes of work assignments must be bargained. (As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9, review den. by Ct.App., 5th Dist, Oct. 16, 1980; hg. den. Nov. 12, 1980.) Management must also bargain about work rules affecting employees' working conditions. (Timken Roller Bearing Co. (1946) 70 NLRB 500 [18 LRRM 1370], enforcement denied on other grounds, (6th Cir. 1947) 161 F.2d 949 [20 LRRM 2204].) Stricter enforcement of work rules must also be bargained. (Lion Uniform, Janesville Apparel Division

(1982) 259 NLRB No. 142 [109 LRRM 1093].)[19/]

An employer's implementation of a disciplinary scheme to enforce a requirement that employees work overtime when overtime had been voluntary constituted an unlawful refusal to bargain. (Pease Company (1980) 251 NLRB 540 [105 LRRM 1314].) Employers have been found to have refused to bargain where they unilaterally required employees to report five minutes prior to their starting time even though no sanctions were announced and there was no showing anyone had been disciplined as a result of the change. (Hedison Manufacturing Company (1982) 260 NLRB No. 76, modifying on other grounds 249 NLRB 791 (1980), enf'd (1st Cir. 1981) 643 F.2d 32 [106 LRRM 2897].)

The record demonstrates that prior to 1982 it was common for employees to work in the rain when cutting crops such as anise and cardoni but that they had not been required to cut lettuce in the rain. It is clear from the testimony of workers that there is a significant difference between cutting lettuce versus cutting anise and cardoni while it is raining.

Respondent cites no authority to counter General Counsel's assertion that Respondent was not permitted to unilaterally institute the new requirement, but simply asserts that it had a "fundamental right" to do so. (Resp. brief, p. 16.) To the extent that Respondent may be citing Karahadian Ranches, Inc. (1979) 5 ALRB

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19. For other related matters which must be bargained see: Schraffts Candy Company (1979) 244 NLRB 581 [102 LRRM 1274] (rules re absenteeism, lateness, etc.); Miller Brewing Company (1967) 166 NLRB 831, aff'd (9th Cir. 1969) 480 F.2d 12 [70 LRRM 2907] (plant rules regulating conduct and establishing discipline for violations).

No. 37 and Rod McLellan Company (1977) 3 ALRB No. 71, review den. by Ct.App., 1st Dist., Div. 4, Nov. 8, 1977, hg. den. Dec. 15, 1977, as setting forth inherent managerial authority permitting unilateral institution of such a requirement, those case are inapplicable since in neither was there a certified bargaining representative.

Respondent's only other argument is that the same employees who refused to cut lettuce in the rain did cut anise and cardoni in the rain when Respondent had customers' orders to fill.[20/] (Resp. Brief p. 18.) Respondent does not characterize this as a defense of past practice although such may have been intended.

Where an employer's unilateral action is simply a continuation of past regular and consistent changes, sometimes referred to as the dynamic status quo, there is in fact no real "change", and the duty to bargain has not been violated. (N.L.R.B. v. Katz, supra; As-H-Ne Farms, Inc., supra.) Respondent here has admitted that prior to 1982, employees were not required to cut. lettuce when it was raining. They either waited until it stopped raining or, if the rain appeared likely to continue, they were allowed to go home.

To the extent Respondent may be asserting that the status quo was that employees were expected to cut lettuce or any other crop in the rain when there were customer orders to be filled, it

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20. Respondent does not specifically argue that it was prevented from bargaining because of an emergency situation or a business necessity. Although the nature of agriculture entails a necessity that growers be able to adjust to changes such as weather, employees also have a significant interest in the conditions under which they are required to work. In the instant case, Respondent advanced no reason why after the first episode on November 18 it could not have notified the union and bargained.

has failed to establish that. There is no evidence, for example, that, unlike 1982, in prior years there were no orders to be filled when the lettuce workers were allowed not to work in the rain. The only evidence in this vein is that in 1982 Mr. Bertuccio purchased waxed cartons which could be used in the rain by the lettuce workers. Mr. Duran, however, acknowledged that waxed cartons were also in use the year before.

