Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GARGIULO, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Labor Organization, and EFREN BARAJAS, LAURO BARAJAS, XAVIER ORTEGA, BALTAZAR AGUIRRE and JOSE MOJICA, UFW Organizers.	Case No. 96-PM-2-SAL 22 ALRB No. 9 (September 4, 1996)

DECISION AND ORDER SETTING MATTER FOR HEARING

We address herein a motion to deny access filed by Gargiulo, Inc. (Gargiulo or Employer), which seeks to deny the United Farm Workers of America, AFL-CIO (UFW or Union) and five named organizers access to Gargiulo 's operations for no less than 60 days.

The regulations of the Agricultural Labor Relations Board (ALRB or Board) grant union representatives a qualified right of preelection organizational access to the employer's property in order to meet with agricultural employees at their work site under strict procedural, time and manner limitations. (Title 8, California Code of Regulations, section 20900 et seq.[1];

[1]Unless otherwise indicated, all section references herein are to the California Code of Regulations, Title 8.

Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d 392.) The regulations also provide that the right of access "shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." (Cal. Code Regs., tit. 8, § 20900(e)(4)(C).) The Board, pursuant to a properly filed motion to deny access and upon due notice and hearing, may bar labor organizations and/or their individual organizers who violate the rule from taking access to any agricultural operations for a period of time to be specified by the Board. (Cal. Code Regs., tit. 8, § 20900(e)(5)(A).)[2]

In Ranch No. 1, Inc. (1979) 5 ALRB No. 36, at page 3, the Board set forth the substantive requirements for a successful motion to deny access:

> A party submitting a motion to deny access is not required to show that violation of the access rule either resulted in the infringement of employees' statutory rights or affected the results of an election. A motion to deny access will be granted where the moving party demonstrates violation of our access rule involving (1) significant disruption of agricultural operations, (2) intentional harassment of an employer or employees, or (3) intentional or reckless disregard of the rule.

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[2]Violations of the rule may also constitute grounds for setting aside an election if the Board determines, by an objective standard, that the conduct complained of was such that it would tend to interfere with employee free choice and affect the results of the election. (Cal. Code Regs., tit. 8, § 20900(e)(5)(B).) Infractions of the rule could also rise to the level of an unfair labor practice in violation of section 1154(a)(1) of the Agricultural Labor Relations Act (ALRA or Act) if the conduct independently establishes interference or restraint of employees in the exercise of their rights within the meaning of ALRA section 1152. (Cal. Code Regs., tit. 8, § 20900(e)(5)(B).)

The Board in Ranch No. 1 barred a union organizer for 60 days after finding that he significantly disrupted operations and displayed a lack of concern for access limitations when he remained in the fields for one and a half to two hours.[3]

Some years later, the Board addressed a motion to deny access in L & C Harvesting, Inc. (1993) 19 ALRB No. 19. On the basis of the moving papers in support of the motion and the union's response, the Board denied the motion without hearing, on the grounds that the declarations in support of the motion did not establish that the access takers deliberately disregarded the access rule and there was no indication of harassment or disruption of work.

Recently, in Dutra Farms (1996) 22 ALRB No. 5, the Board clarified the procedures to be utilized in the filing and evaluation of motions to deny access.[4] We held in that case that,

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[3]The 60-day ban was to commence on the day the union next filed a Notice of Intent to Take Access for the purpose of taking access to the property of any agricultural employer located in the area covered by the then existing Fresno Regional Office.

[4]In 1993, the Board began a comprehensive regulation review, during which we considered input on the Board's access rules previously submitted by employers. As a result of this review, the Board submitted for public comment a proposal which was intended to provide for speedier resolution of access disputes. The proposal would have created a bi-level process, the first of which was an expedited informal resolution by the regional director. The regional director's decision, which would not be stayed, would be appealable to the Board through a formal process that was very similar to that used for evaluating election objections. As a result of public opposition, primarily from employers, the proposal was withdrawn by the Board.

