Hollister, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| PAUL W. BERTUCCIO,<br><br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Party. | ) | case Nos. 79-CE-48-SAL<br>79-CE-49-SAL<br>79-CE-97-SAL<br>79-CE-309-SAL<br>79-CE-311-SAL<br>79-CE-351-SAL<br><br>8 ALRB No. 39 |

DECISION AND ORDER

On October 22, 1980, Administrative Law Officer (ALO) Clayton Rost issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union), each timely filed exceptions with a supporting brief.

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

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent that they are consistent herewith.

The ALO concluded that Respondent violated section 1153 (c) and (a) of the Agricultural Labor Relations Act (Act) by: transferring employee Jesus Perez from his usual assignment in the packing shed to work in the fields, because he had engaged in

union activity; refusing to transfer employee Ramiro Perez back to work in the shed from his temporary assignment in the fields because he had engaged in union activity; and suspending Jesus Perez and Ramiro Perez for placing flags bearing the Union symbol in Respondent's field. The ALO also concluded that Respondent had violated: section 1153 (e) and (a) of the Act by unilaterally ceasing to pay employees an extra hour of pay for work on Sunday; and section 1153 (a) of the Act by criticizing Jesus Perez's and Ramiro Perez's work and threatening to fire them because of their union activity.

The ALO recommended dismissal of allegations in the complaint: that Respondent had refused to assign employee Maria Jiminez to a thinning-and-hoeing crew because of her union activities; and that Respondent refused to give employee Rodrigo Navarette the same amount of irrigation work he had performed in the past, because of his union activities. As we affirm the ALO's conclusions as to these two employees, the allegations in the complaint as to them are hereby dismissed.

The Field Assignment of Jesus Perez

Jesus Perez testified that Respondent's supervisor, Jose Duran", told him on February 9, 1979, that immigration authorities had taken some workers, and that that was a good excuse to send him to the field. General Counsel asserted that Perez's field assignment was discriminatory, and was motivated by Respondent's knowledge of Perez's union activity, and the ALO so found. He also found that Respondent had a practice or policy of assigning long-term employees such as Perez to positions they had held

in the past. Perez was primarily assigned to shed work. Respondent argued that the assignment system was very flexible, and that any reassignment of employees was a reflection of Respondent's policy.

To establish a prima facie case of discriminatory work assignment, the General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that the respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the work assignment. Jackson and Perkins Rose Company (March 19, 1979} 5 ALRB No. 20.

If the General Counsel establishes a prima facie case that protected activity was the reason for the employer's action, the burden then shifts to the employer to prove that it would have so acted even absent any protected activity on the employee's part. Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18. The employer's burden is the burden of going forward with evidence, not the burden of proof, which always remains with General Counsel. Martori Brothers Distributors (March 1, 1982) 8 ALRB No. 15.

The ALO bases his finding that General Counsel established a prima facie case against Respondent primarily upon the fact that supervisor Duran purportedly told Perez that immigration authorities had taken some workers away from the field, and that that was a "good excuse" to send Perez to the field. The ALO believed that if the system used by Respondent was completely flexible, no "excuse" for Perez's field assignment would be needed. Whether or not Respondent needed an "excuse" to reassign Perez is

a tenuous point on which to base the finding of a discriminatory work assignment. There is a need for more than a mere suspicion, and more than the offhand use of the word "excuse," to find that Jesus Perez's assignment was discriminatorily motivated. Tex-Cal Land Management, Inc. (April 24, 1979) 5 ALRB No. 29. Although the Board may draw inferences from the facts of a case in an effort to establish the true basis for an employer's action, circumstances which merely raise a suspicion, as here, do not establish a violation. S. Kuramura, Inc. (June 21, 1977) 3 ALRE No. 49.

The ALO lists several subsequent incidents involving Jesus Perez, apparently to bolster up his conclusion that Respondent violated the Act on February 9, 1979: (1) a May 12, 1979, incident where Jesus Perez and Ramiro Perez erected UFW flags in Respondent's field where they were working, (2) a May 18, 1979, incident where one of Respondent's supervisors reprimanded Jesus Perez for poor work, and, in reply to Perez, stated that Perez could be fired even if he did belong to the Union;[1/] and (3) Respondent Bertuccio refused to write a letter of recommendation for Jesus Perez's son, saying (according to the ALO) "things were not going to be the same because they were raised [sic] up in the Union."[2/] We find that none of those incidents violated Perez's section 1152 rights, and that none of them is probative of Respondent's attitude towards the Union.

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[1/] These two incidents will be discussed later in this Decision.

[2/] The record does not support the ALO's reading of the testimony In fact, Jesus Perez testified that Bertuccio responded, "...that he had clone me favors, but he was not going to do the same."

We find that Respondent demonstrated sufficient justification to establish that the nature of its operations require flexibility in assigning and reassigning workers. The mere transfer of Perez to the field, standing alone, does not support finding of discrimination by Respondent. If Respondent had transferred Jesus Perez to the field, and events concluded at that point, our analysis would end. As will become apparent in our analysis of Respondent's discrimination against Ramiro Perez, events did not conclude with Jesus Perez's transfer to field work.

On March 21, 1979, after Jesus had been on his field assignment for six weeks, he and his nephew, Ramiro Perez, engaged in a conversation with Respondent Paul Bertuccio pertaining to their request for reassignment from field work to shed work. (The record indicates that at no time prior to February 9, 1979, had Jesus Perez's field assignments lasted more than one month.) Their conversation is discussed in detail below as it pertains to Ramiro Perez's work assignment. The important point to note at this time is that we find Bertuccio's threat to Ramiro Perez during that conversation tended to interfere with employees in the exercise of their rights under the Act, and also evidenced a discriminatory basis for his refusal of their request.