Thus, I find that General Counsel has established that Respondent unilaterally instituted a new requirement which resulted in a change in employees' working conditions. Respondent's actions do not fall within an exception to the rule in Katz, supra, which would excuse such a unilateral change. Respondent admits it gave no notice of the change to the UFW. Respondent has therefore failed to meet its obligation to bargain and has thereby violated subsection (e), and derivatively subsection (a), of section 1153 of the Act.

Similarly, Respondent has also violated subsection (e), and derivatively subsection (a), of section 1153 by instituting a new disciplinary rule to enforce its change in working conditions. I have credited General Counsel's witnesses that Duran, an admitted supervisor, announced that employees who refused to abide by the new requirement and missed work three times would be fired. Unilateral implementation of disciplinary rules is a violation of Respondent's obligation to bargain. (Pease Company, supra; Miller Brewing Company, supra.)

B. The One Day Suspensions

Respondent refused to allow the employees who left work on November 18, 1982, to return to work the next day. In effect, they

were suspended without pay for one day. (Martori Brothers (1982) 8 ALRB No. 23, review den. by Ct.App., 4th Dist., Div. 1, Sept. 3, 1982, hg. den. Sept. 29, 1982.) Crew supervisor Jose Duran affirmed that the workers did not, in fact, work November 19th.[21/]

Both this Board and the NLRB have frequently held that a protest over working conditions is protected activity and that employees may not lawfully be fired, suspended or otherwise discriminated against for engaging in such protests. (Anton Caratan & Sons (1982) 8 ALRB No. 82.)

Protests over physical working conditions have repeatedly been held to be protected. (Michael Palumbo d/b/a/ American Home Systems (1972) 200 NLRB 1151, aff'd (6th Cir. 1963) 482 F.2d 947 [85 LRRM 2304] (too cold and too rainy); N.L.R.B. v. Washington Aluminum Co. (1962) 370 U.S. 9 [50 LRRM 2235] (too cold); Martori Brothers, supra, (poor condition of field.) Work stoppages protesting working conditions do not lose their protected nature simply because they are isolated occurrences. (N.L.R.B. v. Washington Aluminum, supra.)

Contrary to Respondent's argument, this Board's recent decision in Sam Andrews' Sons (1983) 9 ALRB No. 24 does not render the work stoppages in the instant case unprotected. The two isolated one time stoppages herein are more akin to the circumstances in Washington Aluminum, supra, than to stoppages which are part of a plan or pattern of recurrent intermittent action. It is the latter type which Sam Andrews, supra, describes as perhaps

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21. General Counsel amended the complaint at the hearing to allege that the one-day suspension violated the Act. Mr. Duran testified after the amendment was made and was not asked why the employees did not work on the 19th.

not enjoying the full protection of the Act. I therefore find that the work stoppage on November 18, 1982, was protected concerted activity and that Respondent's one-day suspension of the employees who particiated in that stoppage was unlawful.

General Counsel asserts that the suspension is a violation of subsection (c) of section 1153 of the Act. There is no evidence that the union was in any way involved in the work stoppages or, in fact, even knew of it. There is also no evidence that the employees were somehow acting in support of the union. I thus decline to find a violation of subsection (c) and, rather, find that Respondent's conduct violated subsection (a) of section 1153 of the Act. (Royal Packing Company, Inc. (1982) 8 ALRB No. 16, remanded by Ct.App., 1st Dist., July 7, 1982, modified on other grounds 8 ARLB No. 48.)

Although not alleged by the General Counsel, I also find that Respondent's conduct on November 30, 1982, thorough its agent Jose Duran, in threatening employees with dismissal if they again protested working conditions, violated subsection (a) of section 1153. (Martori Brothers, supra; American Home Systems, supra.)[22/]

C. The Refusal to Rehire

General Counsel alleges that Respondent violated subsections (c) and (a) of section 1153 of the Act by refusing to rehire six strikers: Ramiro Perez, Javier Ceja, Alfredo Vasquez,

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22. Finding a violation which is not specifically alleged in the complaint is proper where the issue has been fully litigated. (N.L.R.B. v. International Association of Bridge, etc. (9th Cir. 1979) 600 F.2d 770 [101 LRRM 3119], cert. den. (1980) 445 U.S. 915 [103 LRRM 2669]; Rochester Cadet Cleaners, Inc. (1973) 205 NLRB 773 [34 LRRM 1177]; D'Arrigo Brothers Company (1980) 8 ALRB No. 45.) The issue of the threat of dismissal was fully litigated as part of the allegations of the unilateral changes.