In our decision in Dutra Farms, we explained that the process to be used under existing Regulation 20900 was one which was based on

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in order to warrant a hearing, a motion to deny access must be accompanied by supporting declarations, under penalty of perjury, which allege facts within the personal knowledge of the declarants that, if uncontreverted or unexplained, demonstrate a prima facie violation of the access regulation and support the granting of the motion. In other words, the approach established by Board precedent is that a hearing will not be set unless the supporting declarations allege facts which, if proven, would warrant the denial of access for some period of time. Therefore, a party filing a motion to deny access must provide declaratory support for each element of proof necessary to obtain relief. This does not reflect an insensitivity to infringement of property rights, but instead merely reflects efficient administrative practice.

We disagree with our dissenting colleague's view that we have utilized a more stringent standard for setting matters for hearing than that required by Dutra Farms. On the contrary, we have faithfully adhered to the standards set forth in Dutra Farms and Ranch No. 1, which require that the supporting declarations be sufficient to establish a prima facie case warranting the denial

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[4](...continued)
the election objections procedure and, in turn, on the formal procedure under the proposed, but unadopted, regulation. We remain, however, keenly aware that the Board still lacks a mechanism for resolving access disputes expeditiously. For this reason, in the near future, when the Board intends to solicit public input on other issues, we call upon interested parties to offer suggestions for how to fashion a speedier and more workable process.

of access.[5] The Board will not assume that missing factual elements of a prima facie case which are not addressed in the declarations will be furnished at hearing.[6]

Further, we do not believe we place an unreasonable burden on the Employer herein by requiring that the supporting declarations set out a prima facie case. In requiring the Employer to allege facts which, if proven, would establish an access violation, we do not, as suggested by our dissenting colleague, rely on the inferences least favorable to the Employer. To be sure, an element of the prima facie case may be established based on reasonable inferences drawn from facts which are contained in the declarations. In our view, our dissenting colleague has gone beyond drawing such inferences and has assumed the existence of the necessary underlying facts. In contrast, we refuse to fill in the factual gaps in the declarations that are necessary to establish the elements of a prima facie case.

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[5]Our dissenting colleague states that we would require declarations which "standing alone and proven" establish an access violation. If by this he means that we would require the case to be proven prior to hearing, he is mistaken, for what is required are declarations alleging facts which, if proven at hearing, would warrant the denial of access.

[6]Indeed, in none of the Board's various processes leading to an evidentiary hearing would a case proceed to such hearing without a reasonable basis for believing that all elements of a prima facie case are present. The procedure in election cases, on which the procedure in motion to deny access cases is based, similarly requires declaratory support which, if uncontroverted, would establish a prima facie case for overturning an election. This approach was judicially approved in J. R. Norton Co. v. ALRB (1979) 26 Cal.3d 1. In unfair labor practice cases, the General Counsel, pursuant to his statutory duty, investigates charges and issues complaints only where he is satisfied that the case is likely to be proven at hearing.

Nor do we believe that the Board should follow a "more relaxed standard" for setting hearings on motions to deny access in this case because the Board has entertained relatively few such motions. As explained above, the Board previously has set forth the standards to be applied and it is clear from the Employer's moving papers that it was on notice of the relevant case law when its motion was filed. Moreover, we believe the existing standard is clear and relatively easy to apply. Requiring anything less than a prima facie showing would risk unnecessary expenditure of time and other resources for hearings on matters which are without foundation. Moreover, the existing standard is more predictable, in that it more clearly sets forth what is required and allows a moving party to know that, if it proves at hearing the facts set forth in its declarations, its motion will be granted. The standard urged by our dissenting colleague, on the other hand, could result in a moving party not knowing what it must prove at hearing in order ultimately to prevail.

The instant motion was filed by Gargiulo pursuant to Title 8, California Code of Regulations, section 20900(e)(5)(A) and Dutra Farms. Gargiulo alleges that the UFW engaged in violations of the time and number limitations of the regulation as well as in conduct which resulted in damage to crops and disrupted operations. Applying the standards set forth in Ranch No. 1 and Dutra Farms, we find that some of the allegations submitted by Gargiulo warrant a hearing and some do not. As explained below, the additional allegations which our dissenting colleague would

set for hearing do not meet the standards discussed above because they fail to establish prima facie violations of the access regulations.