In view of Jesus Perez's close working relationship and familial relationship with Ramiro (Jesus was Ramiro's uncle), we infer that Respondent denied Jesus Perez's reassignment request because it was coupled with Ramiro's request, especially in view of the revealing threat Bertuccio made to Ramiro after denying their request. Forest City Containers, Inc. (1974) 212 NLRS No. 16

[87 LRRM 1056]; Hickman Garment Co. (1975) 216 NLRB No. 140 [88 LRRM 1651]. Although Jesus may have been merely in the wrong place with the wrong employee at the wrong time in requesting reassignment back to shed work on March 21, the inference remains and we find that when Jesus participated in concerted activity with Ramiro by requesting reassignment, Respondent retaliated against both employees, apparently because of Ramiro's involvement in a union rally, on March 7, 1979, by denying their request. Under these circumstances, we feel that Respondent had an obligation to establish a substantial business justification for its refusal to transfer Jesus Perez, as it had customarily done in previous years, back to shed work after a short stint in the fields. We find Respondent's proffered explanation insufficient under all the circumstances. We conclude that Respondent's refusal to transfer Jesus Perez back to shed work on or about March 21, 1979, violated section 1153(c) and (a) of the Act.

Refusal to Reassign Ramiro Perez

Ramiro Perez is a year-round employee of Respondent. During the summer and fall seasons, he works in Respondent's retail store. At other times, he drives a forklift and does other jobs in and around the sheds, and occasionally works in the fields. There was little or no evidence at the hearing that he was assigned to the fields in anything but a replacement capacity and, on such occasions, only for short periods of time.

Ramiro was a member of the Union negotiating committee, elected in December of 1978, and participated in negotiating sessions with Respondent in January of 1979. On February 2, 1979,

Respondent granted Ramiro leave to go to Mexico for three weeks. He returned March 2, about a week late, and asked Respondent for work. Respondent told him that there was no work then available, but to return in a few days and there might be work then.

As Ramiro returned from Mexico one week late, other employees were already working in the shed when he applied for work. In no previous year had Ramiro been assigned to replace any employee already working in the shed. However, in previous years he had returned from his trips to Mexico at an earlier time, before other workers had been assigned to start shed work.

On March 10, Ramiro was rehired and assigned to work in the fields. On March 21, Ramiro, along with Jesus Perez, asked Respondent Bertuccio to assign them to work in the onion shed. Bertuccio replied that there were no openings in the onion shed and, addressing Ramiro Perez, stated that he was the one who took the employees out of the fields on March 7, to march at a union rally, adding that as a result of the work stoppage, Respondent had lost about $2,000 and that Ramiro was going to pay for it and that he (Bertuccio) would see Ramiro in court.

We find that Bertuccio demonstrated his anti-union animus by threatening Ramiro with civil action because of Ramiro's union activity, and, as that statement clearly tended to interfere with, restrain, and coerce employees in the free exercise of their rights under the Act, we conclude that it was a violation of section 1153 (a) of the Act. Clyde Taylor Company (1960) 127 ML RE. 103 [45 LRPM 1514].

In order to establish that Respondent violated section

1153(c) and (a) of the Act by its failure or refusal to transfer Ramiro (and Jesus) back to shed work, the General Counsel must show that there was a causal connection between Ramiro's known union activities and Respondent's failure or refusal to reassign him to shed work.

The fact that Respondent discriminated against Ramiro Perez by its failure or refusal to transfer him from field work to shed work is supported on a number of grounds. From the testimony of Ramiro Perez, Respondent Paul Bertuccio, and Tina Bertuccio, it appears that when Ramiro Perez began employment at the Bertuccio Ranch in 1973, he was assigned primarily to field work. Ramiro testified that during the three years preceding the hearings in this case he had worked in the fields only for short periods of a month or less, and only when shed work was not available or as a replacement worker.

Tina Bertuccio testified that usually in March, Ramiro Perez "may be on the forklift." It was on March 21, that Ramiro and Jesus Perez asked Paul Bertuccio to reassign them from the field to the onion shed, where Ramiro customarily operated the forklift. When Tina Bertuccio's testimony is considered in light of the fact that Ramiro Perez was not transferred back from field work to the shed until the middle of May, Respondent's argument that it had a business justification for continuing Ramiro Perez in his field assignment appears unpersuasive.

The connection between Ramiro Perez's protected activity and Respondent's failure or refusal to give him the shed assignment he requested is clear. Bertuccio's threat that he

would see Ramiro in court immediately followed his refusal to transfer Ramiro (and Jesus) back to shed work. Respondent's refusal to grant the employees' request for shed work was not isolated by any amount of time; the refusal immediately preceded Respondent's threat of a civil suit against Ramiro Perez for $2,000 in damages.

Respondent has not produced sufficient evidence to rebut the prima facie case established by General Counsel that Respondent discriminated unlawfully against Ramiro Perez by failing or refusing to transfer him from field work to the onion shed. Respondent's proffered business justification that it has a right to assign workers wherever it wants, fails to address its customary past practice of assigning Ramiro Perez to shed work in March.

On the basis of the above findings, we affirm the ALO's conclusion that Respondent violated section 1153 (c) and (a) of the Act by failing or refusing to transfer Ramiro Perez and Jesus Perez to shed work on and after March 21, 1979.