David Soliz, Felix Rodriguez and Carlos Haro. General Counsel asserts that in an effort to avoid rehiring Perez and Ceja, who Mrs. Bertuccio agreed were the two most vocal union activists, Respondent seized on the excuse that they and the other four workers were involved in strike related violence.[23/] Thus, Vasquez, Rodriguez, Haro and Soliz allegedly fell victim to Respondent's discriminatory scheme to rid itself of Perez and Ceja.

Respondent maintains that its refusal to rehire all six individuals was based on a nondiscriminatory policy of not rehiring strikers who engaged in serious strike violence. Moreover, Respondent asserts that it cannot have refused to rehire Perez, Soliz and Haro because they never made unconditional offers to return to work.

Respondent does not specify on what basis it contends chat Mr. Soliz failed to make an offer. Thus it is unclear whether Respondent's position rests on a claim that Mr. Soliz did not ask to return to work or that his request did not constitute a valid unconditional offer.

I have already found that although Mr. Soliz did not sign the petition, he asked Mrs. Bertuccio if he could return to work on June 18, 1982, when the petition was being presented to her. I find that this request constituted a valid unconditional offer to return to work. No specific words are required in an offer of

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23. General Counsel conceded Respondent's good faith belief that the six employees were involved in strike misconduct and presented the case solely as one of discriminatory treatment. (G.C. brief p. 11; Prehearing Conference, Reporter's Transcript pp. 2-3 and 6.)

reinstatement, and an offer will be considered unconditional unless the employee has given the employer reason to believe s/he will not accept any offer of equivalent reemployment. (N.L.R.B. v. Koenig Iron Works, Inc. (2d Cir. 1982) 681 F.2d 130 [110 LRRM 2995]; Continental Industries, Inc. (1982) 264 NLRB No. 17 [111 LRRM 1256]; Decker Foundry Company, Inc. (1978) 237 NLRB 636 [104 LRRM 1055]; Hartmann Luggage Company (1970) 183 NLRB 1246 [75 LRRM 1295], modified on other grounds (6th Cir. 1971) 453 F.2d 178 [79 LRRM 2139].)

With regard to Carlos Haro and Ramiro Perez, General Counsel asserts that it would have been futile for either of them to have made an offer to return to work and that they were thus not required to do so. General Counsel maintains, in the alternative, that Perez, by appearing with the other strikers on June 18, was asking for his job back and was seeking the return of all strikers including Haro. General Counsel concedes that Haro was not present when the petition was presented and that he did not sign the petition.

The only authority General Counsel cites for his position is this Board's decision in Abbati Farms, Inc. and Abatti Produce, Inc. (1979) 5 ALRB No. 34, modified on other grounds in Abatti Farms, Inc. v. Agricultural Labor Relations Bd. (1980) 107 Cal.App.3d 317, hg. den. August 28, 1980. That case, however, dealt with employees who had been laid off and refused rehire because of their union activities. It did not deal with strikers.

Respondent's counsel cites E.A. Laboratories, Inc. (1948) 80 NLRB 625 [23 LRRM 1162], amended (1949) 86 NLRB 711 [24 LRRM 1665], enf'd. in relevant part (2d Cir. 1951) 188 F.2d 885 [28 LRRM 2043], cert, denied (1951) 342 U.S. 871 [29 LRRM 2022] as authority for his position that absent an unconditional offer to return to work, Respondent has no responsibility to rehire striking employees. In E.A. Laboratories, supra, the NLRB rejected the General Counsel's argument that certain strikers who had not made offers to return to work should be awarded back pay since it would have been "futile and useless" for them to apply because the employer had strongly stated it would not rehire anyone who had been active in the strike. This part of the decision, however, is dicta since the NLRB found that it would not in fact have been futile because the employer had actually rehired a number of the strikers. In the instant case, Mrs. Bertuccio stated flatly that had Perez made an offer to return to work she would not have rehired him.