June 8. 1996--Silliman Ranch

In this incident, it is alleged that, at approximately 3:30 in the afternoon, 25 "UFW organizers" ran into the field where 80 to 100 employees were working and yelled at employees. When two supervisors started toward the group to ask what they were doing, the group retreated to the edge of the road.[7]

Since the supporting declarations reflect that the group retreated as soon as they saw the supervisors approaching, any disruption of work would have been very brief and, thus, not "significant" within the meaning of Ranch No. l.[8] More importantly, the bare allegation that the 25 were "UFW organizers" is patently insufficient to reflect union responsibility, since there are no facts alleged as to why the 25 were thought to be organizers or union agents. The access regulation, of course, regulates only the conduct of unions and their agents. Claims of violations of property rights by others, while cognizable under trespass laws, do not fall within the Board's jurisdiction. Consequently, the supporting declarations do not allege facts,

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[7]As there was no declaratory support whatsoever for the claim of crop damage with regard to this or any of the other alleged incidents, that allegation is summarily dismissed.

[8]The Board in Ranch No. 1 did not define "significant disruption," but we understand it to denote something beyond that which is too brief, inconsequential, or de minimis to warrant any sanction against the union or any of its organizers.

sufficient to establish a prima facie violation of the access regulation and warrant the denial of access.

June 12. 1996--Silliman Ranch

The thrust of the allegation here is that UFW organizers, while taking access, provoked an assault by employees who had been insulted by the organizers. There is no allegation of disruption of work, damage to property, or violation of time or number restrictions. The only issue posed by this allegation is whether the alleged threats of firing (if the union prevailed in an election) and cursing directed at employees constitutes "harassment" within the meaning of the Ranch No. 1 standard.

The Board in Ranch No, 1 did not explain what would constitute "intentional harassment." However, particularly in light of the provision of Title 8, California Code of Regulations, section 20900(e)(4)(C) which states that speech itself shall not be considered disruptive conduct, we believe that intentional harassment is established where the facts reflect that organizers or union agents took access not with the intent to communicate with employees and gather their support, but with an ulterior motive to harass.[9] We agree with our dissenting colleague that speech which threatens economic harm to employees is not to be condoned. However, a distinction must be made between conduct

[9]We acknowledge that this is a difficult standard to meet, but we believe it is consistent with the purpose of the access regulation, which is not to regulate the content of the union's message, but to provide procedural guidelines for limited access to the employer's property. The election objections and unfair labor practice processes are better suited to deal with allegations of unprotected speech.

which is intended to harass, and speech which, however deplorable we may find it, does not in itself constitute intentional harassment. Since the allegation here is simply that the organizers exchanged insults and threats with unsympathetic employees, and there is no showing that the organizers entered with the intent to harass, this allegation is dismissed.

June 13. 1996--Monterey Bay Academy

The supporting declaration states that, at the end of the lunch period, during which UFW organizers had been taking access, about 40 union supporters approached the crews and yelled that the workers should not work and leave the field. The supervisor then blew his whistle to signify the end of the lunch period, which was 12:30 p.m. The 40 union supporters left at about 12:37 p.m. and then marched through the field chanting loudly.

There is no allegation that a UFW agent encouraged the 40 supporters to enter the property; therefore there is no basis shown for attaching responsibility for the conduct to the UFW. Even if there were, the seven minute delay in exiting the field was, without more evidence of its impact, too brief to be considered significant. Since the declaration does not state how long the subsequent march lasted, or its proximity to the employees, the declaration fails to indicate significant disruption from that activity. In addition, there are no facts alleged to indicate that either the seven minute delay or the

march reflected intentional or reckless disregard for the access rules. Therefore, this allegation will not be set for hearing.