Flag Planting Incident

Respondent has excepted to the ALO's conclusions that Respondent unlawfully suspended Jesus Perez and Ramiro Perez for placing UFW flags in the field where they were working. On May 12, 1979, three employees (Jesus Perez, Ramiro Perez, and Enrique Ramos) brought UFW flags into Respondent's field and erected them on the ground where they were working. Paul Bertuccio later arrived at the scene and told the three workers they could either take the flags down and continue work or they could leave work.

Jesus Perez and Ramiro Perez elected to leave work; Enrique Ramos elected to continue work with another crew. The incident occurred on a Saturday. Jesus Perez and Ramiro Perez were put back to work on the following Tuesday. Respondent Paul Bertuccio testified that he told the workers he did not want flags flying in the field and that he didn't think that they had any right to place the flags there.

The ALO stated that this matter is a question of law, and that the issue is,

> whether the workers have a right to display Union insignia in the form of flags stuck into the ground in the field as a part of the protected activity under section 1152 of the Act; or alternatively if the Respondent, Paul Bertuccio, has a right, based upon control of his property, not to have the flags flown in fields which he owns or are under this [sic] control.

The ALO proceeded to cite cases supporting the right of workers to wear union insignia. Those cases are not apposite in the instant situation. The workers in the instant case were not displaying flags, emblems, or union buttons upon their persons; they had erected UFW flags on the ground at Respondent's premises.

The ALO cited Montgomery Ward & Co. (1975) 220 NLRB 373 [90 LRRM 1430] for the proposition that an employer cannot lawfully ban union stickers on company property such as tool boxes, uniforms, and trucks. But in that case, the national Board held that the employer violated the Act by imposing an "unduly broad ban on the use of union stickers on company uniforms and company property" where the regulation extended to all employees. The NLRB made no finding as to the right of the employer to prohibit

union stickers on specific company property, it held merely that the ban was overly broad. In fact, the NLRB remedial order and the notice it required the employer to post at its premises stated, "We will not threaten our employees against wearing union stickers or other insignia except when in contact with customers or the general public." (Emphasis added.)

The ALO, in the instant case, did not have the benefit of our Decision in C. J. Maggio, Inc. (Dec. 10, 1980) 6 ALRB No. 62 in writing his opinion. In that case, we held that the placing or displaying of union flags on an employer's truck was not protected activity under the Act. As in the instant case, the employees in C. J. Maggio were instructed to either remove the flags or there would be no work for them. When they refused to remove the flags, they were told to pick up their final checks and that they were being replaced. In Maggio, we rejected the ALO's conclusion that placing union emblems, flags, or banners on company vehicles or other company property was protected concerted activity. We find that the unauthorized placement or display of union flags in an employer's field is similarly unprotected. Because the placing of flags upon an employer's property is not protected activity under the Act, that allegation of the complaint is hereby dismissed.

Unilateral Change Affecting Extra Pay For Sunday Work

The ALO concluded that Respondent violated section 1153(e) and (a) by unilaterally discontinuing its practice of

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paying employees an extra hour of pay for work they performed on Sunday.[3/] On the basis of our review of the record evidence, we affirm the ALO's conclusion.

Respondent contends that the testimony of the General Counsel's own witnesses seriously conflicted, and that one General Counsel witness was impeached through prior inconsistent statements, Respondent argues that the record reveals that Ramiro Perez testi-field that he had been paid an extra hour for Sunday work only once, on May 24, 1979. He stated he had worked on another Sunday and was not paid an extra hour for that work. Perez also testi-field that he was told by supervisor Zarate, that he and his crew would no longer get the extra hour's pay after May 26, 1979. Respondent relies on the sworn declaration of General Counsel's corroborating witness, Ernesto Ceja, to the effect that it was supervisor Jose Duran who told them of the cessation of the extra-hour's-pay practice. Ceja's testimony at the hearing indicated that it was Zarate who told the workers of the cessation. There was further testimony that contradicted Ceja's statement as to which Sundays he received extra pay.

Ceja testified that he had qualified for an extra hour of pay for Sunday work performed in February, March, April and May. He also corroborated Perez's testimony that it was Zarate who told the employees they would no longer be paid extra for Sunday work,

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[3/] The ALO's summary discussion of this issue fails to include any evidence as to the Sunday pay question. He made no credibility resolutions as to the conflicts in testimony, and no citation to the record supported the ALO's conclusion. See S. Kuramura, Inc. (June 21, 1977) 3 ALRB No. 49.

even though his testimony contradicted his earlier declaration to the Board agent.

Although it must be granted that there are inconsistencies in the testimony of General Counsel's witness, the inconsistencies are not so extreme as to overcome the evidence that at some point prior to May 1979, Respondent had a practice of an extra hour's pay for Sunday work. Respondent has failed to rebut the evidence that a company supervisor told the employees on May 26 that the practice was being discontinued. Even if we were to discredit the corroborating testimony of Ceja at the hearing, we would nevertheless find that a company supervisor told employees they would no longer receive an extra hour of pay for work performed on Sundays. Moreover, Respondent is clearly liable for any unlawful unilateral changes in working conditions effected by any of its supervisors.

Supervisor Jose Duran's Alleged Threat to Fire Jesus Perez and Ramiro Perez Due to Their Union Support

Respondent argues that the allegation of threats made to Ramiro Perez must be dismissed. Respondent notes that it is clear from the record that Jose Duran was addressing only Jesus Perez in the conversation containing the alleged threat. We agree. The testimony of both Jesus Perez and Ramiro Perez support the dismissal of the allegation in the complaint as it relates to Ramiro Perez. Further, the record evidence concerning the alleged threat to Jesus Perez does not support the ALO's finding of a violation of the Act.