The NLRB in Taylor Instruments Companies (1968) 169 NLRB 162 [67 LRRM 1145] cited E.A. Laboratories, supra, with approval although the NLRB indicated that had there been a "more definitive expression" of the employer's unwillingness to rehire a particular employee, application of the futility doctrine might have been warranted. (At p. 180.)

This Board has held that an employee is not required to apply for work where the employee's knowledge of the employer's discriminatory hiring practice would lead the employee to reasonably infer that "further efforts to seek employment would be futile." (J.R. Norton Company (1982) 8 ALRB Mo. 76.) In that case,

the employer had said it would not hire participants in a work stoppage which had been conducted in a prior season. The Board reversed the Administrative Law Officer's conclusion that a wide category of employees should be considered presumptive discriminatees stating that the employees must show they applied for work or that the failure to do so was based on a reasonable belief that such an application would be futile.

Although the Board in Norton, supra, 8 ALRB No. 76, did not discuss the case of Abilities and Goodwill, Inc. (1979) 241 NLRB 27 [100 LRRM 1470], enforcement denied on other grounds (1st Cir. 1979) 612 F.2d 6 [103 LRRM 2029], that case and others like it provide support for the conclusion that Respondent's pronouncement relieved Perez of the obligation to thereafter make an application. In Abilities, the NLRB changed the traditional rule that strikers must make an unconditional offer to return to work before an employer has an obligation to rehire them. The NLRB decided that henceforth strikers who were discharged would be treated as any other discharged employees. That is, they have no duty to make an offer to return to work; rather, the employer must offer them reinstatement.

The NLRB's rationale for the change was that the employer, by its discharge, had created the impression that it would be futile for the striker to seek to return to work. An uncertainty was thereby created as to whether the striking employee failed to return to work because of a continued commitment to the strike or because of a belief that it would be futile to apply to return. Since the employer's act created the ambiguity, the employer should bear the

burden of the uncertainty.

This Board has held that a threat to discharge employees if they went on strike invoked the principles of Abilities, supra, and entitled them to reinstatement and back pay as of the date of the threatened discharge. (O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, review den. by Ct.App., 1st Dist., Div. 4, November 10, 1980, hg. den. December 10, 1980.)

Thus, where an employer has discharged or threatened to discharge strikers, or has with sufficient particularity indicated a definite intention not to rehire them, the strikers will not be required to make an offer to return to work. The central question seems to be whether the employer by some overt action has effectively severed the employment relationship or otherwise communicated a specific intention not to allow employees to return and thereby created in the striking employees' minds an impression that it is futile to apply for reinstatement. In those cases, the employees are not required to go through the idle act of making an application. (Inta-Roto, Incorporated (1980) 252 NLRB 764.)

In the instant case, I have found that Perez, on June 18, 1982, was not at that point ready to return to work. That fact, however, does not resolve the issue. While a striking employee normally must communicate his availability to return to work, where the employer had made clear its intention not to rehire her/him, then the employee need not go through the idle act of applying. Perez was part of a group of only five employees whom Mrs. Bertuccio said she would not rehire. She specifically announced, in his presence, that this group would not be rehired, and she testified

she would not have rehired him. Requiring Perez to thereafter make an offer to return would indeed be to force him to go through a useless and idle act. He had a reasonable basis for believing that further efforts would be futile. (J.R. Norton, supra, 8 ALRB No. 76.)

Perez, at the time Respondent made clear its intention not to rehire him, intended to continue working on the boycott which the union had been conducting along with its strike. The issue of when an employee is actually available for work is appropriately a matter for compliance. (Abilities, supra.) That case recognizes that, at the time an employer discriminatorily discharges striking employees, some or all may at that point still be committed to the strike and not have a present intention to return to work and reserves that question for the compliance stage. Examining for the moment only whether Perez' failure to make an offer removes him from the protections of the Act, I find that it did not.