June 14. 1996--Jensen Ranch

Among the claims surrounding this incident is that a group of 60-80 "organizers" blocked ingress and egress. However, the supporting declarations reflect that this took place on the public road. Most revealing is the allegation that, after the blocking of ingress and egress, UFW organizer Efren Barajas "led the mob onto the property." Consequently, that portion of the allegation must be dismissed. Our dissenting colleague errs in believing that allegations not clearly described as occurring on the Employer's property should be set for hearing, leaving to that process the issue of the location of the conduct. By definition, the Board's access rules apply only to entry onto the employer's property. The Board is obviously without jurisdiction to regulate access to public property. Therefore, entry onto the employer's property is the most fundamental element of an access violation and must be alleged in the supporting declarations.

However, the supporting declarations do state that Barajas led the group onto the property about an hour and fifteen minutes before the end of work. From there they shouted obscenities at the workers in the field. This reflects a significant period of improper access. More importantly, Barajas is alleged to have stated that he would follow any (access) rules he chose. This conduct reflects an intentional disregard of the

access rules. Consequently, this portion of the allegation will be set for hearing.

June 15. 1996--Holly Ranch

The allegation here is that UFW organizers stayed 40 minutes past the time allotted for access under the regulation and that UFW organizer Efren Barajas stated that he would decide when it was time to leave. Not only is 40 minutes not insignificant, but the comment attributed to Barajas shows a cavalier attitude toward the access rules, particularly when viewed in conjunction with the comments attributed to him on June 14. Therefore, this allegation reflects an intentional or reckless disregard for the access rules and will be set for hearing.[10]

ORDER

The following questions shall be set for hearing:

1. On June 14, 1996, at Jensen Ranch, did UFW organizer Efren Barajas show an intentional and/or reckless disregard for the Board's access regulations by leading a group of UFW supporters onto the property of the Employer about an hour and fifteen minutes before the proper time for access, where the group shouted obscenities at workers in the field and Barajas stated that he would follow any access rules that he chose?

2. On June 15, 1996, did UFW organizers show an intentional and/or reckless disregard for the Board's access regulations by remaining on the Employer's property for approximately 40 minutes past the proper time for access and by Efren Barajas stating that he would decide when it was time to leave?

[10]There is also a vague allegation that too many organizers were present for the number of employees in the area, but it appears to be based solely on the fact that the number of employees in the area was fluid during the access period. There is no clear allegation that an excess number of organizers entered the property at the beginning of the access period.

The Employer shall have the burden of proving that the Union and/or its agents engaged in conduct which warrants the granting of the motion to deny access. The Union will have full party status, including the opportunity to call, examine and cross examine witnesses. Thereafter, the Investigative Hearing Examiner will issue a recommended decision to which any party may file exceptions with the Board.

All of the remaining allegations are dismissed for failure to provide supporting declarations which allege facts sufficient to warrant the granting of the motion to deny access.

The Executive Secretary of the Board shall issue a formal Notice of Hearing setting forth the date, place, and time of said hearing.

DATED: September 4, 1996

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CHAIRMAN STOKER, Concurring and Dissenting:

While properly setting certain matters for hearing, as referenced in the Order herein, my colleagues in the majority dispose of additional matters which, in my view, are equally worthy of exploring in the course of an evidentiary hearing. They are:

1. On June 8, 1996, at approximately 3:30 in the afternoon, did an estimated 25 UFW organizers run into a field where 80 to 100 employees were working and, if so, did this conduct violate the rule and/or result in a disruption of operations or intentional harassment of employees?