Even the testimony given by Ramiro Perez and Jesus Perez as to supervisor Jose Duran's alleged threat does not support the ALO's findings and conclusion. The employees testified that Duran

told Jesus Perez that he had left some weeds, and that he had better pay closer attention to his work or he would be fired. Both Ramiro and Jesus testified that Jesus told Duran to be careful how he talked to him (Jesus). Duran then said that the fact that Jesus was going to join the union did not scare him, adding that although Jesus may be a union member, Duran still had authority to fire him. Jesus told him to go ahead if he thought it was just.

We find that the General Counsel has not proven that Duran's statement, in its context, amounted to a threat violative of the Act, and accordingly that allegation of the complaint is hereby dismissed.

## ORDER

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

1. Cease and desist from:

(a) Threatening employees with legal action or any other reprisal, because of their union activities or concerted activities for the purpose of mutual aid and protection.

(b) Failing or refusing to reassign employees to particular work because of their union activities or concerted activities for the purpose of mutual aid and protection.

(c) Instituting unilateral changes in the employees' pay for Sunday work or in any other term or condition of the employees' employment without first notifying and affording the United Farm Workers of America, AFL-CIO, (UFW) a reasonable

opportunity to bargain with respect thereto.

(d) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code section 1152.

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

(a) Offer to employees Jesus Perez and Ramiro Perez immediate and full reinstatement to their former positions in the packing sheds and give them the same preference for work in the packing sheds as they received prior to March 21, 1979, unless and until such preference is changed by a collective bargaining agreement negotiated with the UFW.

(b) Make whole employees Jesus Perez and Ramiro Perez for all losses of pay and other economic losses which they have suffered after March 21, 1979, as a result of its failure to assign them to work in its packing sheds on that date, the amount: of such reimbursement to be computed pursuant to the formula set forth in J. & L. Farms (Aug. 12, 1980) 6 ALRE No. 43, plus interest thereon at 7 percent per annum.

(c) On request of the UFW, revoke the unilateral change in wages effected on or about (lay 26, 1979, by its discontinuance of the prior practice of paying employees an extra hour of pay for work performed on Sunday, and restore the prior practice.

(d) Reimburse employees for all extra pay lost as a result of such discontinuance, plus interest on such sums computed at 7 percent per annum.

(e) On request, meet and bargain with the UFW, as the

exclusive collective-bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in the employees' wage rates and other terms and conditions of their employment.

(f) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying and otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the 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 hereinafter.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from March 21, 1979, until the date on which the said Notice is mailed.

(i) Post copies of the attached Notice, in all appropriate languages, for 60 days, in conspicuous places on its property, the period 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 representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and

property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of management, to answer any questions the employees may have concerning the Notice and/or employees' 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 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: June 9, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

ALFRED H. SONG, 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 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 changing wages, threatening an employee, and failing or refusing to reassign employees because of their union activities. The Board has told us to post and publish this Notice. We will do what the Board has told 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 and 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.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that we stopped paying our workers an extra hour of pay for Sunday work without first notifying our workers' chosen representative, the United Farm Workers (UFW), and without giving the UFW an opportunity to bargain over the change.

WE WILL NOT hereafter fail or refuse to bargain with the UFW, at its request, or make changes in the terms and conditions of our workers' employment without first notifying and bargaining with their chosen representative, the UFW, about such proposed changes.

The Board found that we threatened legal action against Ramiro Perez in violation of the Agricultural Labor Relations Act. WE WILL NOT hereafter threaten any employee with legal action or any other reprisal because of such employee's participation in union activity or other protected concerted activity.

The Board found that we failed or refused to transfer Ramiro Perez and Jesus Perez from field work to their usual work in the onion shed because of their union activities and other protected activity. WE WILL NOT hereafter transfer or fail or refuse to transfer any employee because of his or her participation in union activities or other protected activity.

Dated: PAUL W. BERTUCCIO

BY: _____

(Representative) (Title)

If you have any questions 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, CA 93907. The telephone number is (408) 443-3160.

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

Paul W. Bertuccio

8 ALRB No. 39
Case Nos. 79-CE-48-SAL
79-CE-49-SAL
79-CE-97-3AL
79-CE-309-SAL
79-CE-311-SAL
79-CE-351-SAL

ALO DECISION

The ALO concluded that Respondent violated Labor Code section 1153 (c) and (a) by: (1) transferring employee Jesus Perez from his usual packing-shed assignment to field work because he had engaged in union activity; (2) refusing to transfer employee Ramiro Perez back to shed work from his temporary assignment to field work because of his union activity; and (3) unilaterally ceasing to pay employees an extra hour of pay for Sunday work. The ALO also concluded that Respondent violated section 1153(a) of the Act by criticizing the work of Jesus Perez and Ramiro Perez and threatening to fire them because of their union activity.

The ALO recommended dismissal of allegations in the complaint: that Respondent had refused to assign employee Maria Jiminez to a thinning-and-hoeing crew because of her union activities; and that Respondent refused to give employee Rodrigo Navarette the same amount of irrigation work he had performed in the past, because of his union activities.

BOARD DECISION

The Board affirmed the ALO's finding and conclusions as to Jiminez and Navarette and dismissed the allegations in the complaint as to those two employees.

The Board concluded that Respondent did not violate the Act by suspending Jesus Perez and Ramiro Perez for erecting UFW flags in Respondent's property. The Board found that such conduct is not a protected activity under the Act and dismissed the allegation. The Board dismissed the allegation in the complaint that a company supervisor threatened to fire Jesus Perez and Ramiro Perez due to their union support.