The case of Carlos Haro is different. There is no evidence Haro was aware of Respondent's policy or, therefore, that he had reason to believe that it would be futile for him to apply for work. Thus, the rationale of Norton does not apply. Neither Norton, Abatti, supra, nor International Brotherhood of Teamsters v. U.S. (1977) 431 U.S. 324 upon which Abatti relies, stand for the proposition that an employee who is not aware that it would be futile to apply is excused from applying. The Supreme Court in Teamsters, supra, specifically refers to employees who do not subject themselves to the indignity of a futile application knowing of an employer's policy of discrimination. (See also J.R. Norton

Company, supra, 8 ALRB No. 76 and 8 ALRB No. 79.) I therefore find that Haro's failure to make an offer is not excused and recommend that, as to him, the charge be dismissed.

Respondent admits that Vasquez, Rodriguez and Ceja made offers to return to work. I have found that Soliz also made a valid offer and that Perez was excused from doing so. The question remaining is whether Respondent's refusal to rehire these employees was legitimate.

Generally, to establish a prima facie case of discriminatory failure or refusal to rehire, General Counsel must prove that the discriminatee made a proper application at a time when work was available, that the employer's policy was to rehire former employees, and that the employer's failure or refusal to rehire was based on the employee's union activity or other protected concerted activity. (J.R. Norton Company, supra, 8 ALRB No. 89.)

It is uncontested that Respondent rehired most of its former employees including a number of whom were active in the union.[24/] I have also found that each of the alleged discriminatees either applied to return to work or were excused from doing so; thus, I turn to the question of whether the employer's failure to rehire was discriminatorily motivated.

An employer's duty to rehire striking employees may be excused only by a legitimate business justification. (N.L.R.B. v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375 [66 LRRM 2737].) In the instant case, Mrs. Bertuccio asserted as her justification a policy of not rehiring employees who were charged with felonies

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24. The parties stipulated that job availability is not an issue.

arising from strike misconduct. I note that this differs from Respondent's argument in its brief wherein it relies on serious strike misconduct. Clearly the significant fact is the policy actually adhered to by the employer, and Mrs. Bertuccio averred that it was the felony charges which motivated her not to rehire the strikers. As noted above, General Counsel did not contest that this could constitute a valid reason but instead contends that such is not Respondent's true reason.

It is quite clear that the presence of a valid reason cannot serve to camouflage an illegal one. (Garrett Railroad Car and Equipment, Inc. (1981) 255 NLRB 620 [107 LRRM 1103]; Acme-Evans Company (1940) 24 NLRB 71 [6 LRRM 385]; Reed & Prince Manufacturing Company (1939) 12 NLRB 944 [4 LRRM 208], enf'd (1st Cir. 1941) 118 F.2d 874 [8 LRRM 478], cert. den. (1941) 313 U.S. 595 [8 LRRM 458].) Thus, a violation occurs where an employee's union activity, not her/his alleged strike misconduct, is the true cause of the employer's failure to rehire. (California Coastal Farms (1978) 6 ALRB No. 25, review den. by Ct.App., 1st Dist., 4th Div., December 17, 1980, hg. den. January 14, 1981.)

I decline to accept General Counsel's theory that Respondent devised a discriminatory scheme to avoid rehiring Perez and Ceja and, in that process, discriminated against Haro, Vasquez, Rodriguez and Soliz. There are two main reasons I cannot accept the theory these four were innocent victim's of Respondent's scheme to get rid of Perez and Ceja. The first is that at the time Respondent refused to rehire those employees, Perez and Ceja were not seeking to return to work. Both were still involved in the boycott. I find

it farfetched to conclude that Respondent concocted a scheme which required refusing to rehire the three to provide an excuse not to rehire Ceja and Perez should they at some time in the future ask to return to work.