2. On June 14, did two UFW organizers, accompanied by "60 to 80 other organizers," interfere with access to and egress from the Employer's Jensen Ranch and then enter the work site where they shouted obscenities at employees, thereby violating the rule and/or disrupting operations?[1]

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[1]While it is not clear whether the organizers were actually on the Employer's premises at the time of the alleged blocking of traffic to or from the ranch or amassed on the public roadway. If the latter, I would agree with the majority that the matter would be beyond the purview of the Board as the access regulation governs only that conduct which takes place on an employer's

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3. While taking access to Silliman Ranch on occasions prior to June 12, did organizers threaten employees who didn't support the UFW that they would lose their jobs after the Union "got in?"[2] (See, e.g., Triple E Produce Corporation v. Agricultural Labor Relations Board (1983) 35 Cal.3d 42 [196 Cal.Rptr. 518].)[3]

In considering which standard is appropriate when evaluating allegations in support of a motion to deny access, there should be no doubt that the Board's creation of a process by which alleged violations of the access rule may be initially pleaded directly before the Board was designed to foster an expedited response. In so doing, the Board acknowledged its

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[1](...continued)
premises. However, because the declaratory support is not conclusive on that point, the question as to the precise location of the alleged misconduct may be resolved at hearing as a threshold matter.

[2]The majority makes much of the fact that such threats are covered by Title 8, California Code of Regulations, section 20900(e)(4)(C) which holds that "[s]peech by itself shall not be considered disruptive conduct." That is not an adequate response. Speech which serves to threaten economic harm to employees cannot be condoned when asserted in conjunction with the taking of Board authorized access.

[3]In the cited case, the California Supreme Court examined identical threats, albeit in the context of election objections, whereas here there has been no election. Nevertheless, the court's view of such conduct is instructive. It noted that ALRA section 1152 gives employees the right to support labor organizations as well as the right to refrain from such activity. Moreover, it is a violation of the Act for labor organizations to coerce employees in the exercise of their right to support or not support a union. The question here is not one of interference with employee free choice in the context of an election, or coercion in the context of an unfair labor practice. Rather, the issue is whether such conduct falls ouside the access rule's purpose of facilitating communication in order that employees may learn the "advantages and disadvantages of organization from others." (Cal. Code Regs., tit. 8, § 20900(e).)

responsibility to immediately examine alleged violations of the rule where, as here, there was no election and the normal unfair labor practice process is comparatively long. Thus, where crops are being destroyed or operations disrupted, election objections and unfair labor practice charges are of no avail to an employer. Accordingly, the motion to deny access is an extraordinary process, outside the normal channels of either elections or unfair labor practices, and thus need not be governed by the same procedural constraints.

The majority, however, by its decision, has clearly established a much more stringent standard for reviewing access issues in determining whether to set an allegation for hearing. As stated in Dutra Farms (1996) 22 ALRB No. 5, a party must accompany its motion with declarations which, ". . .if uncontroverted or unexplained, would support the granting of the motion." The question which Dutra did not address is the level of review the Board should impose in reviewing access motion declarations. The majority clearly believes that the declarations must contain all allegations which standing alone and proven, establish a violation of Title 8, California Code of Regulations, section 20900 et. seq. I oppose this standard and believe that the moving party has a duty to allege only enough facts which, in considering the declarations in the most favorable light for moving party(ies), establishes prima facie that a violation has occurred.

The Board should remain mindful of the differences between motions to deny access and election and unfair labor practice

matters. The motion which gives rise to this proceeding is the product of an alternative to either election objections or unfair labor practice charges and therefore should both be construed and evaluated as such. The difference in the cases becomes particularly significant in light of the majority's apparent imposition of the same pleading requirements for access matters, at least insofar as they concern declarations in support of the motions. I believe this is inappropriate in light of the stated Board policy that "statutory and constitutional principles require that a reasonable and just accomodation be made between the right of unions to access and the legitimate property and business interests of the employer." (Cal. Code Regs, tit. 8, § 20900(b).) As a union's right to take access to an employer's premises is a privilege created by the Board, it is incumbent upon the Board to assure that the appropriate balance is preserved. Accordingly, the Board is obliged to examine alleged violations of the rule with the strictest of scrutiny and retain some flexibility in that process, including the adoption of a somewhat less rigorous standard than it follows in other types of cases. Anything less invites abuse of the access privilege which in turn translates into abuse of property rights.