The Board concluded that Respondent violated Labor Code section 1153 (c) and (a), not by its transfer of employee Jesus Perez to the field, but by its refusal to transfer him and Rarniro Perez back to shed work from their temporary assignments to field work at their request. The Board found that the two employees had a familial and working relationship, and that in light of Respondent's threat of civil action against Ramiro Perez for engaging in protected activities, Respondent retaliated against: Ramiro, and also against Jesus Perez by denying them reinstatement

to their usual positions in the onion shed.

The Board also found that Respondent's threat to file a civil suit against Ramiro Perez because of his union activity tended to interfere with, restrain, and coerce employees in the free exercise of their rights under the Act, and was therefore a violation of section 1153(a) of the Act.

The Board also concluded that Respondent violated section 1153(e) and (a) by unilaterally discontinuing its practice of paying employees an extra hour of pay for Sunday work.

THE REMEDY

The Board ordered reassignment and backpay for Jesus and Ramiro Perez and backpay for Sunday workers in addition to its customary remedial-order provisions.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In The Matter Of: | |
| PAUL W. BERTUCCIO, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party. | Case Nos. 79-CE-43-SAL 79-CE-49-SAL 79-CE-9-SAL 79-CE-309-SAL 79-CE-311-SAL |

NORMAN K. SATO for the General Counsel 13

JASPER E. HELMEL for Dressier, Stoll, Hersh & Quesenbery for the respondent

ANA MURGUIA for the Charging Party

Before: CLAYTON 0. ROST, Administrative Law Officer

## DECISION

## STATEMENT OF THE CASE

The United Farm Workers of America, AFL-CIO (herein after UFW, filed the following unfair labor practice charges in the following dates: 79-CE-48-SAL on Mar. 21, 1979; 79-CE-49-SAL- on March 21, 1979; 79-CE-9~-SAL on May 15, 19-9; "9-CE-309-5A1 on August 27, 1979; 79-CE-311-SAL on August 27, 19-9; "9-CE-351-SAL on September 10, 1979.

Complaints were issued in the above cases and were consolidated by Board order for hearing.

Both the charges and the Complaints were duly served upon the respondent.

The respondent has answered the Complaints.

The consolidated cases were heard by the undersigned as Hearing Officer on October 11, 12, 15, 16, 18, 22, 23 and 25, 1979, in Gilroy, California. Appearances were made by all parties as set forth above.

At the commencement of the hearing, without objection, the General Counsel amended the Complaints in all cases except 79-CE-311-SAL to alleged violations of Section 1153(a) and (c) of the Act.

With respect to Actions Numbers 48 and 49, motion to add to paragraph o of the Complaint an allegation that respondent failed to re-hire Ramiro Perez on or about february 9 because of Union activities, was granted without objection. The Complaints, as amended, were denied by respondent.

Upon close of the hearing, on October 25, 1973, the parties were granted until January 8, 1980 to file simultaneous briefs. Both parties requested extensions of time to file briefs; the last request for an extension of time was made by respondent, and pursuant thereto the time to file briefs was extended to March 3, 1980, at which time briefs were filed by the parties.

At the close of respondent's case, the General Counsel made the following dismissals:

79-CE-43 and 49, the name of Anselmo Delagado was dismissed from the Complaint.

79-CE-309, 311, 351, paragraph 8, alleging that supervisor Duran threatened employees on August 18, 1979 was dismissed.

During the hearing, Action Number "79-CE-351-SAL was settled. All issues were determined by settlement agreement which was approved by the undersigned as Administrative Law Officer on November 11, 1979 and forwarded to the Board on November 14, 1979.

## FINDINGS OF FACT

1 . Stipulations or Admissions

The parties made the following stipulations or admissions during the hearing or in the pleadings filed herein.

Respondent is an agricultural employer within the meaning of the Act.

The United Farm Workers of America, AFL-CIO, is an agricultural labor organization.

The following persons were supervisors employed by respondent:

Jose Duran

Jose Martinez

Manuel Arreola

The following persons are agricultural employee as defined in the Act, employed by the respondent:

Jesus Perez

Ramiro Perez

Rodrigo Navarette

The United Farm Workers of America was certified as a collective bargaining agent of the agricultural employ ees, employed by the respondent. The date of certification was November 17, 1978.

Case Number 309

During negotiations between respondent and the UFW as the collective bargaining representative of respondent's agricultural employees, the subject of an extra hour of Pay on Sunday was not discussed as part of the negotiations.

Case Number 48 and 49

Respondent admits a reassignment of Jesus Perez, Ramiro Perez and Anselmo Delagado. The answer sets up reasons for reassignment,

Case Number 97

The answer admits Jesus Perez and Ramiro Perez were suspended. Reasons for the suspension are set forth in the answer (RT 9-13).

Respondent's brief, page 10, concedes that respondent had knowledge of the union activity of the alleged discriminatees, with the exception of Rodrigo Navarette.

Judicial Notice

The General Counsel moved that the Administrative Law Officer take judicial notice of a decision involving respondent contained in 5 ALRB 5. The motion was granted.

The ALO takes judicial notice of that decision.

3. Background

There was no dispute concerning the operation of the Bertuccio Ranch. The briefs of both parties contain a description of the Ranch operation.

Paul W. Bertuccio is the sole proprietor of his farming operation. Tina Bertuccio is his wife, and works with him on the ranch. Bertuccio makes decisions concerning the operation of the ranch; Mrs. Bertuccio makes decisions in certain areas and exercises supervisory authority over employees.