Moreover, the allegedly discriminatory scheme did not apply to Ceja who was not encompassed within the terms of the policy since he was not charged with a felony. If Respondent were to go to the trouble of devising a discriminatory scheme, surely it would have articulated a policy which included both Ceja and Perez. It would have been quite simple to do so.

I find, rather, that at the time Respondent refused to rehire Haro, Rodriguez, Soliz and Vasquez, it was not concerned with finding a reason to avoid rehiring Perez and Ceja but rather was reacting to the alleged violent acts of the three which General Counsel has conceded it was privileged to do absent a scheme of discriminatory treatment. There is no evidence that Respondent considered the protected activity of the three in its decision not to rehire them, and General Counsel did not contend such was the case. Thus, I would recommend dismissal of the charges pertaining to these employees.[25/]

This conclusion is reinforced by Mrs. Bertuccio's actions when Ceja returned on July 21, 1982, seeking to come back to work.

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25. General Counsel argues that Respondent was not truly concerned with the strike violence because the conduct involved in the felony charges was similar to that in the misdemeanor cases. While there is merit to this contention, I do not find it unbelieveable that a lay person would see a significant distinction between persons charged with a felony and those charged with a misdemeanor. Thus, I am not convinced that Mrs. Bertuccio's reliance on the felony charges is indicative of a discriminatory motive.

She did not invoke a prepared policy and refuse to rehire him based on her ready-made scheme previously devised to deal with just such an eventuality. She hesitated, disappeared into the office for 10 to 15 minutes and returned to tell him he could not come back but without giving him any reason other than that she had no work for him. Such conduct belies a prearranged scheme.

It does, on the other hand, demonstrate clearly that her reason for not rehiring Ceja was not his misdemeanor convictions. She did not refer to them or to any other strike misconduct.

The most telling indication, however, that it was not the charges of which Ceja was convicted with which she was concerned is Mrs. Bertuccio's statement that she did not return him to work because he was an instigator. (R.T. III: 156.) The conduct she described which caused her to consider him an instigator was getting people together on the picket line, "running, hollering, screaming, threatening, the whole bit . . . ." (R.T. III:157.) It is notable that she did not mention the strike misconduct on which she ostensibly relied.

Still, the fact that Mrs. Bertuccio was candid enough to admit that she considered Ceja one of the two top union activists and that he had caused a lot of problems, does not dispose of the issue. So long as the employer has a legitimate reason for discharging or not rehiring an employee, the fact that the employer may be pleased to get rid of a union activist does not run afoul of the law. (Lassen Canyon Nursery (1977) 4 ALRB No. 21 citing Frosty Morn Meats Inc. v. N.L.R.B. (5th Cir. 1961) 296 F.2d 617 [49 LRR.M 2159, 2162].)

On these facts, however, her admissions regarding Ceja, the failure to rehire Ceja although he did not fit within her policy, and the failure to give him any reasons when he applied for rehire convince me that her real reason for not rehiring him was his protected union and other concerted activity.

An employer's history of anti-union animus may be used to impute an improper motive for its actions. (Paul W. Bertuccio (1982) 8 ALRB No. 101, citing A.L.R.B. v. Ruline Nursery Company (1981) 115 Cal.App.3d 1005.) Respondent has been involved in a number of proceedings before this Board and has been found to have committed numerous violations of the Act.[26/] This consideration, in combination with the others just referred to, demonstrate that Respondent's true reason for failing to rehire Ceja was his protected union and concerted activity. Thus, I find that by refusing to rehire him Respondent has violated subsections (c) and (a) of the Act. (Anton Caratan and Sons (1982) 8 ARLB No. 83.)

Respondent's conduct toward Ceja, Mrs. Bertuccio's admissions that Perez was linked with Ceja as the most active union supporter and the history of anti-union animus establish General Counsel's prima facie case that protected union and concerted activity were a basis for Respondent's refusal to rehire Perez.