An evaluation of the moving party's likelihood of success on the merits entails these questions: (1) the proper standard to be applied in evaluating the Employer's claims and (2) the application of this standard to the facts presently before the Board. However, notwithstanding the sparse record available in this case, my colleagues in the majority, in assessing whether

a prima facie showing has been made, consistently rely upon those inferences least favorable to the Petitioner, disregarding the equally plausible inferences favorable to him. In so doing, I believe the majority exacts an unreasonable burden in what may well be a first impression situation in which the Board has had limited exposure and for which there is scant guidance.

Despite the limited evidence in the record, the majority position places an unreasonable burden on a party who believes it can demonstrate that the access rule is being abused. The immediate impact of the majority position is to forestall the availability of remedy where one may indeed be warranted and, more importantly, I believe, serves to dissuade future efforts by other employers who may indeed have a well founded basis for filing such motion. Thus, in a case like this, the Board's experience with such motions is limited, and, unlike in election or unfair labor practice cases, there is virtually no precedent. Accordingly, in order that the Board may refine its expertise in such matters, and develop more precise principles of pleading and law as guidance for future cases, it should not be unreasonable, at least in this instance, to follow a more relaxed standard when assessing whether a prima facie showing has been established. Thus, while I believe that those circumstances would justify a lesser showing here, I am also persuaded that the Employer herein has demonstrated an adequate Dutra showing to warrant setting for hearing the additional matters described above.

The issue is not whether the party seeking to deny access must make a strong prima facie showing at the outset, as the

majority suggests, but rather whether the supporting declarations are sufficient to suggest that the Board should intervene in the interest of assuring a clear understanding by all parties of regulations of its own making. For the reasons explained above, I would literally construe the declarations in order to permit the moving party to attempt to prove its case by means of a full evidentiary hearing.

DATED: September 4, 1996

MICHAEL B. STOKER, Chairman

CASE SUMMARY

Gargiulo, Inc.
UFW)

Case No. 96-PM-2-SAL
22 ALRB No. 9

Background

Gargiulo, Inc. filed a motion to deny access, seeking to have the United Farm Workers of America AFL-CIO (UFW) and five named organizers barred from taking access to Gargiulo's operations for no less than 60 days. Gargiulo alleged that the UFW engaged in violations of the time and number limitations of the Board's access regulation as well as in conduct which resulted in damage to crops and disrupted operations.

Board Decision

Applying the standards set forth in Ranch No. 1, Inc. (1979) 5 ALRB No. 36 and JDutra Farms (1996) 22 ALRB No. 5, the Board set for hearing those allegations for which there was sufficient declaratory support to establish (upon proof at hearing) that there was a violation of the access rules warranting the denial of access, i.e., one which involved (1) significant disruption of agricultural operations, (2) intentional harassment of an employer or employees, or (3) intentional or reckless disregard of the rules. The Board explained that it will not assume that missing factual elements which are not addressed in the declarations will be furnished at hearing.

The Board set for hearing allegations that a UFW organizer showed an intentional or reckless disregard for the Board's access regulations by (1) leading a group of supporters onto the employer's property about an hour and fifteen minutes before the proper time for access, where the group shouted obscenities at employees in the field, and the organizer stated that he would follow any access rules that he chose, and (2) remaining on the employer's property approximately forty minutes past the proper time for access and stating that he would decide when it was time to leave. The Board dismissed all other allegations for failure to allege various elements of a prima facie case. With regard to these allegations, the declarations either did not provide any basis for concluding that the conduct was attributable to the UFW, failed to reflect significant disruption, failed to allege any damage to property, or failed to show that organizers entered the property with the intent to harass those who did not support them.

Concurring & Dissenting Opinion

The Chairman differed from his colleagues in the majority only insofar as he would find the Employer has alleged additional violations of the access rule which also warrants hearing. He observed that since the motion to deny access was developed as an

alternative to resolving access disputes through election or unfair labor practice processes, the Board need not hold parties to the same standards, but may intervene upon a showing that the rule it created has been misused. He believes an adequate showing has been made, particularly since section 20900(b) of the access regulation obligates the Board to address conduct which threatens the balance "between the right of unions to access and the legitimate property and business interests of the employer."

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