The company grows numerous crops, including let tuce, onions, ornamental corn, gourds, walnuts, green pep pers, sugar beets, apricots, tomatoes, squash, garlic, car- done and anise.

The crops are grown on approximately 2,500 acres located in the vicinity of Hollister, San Benito County, California. The ranch areas are not contiguous and are found in several different locations, from near the town of Hollis- ter to approximately 20 miles away. Of the total acreage operated by the respondent, approximately one-half is leased land.

Mr. and Mrs. Bertuccio operate the farming busi- ness. They have several foremen, and below the foremen, have sub-foremen or lead-men.

The principal business of The respondent is the raising of produce, packing the produce in packing sheds, and shipping the same to non-retail dealers. In addition.

the respondent maintains a retail produce stand located at the company headquarters near Hollister, which is operated by Tina Bertuccio.

At the same location, the respondent maintains approximately four (4) packing sheds. The main sheds are the onion shed, the apricot shed, and the pepper shed.

The respondent's office is located at the same location, near the sheds and retail store.

In late 1977 the UFW organized the agricultural employees of the respondent. This organizational drive led to an election on October 17, 1977 which the UFW won. There were objections by the respondent to the election. The Board certified the UFW as a collective bargaining representative of the respondent's agricultural employees on November 17, 1978. After the certification, a negotiating committee was formed by the respondent's employees. During late 1973 and early 1979, the UFW, the negotiating committee, and the Bertuccios met in several bargaining sessions. No contract had been agreed to by the parties at the time of hearing of this matter.

4. Case Number 79-CE-48-SAL

The Complaint in this matter alleges that, commencing February 9, 1979, respondent demoted Jesus Perez , Ramiro Perez and Anselmo Delegado from packing shed workers to field workers because of their support for and activities on behalf of the UFW.

The charge as to Anselmo Delegado was dismissed.

Jesus Perez first started working at the Bertuccio Ranch about 1960 for a labor contractor. He commenced working directly for Bertuccio shortly after that, and his family followed him. He worked first in the field, thinning lettuce and doing irrigation work. He started shed work approximately 15 years ago, sorting onions and bell peppers.

The major harvest time in the Bertuccio Ranch is from sometime in May until approximately the end of November. After the major harvest is over, the work continues in the onion packing shed, where onions are held in cold storage. Frequently they sprout and have to be resorted. in addition, there is repair work in fixing and sorting containers used in handling produce. Jesus perez usually did this kind of work at the sheds during the winter season. He did do some work in the fields in prior years when there was little work in the sheds.

The respondent does not have a seniority system. but does have a preference system of giving workers and their family members who have worked for the Bertuccios before. There is also a general preference of giving workers work that they want to do and that they have done before, although there is no fixed rule. Because of the seasonal nature of the work and the business, the respondent assigns workers to do different jobs at different times, but in the past has followed the practice of using workers for particular jobs; for example, Perez usually worked in the onion and the pepper sheds sorting when that work was avail able, and did additional shed work in the manner indicated

above. Rodrigo Navarette was considered to be an irrigator during the irrigation season. Ramiro Perez usually works in the shed driving a forklift and does other jobs in the shed, and works in the retail store. Because of the flexible system employed by the respondent, there are exceptions and periods of time during which workers will be assigned to other tasks when there is little work that they usually do. Nevertheless, I find that there was a system of preference used in assign ing work to employees in the manner set forth above.

Jesus Perez lived with his family in a house owned by the respondent. Members of the family worked for the respondent. Ramiro Perez was a nephew of Jesus Perez.

Jesus Perez was elected to the UFW negotiating committee in the Fall of 1978. Bargaining sessions the respondent commenced toward the end of 1978 and early 1979. A number of sessions were held; Jesus Perez and Ramiro Perez, as well, were present at the negotiating sessions. If the respondent had not known of Perez's Union activities before that time, the respondent learned of the same at this point.

Perez was considered to be a good worker, and so characterized by Tina Bertuccio in her testimony. Jesus Perez was a credible witness in the hearing in this matter.

On February 9, Jesus Perez was assigned to do field work. On that day, Jose Duran, supervisor of the respon-dent, told Perez that the immigration authorities had taken some workers, and this was a good excuse to send him to the field, and 1 credit Perez's testimony in that regard.

If the system of preference used by respondent was completely flexible, an excuse would not be needed. I find that the reference was intended to convey, and did convey to Perez, that he was being punished for his Union activities. Prior to 1979, there had been no difficulty with Perez and no indications of any disputes between Perez and the respondent. The only difference in 1979 was that Perez's union activity became known to the respondent. I find that the act of sending Perez to the field with this comment was a part of a course of conduct to punish Perez for his union activity.

On March 21 Perez was off work (the winter field work is seasonal, depending on the weather). He went to the respondent to see if there was shed work. He observed people working in the sheds who had not worked there before. He spoke to Paul Bertuccio and asked for shed work. Bertuccio responded that there was none. Perez asked him why people were working in the shed who had never worked there before. Bertuccio replied Perez was not going to give him orders. Perez pressed the issue and mentioned seniority. Bertuccio told him that, until there was a contract, there would be no seniority.

At the same time, the respondent told Perez to get out of the house where he had lived for approximately six years, and look for another house, because this one was to be demolished. At the time, the respondent contemplated subdividing the property to build new homes, but did not have a timetable with respect to the homes, had net annexed to the City of Hollister, and had not received any

formal approvals on any of the steps of subdivision from governmental authorities. At this time, Bertuccio told Perez that he wanted him out by July. Subsequently, he received a notice that he should vacate by October or November, 1979. At the time of the hearing, the subdivision process was not completed, nor the annexation completed.