Once the General Counsel establishes a prima facie case that an employee's protected and/or union activity was a basis for

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26. Paul W. Bertuccio & Bertuccio Farms (1978) 4 ALRB No. 91; Paul W. Bertuccio & Bertuccio Farms (1979) 5 ALRB No. 5, review den. by Ct.App., 1st Dist., Div. 2, Oct. 22, 1976, hg. den. Nov. 21, 1979; Paul W. Bertuccio (1982) review den. by Ct.App., 1st Dist., Div. 1, Sept. 30, 1982, hg. den. Oct. 27, 1982; Paul W. Bertuccio (1982) 8 ALRB No. 39; Paul W. Bertuccio (1982) 8 ALRB No. 101.

the employer's refusal to rehire the employee, "the burden shifts to the employer to prove that it would have refused rehire even if the employee(s) had not engaged in the protected activity. (Anton Caratan, supra, citing Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] aff'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]; Nishi Greenhouse (1981) 7 ALRB No. 18.)

I find that Respondent's refusal to rehire Perez was based both on its nondiscriminatory policy regarding the felony charges and its unlawful desire to avoid rehiring a pronounced union activist. In assessing such a case of mixed-motive, this Board has held the Wright Line test is applicable. Thus, Respondent must prove by a preponderance of the evidence that it would have refused to rehire Perez even absent his union and protected activity. (Anton Caratan, supra.)

I find that Respondent has not met this burden. Ceja and Perez were inextricably linked in Respondent's judgment as the two persons who "guided" the other strikers and were the most vocal union activists. Mrs. Bertuccio stated that she believed both Ceja and Perez caused a lot of problems at the ranch, that she did not want them back there and would hire them only if required to do so by law. Her refusal to rehire Ceja, whom she admitted she knew had not been charged with a felony and thus did not fit within her stated policy, her failure to provide Ceja with any reason for her failure to rehire him, the fact that Ceja and Perez were inextricably linked together and Respondent's history of anti-union animus cause me to believe that with Perez, as with Ceja, it was Respondent's concern with their union and other concerted activities

which was the true basis for Respondent's decision not to rehire Perez.

I therefore find that in refusing to rehire Perez, Respondent violated subsections (c) and (a) of section 1153 of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices within the meaning of subsections (a), (c) and (e) of section 1153 of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent refused to rehire Javier Ceja and Ramiro Perez because of their participation in protected union and other concerted activities, I shall recommend that Respondent be ordered to offer them reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, beginning with the earliest date following issuance of this proposed Order.

I further recommend that the Respondent make whole Javier Ceja and Ramiro Perez by payment to them of a sum of money equal to the wages they each would have earned but for Respondent's unlawful refusal to rehire them, less their respective net earnings, together with interst in accordance with approrpriate Board precedent. Back pay shall be computed in accordance with appropriate Board precedent.

Under applicable legal precedent, Respondent's liability for back pay for Perez would commence from the date Respondent

communicated its intention not to rehire him. Such a date, however, is predicated on the rationale that Respondent should bear the burden of the uncertainty of whether the employee's failure to return to work was occasioned by the employee's perception that it would be futile to attempt to return. Here, there is evidence that, at least initially, Perez' failure to return was due to his involvement in the boycott. It would therefore be inequitable to simply apply the above standard. Instead, I recommend that Respondent's back pay obligation commence with the date Perez left the boycott. Respondent is, of course, free to demonstrate that after that date Perez remained unavailable for work. Similarly, Perez may demonstrate that he was actually available for work at an earlier date.

Having found that Respondent violated subsections (e) and (a) of section 1153 of the Act by its unilateral change in working conditions and its unilateral institution of a new disciplinary rule, I shall recommend that Respondent be ordered to rescind its unilateral changes and, upon request by the union, to meet and bargain collectively with the union regarding these issues either to agreement or to a bona fide impasse. I decline to recommend that the UFW's certification be extended for one year, as requested by General Counsel, since the unilateral change herein is not an element in a finding of an overall refusal to bargain which could warrant such an extension.

I shall also recommend that Respondent make whole each of the employees it refused to allow to work on November 19, 1982, because of their refusal to cut lettuce in the rain on November 18,

1982, including but not limited to, Ignacio Soltero, Pedro Galindo, Jose Zendejas, Sergio Zendejas, Samuel Zendejas, Tomas Martinez, Gelacio Munoz, Jaime Lopez, Gil Corona and Lupe Ramos, for all economic losses they have suffered as a result of Respondent's discriminatory one-day suspension, the makewhole amounts and interest thereon to be computed in accordance with applicable Board precedent. General Counsel may establish at the compliance hearing whether there are any other individuals who were similarly suspended.

I shall further recommend that the Respondent shall be ordered to preserve and upon request to make available to the Board and its agents for examination and copying, all of its foremen's notebooks containing employee numbers and dates of hire, as well as the personnel files at Respondent's offices so that employees' back pay due them and seniority may be ascertained.

In order to further effectuate the purposes of the Act and to insure to the employees the enjoyment of the rights guaranteed to them in section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act, and it has been ordered not to engage in future violations of the Act.

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

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent

Bertuccio Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees' terms or conditions of work.

(b) Discouraging membership of employees in the UFW or any other labor organization by discharging or failing to rehire any of its agricultural employees for participating in concerted activities, supporting the UFW, or because they filed charges or testified at unfair labor practice hearings under the Act.

(c) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by section 1152.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(b) Rescind its unilateral change requiring employees to cut lettuce in the rain and its unilaterally instituted disciplinary rule that employees who, without excuse, fail to comply with the aforementioned requirement will be fired after the third such failure.

(c) Make whole each of the employees it refused to allow to work on November 19, 1982, because of their refusal to cut lettuce in the rain on November 18, 1982, including, but not limited to, Ignacio Soltero, Pedro Galindo, Jose Zendejas, Sergio Zendejas, Samuel Zendejas, Tomas Martinez, Gelacio Munoz, Jaime Lopez, Gil Corona and Lupe Ramos, for all economic losses they have suffered as a result of their discriminatory one-day suspension by Respondent, the makewhole amount and interest thereon, to be computed in accordance with established Board precedent.

(d) Offer JAVIER CEJA and RAMIRQ PEREZ reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, beginning with the earliest date following issuance of the Order.

(e) Make whole Javier Ceja and Ramiro Perez for any losses they suffered as a result of their discriminatory failure to be rehired, by payment to each of them a sum of money equal to the wages they lost, less their respective net interim earnings, together with interest thereon in accordance with established Board precedent. Back pay shall be computed in accordance with the principles set forth herein and with appropriate Board precedent.

(f) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying and otherwise copying, all payroll records, 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 back pay period and the amount of back pay due under the terms of this Order.

(g) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereafter.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent during 1982 and 1983.

(i) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(j) Arrange for a reprsentative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and company 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 and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30

days after the date of issance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

It is recommended that the remaining allegations in the complaint as amended be dismissed.

DATED: October 5, 1983

BARBARA D.MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, Bertuccio Farms, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law. 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 farm workers 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 to obtain a contract covering 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 or protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT discharge, fail to rehire, or in any other way discriminate against, interefere with, or restrain or coerce you because of your exercise of your right to act together with other workers to help and protect one another.

WE WILL offer JAVIER CEJA and RAMIRO PEREZ their old jobs back if they want them and will pay them any money they lost because we unlawfully failed to rehire them.

WE WILL meet and bargain in good faith with the UFW about changes in your working conditions and new disciplinary rules because it is the representative chosen by our employees.

WE WILL NOT change your terms or conditions of work without first meeting and bargaining with the UFW about such matters because it is the representative chosen by our employees.

WE WILL pay the workers who refused to cut lettuce in the rain on November 18, 1982, for the day's wages they lost when we refused to let them work on November 19, 1982. Those workers include but are not limited to Ignacio Soltero, Pedro Galindo, Jose Zendejas, Sergio Zendejas, Samuel Zendejas, Tomas Martinez, Gelacio Munoz, Jaime

Lopez, Gil Corona and Lupe Ramos.

DATED: BERTUCCIO FARMS

By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question, contact the Board at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-2160.

DO NOT REMOVE OR MUTILATE.