The charge that respondent has threatened Jesus Perez with eviction and is evicting him from company housing was settled. Basis of the settlement was a method for transition of the Perez family from the company housing as development of the property continued. The evidence remains upon the record, nevertheless, of the manner in which this was handled by the respondent, and is a part of the transactions between the respondent and Jesus Perez during the winter and Spring of 1979.

On May 12, 1979, Jesus Perez, and Ramiro Perez as well, were involved in an incident with the respondent involving planting of union flags in a field where Perez was working. Respondent Bertuccio came to the site where the incident occurred. This incident is discussed more fully below.

On May 16, 1979, while Perez was working in the field, Duran reprimanded him for poor work. When Perez responded, respondent Duran said that he could fire him even though he belonged to the union. Duran gratuitously interjected the issue of Perez's union membership into that conversation.

Perez testified credibly that favors had previ ously been extended by the respondent to his family. In

June 1978 he asked for a letter of reference for his son. Respondent Bertuccio refused and responded that things were not going to be the same because they were mised up in the Union.

In previous years, Perez had done some work in the fields while the sheds were not in operation. However, not for the extended period of time as in 1973.

I find that Perez was sent to the fields in February of 1979 and kept there until lace Spring in retribution for his union activities protected under the Act in violation of Sections 1152 and 1153(a) and (c) of the Act. Jesus Perez should be placed on a preferred hiring list for work in the sheds in the manner set forth at the end of this decision, and made whole for any wage loss sustained by him from March 21, 1979 to the date that he was reassigned to shed work.

Ramiro Perez is a year-around employee of respcndent. During the Summer and Fall seasons, he works in the retail store of the respondent. At other times, he drives a forklift and does other jobs around the sheds, and occasionally works in the fields.

He was a union negotiating committee member, elected in December of 19⁷8, and participated in negotiating sessions with respondent at the end of 1978 or beginning of 1979.

Ramiro went to Mexico on February 2. He said he would be back in three weeks. He came back March 2, and spoke to respondent, asking for work. He use told there was no work then.

On March 10, he was put to work in the field.

On March 21, Ramiro and Jesus Perez went to see the respondent Bertuccio. They were not working the field that day because of weather. They asked for work. Ramiro said he had seen people working the shed. Bertuccio stated there wasn't any work, and further responded that he had nothing to do with the union and that there was no seniority. He suggested that they go to the union or go off of the ranch for work. Jesus Perez said he would, if Bertuccio would sign a document asking them to leave, which did not occur.

Bertuccio, addressing Ramiro, told Ramiro that he was the one who got the people cut of the field to march at a Union rally on March 7th, and told him that there were two people who saw him do it. Bertuccio told Ramiro that he had lost about 52,000 and that Ramiro was going to pay for it.

At the same meeting, Ramiro was present when respondent asked Jesus Perez to vacate the house.

Ramiro returned from Mexico later than he had told respondent he would be back. Other people were working in the shed when Ramiro had checked. Ramiro had not replaced other people in the shed who were already working there on any previous years.

Ramiro normally works in the onion packing shed and the forklift job is in connection with that. The onion shed was shun down at this time. Ramiro did other jobs in the sheds and was used in the field as a replacement worker for short periods of time. However, en the previous years, he had left for Mexico earlier (usually in December and

returned in January, when the repacking of onions was still going on).

Respondent is in complete charge of assigning work. Although his return from Mexico was different in 1979, the respondent's statements to Ramiro, I find, reflect an intent to punish Ramiro for what respondent believed was Ramiro's involvement in a union march in Salinas on March Labor needs and workers fluctuate on respondent's ranch, and respondent has complete charge of the same.

I find that respondent's remarks to Ramiro Perez on March 21 violated Labor Code Sections 1152 and 1155(a). I find that the General Counsel has not sustained the burden of proving work available for Ramiro Perez for the period from March 2 to March 10, 1979 because of Ramiro's late return from Mexico. I find that the failure of respondent to place Ramiro Perez in shed work on and after March 21 violated Labor Code Sections 1152 and 1153(a) and (c). The entire sequence of Ramiro's work assignments was fully litigated at the hearing. The orders made arising therefrom are set forth below.

5. Case Numbers 79-CE-49-SAL

This case alleges that the company refused to hire certain female shed employees for field work in the thinning and hoeing crews in approximately March 1979.

At the time, there were women working in a labor contractor's crew hired by Bertuccio. The labor contractor supplies the workers and the supervisors for such work. They are not directly engaged by the respondent.

Tina Bertuccio testified that there was a policy of not hiring women in the thinning and hoeing crews for several years prior to this time. Women do work in other crews.

Maria Jiminez testified that she was an active union member and member of the negotiating committee. The I respondent admits, in their brief, that they knew of the union membership of the employees involved in the charges.

Maria Jiminez asked for work in the thinning and hoeing crews in March, 1979, and told Tina Bertuccio that there were women working the crews. Mrs. Bertuccio said that she did not know that. Work was refused to Jiminez. Mrs. Bertuccio told Duran to see that the work of women in the fields was not continued. She testified that she previously did not know that the women were working in the crews. Jiminez testified that she knew that there was a policy against women working in the thinning and hoeing crews since 1975. She further testified that neither she nor any of the women who worked in the shed had worked in the thinning and hoeing crews.

I find that there was a policy of the respondent that women were not to be employed in the thinning and hoeing crews, and that the respondent did not know of the women working in the thinning and hoeing crews until Jiminez brought it to Mrs. Bertuccio's attention. I find that the actions of Mrs. Bertuccio in telling Jose Duran to see that the women were replaced or laid off was in accordance with a policy known to Jiminez, and that the refusal to put Jimi-

nez on in the thinning and hoeing crews was not motivated by a reprisal for the union activities of Jiminez or the other women involved. The acts of the respondent did not constitute a violation of the Act.

6. Case Number 79-CE-97-SAL

This complaint alleges that respondent wrongfully suspended Jesus Perez and Ramiro Perez for putting flags bearing the union symbol in the field where they were working on or about May 12, 1979. The employees involved were Jesus and Ramiro Perez and Enrique Ramos.

The facts in this matter are not substantially in dispute.

All three employees took union flags into the field with them and stuck them in the ground where they were working. How far into the field is subject to various estimates, but it is unquestioned that they were in respondent's field.

Paul Bertuccio came to the scene. Bertuccio told the three workers that they could take the flags down and continue work, or they could leave work if they would not take the flags down. Jesus Perez and Ramiro Perez elected to leave work: Enrique Ramos elected to continue work with another crew.

There were only three people involved in this work; no organizational activities were being carried on at the time. The UFW had been certified as the bargaining agent of respondent's employees, and negotiations had been under way since approximately the first of 1979.

There is no evidence that the flags interrupted work.

There was no rule by the company against employees personally wearing Union insignia or putting Union insignia or flags on their own cars, and employees had done so. There were no company rules relating to flags or signs in the fields.

The field was in a rural area of San Benito County.

Respondent testified that he told the workers that he did not want the flags flying in the field and that he didn't think that they had any right to put the flags out in the field. In his testimony, he did not advance any other reason for asking the workers to remove the flag.

The facts are not in dispute. The matter then becomes a question of law. The question is whether the work ers have a right to display Union insignia in the form of flags stuck into the ground in the field as a part of their protected activity under Section 1152 of the Act; or alterna tively if the respondent, Paul Bertuccio, has a right, based upon control of his property, not to have the flags flown in fields which he owns or are under this control.

Section 1152 of the Act provides as follows:

> "Employees shall have the right to self-organiza tion, to form, join, or assist labor organiza- tions, to bargain collectively through represen tatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The language of Section 1152 is almost identical to that of Section 7 of the National Labor Relations Act.

Display of Union insignia has been the subject of several decisions of the NRLB.

It is well established that display of Union insignia is protected under Section 7 of the National Labor Relations Act.

Montgomery Ward & Co., 220 NLRB 373.

United Parcel Service, 195 NLRB 441.

FabriTek , Inc., 148 NLRB 1623, particularly cases cited in Footnote 10. (Reversed, 352 Fed.2d 577 (CAB).) Cases collected in Footnote 10 of Fabri-Tek, supra, involve various articles worn by the workers. Even the streamer mentioned in Boeing Airplane Co., 103 NLRB 1025, Enfd. 217 Fed.2d 369 (CA9), appears to be a streamer worn by one of the workers.

Counsel have not supplied authority concerning flags or banners.

Various authorities, both the National Labor Relations Board and the Courts, have affirmed the function of the Board to achieve a reasonable balance between the statu tory right of employees to organize, and the right of the employer to control the use of his premises. United Parcel Service, supra, at page 448, and cases cited.

With respect to regulation by the employer, the Court of Appeals in Fabri-Tek, supra, at 352, Fed.2d 535, points out that the employer can prohibit or regulate the wearing of Union insignia where there are special considera- tion relating to employee efficiency and plant discipline. Plant discipline is equated with activities which disrupt or

tend to disrupt production and break down employee discipline, but does not include restriction of passive, inoffensive advertisement of organizational aims and interests; i.e., the wearing of advertising insignia and buttons, which in no way interfere with discipline or efficient production.

In United Parcel Service, supra, the NLRB affirmed the Administrative Law Officer's holding that the employer justified its prohibition of wearing of Union insignia out side the plant by drivers who were representatives of the company, which emphasized neatly-uniformed drivers as an integral part of its public image. However, where the drivers did not come into contact with the public, interfering with their right to wear Union insignia would be an unfair labor practice.

Montgomery Ward, supra, held that the employer did not have a sufficient interest to ban Union stickers on all company uniforms or other company property, like tool boxes and trucks, where the regulation extended to inside employees as well as those meeting the public.

In Fabri-Tek, Inc. v. NLRB, 352 Fed.2d 577, the Court of Appeals applied these rules to workers in an electronics plant having a high incidence of rejects and calling for great concentration. The Court affirmed the right of the employer to prohibit vari-vue buttons and large, outsized buttons, because it held that the evidence showed this would distract the employees, where great concentration was necessary, and would cause economic loss to the employer. The Court pointed out that the employees had the right to wear

ordinary sized insignia.

I find that display by the three employees of flags in respondent's field was an activity protected under Section 1152 of the Act. No evidence was offered that this would have any adverse affect upon the public or upon the work of the employees. No justification of any kind has been claimed by the respondent for requiring removal of the flags as a condition for continuing work on the part of the three workers, except that he didn't think that they had any right to put the flags up. In the resolution of conflicting rights, I find that the workers had the right to display the Union insignia under Section 1152 of the Act, and that the same was one part of their right to form, join or assist labor organizations and to bargain collectively (bargaining negotiations were then pending between respondent and the Union). I further find that display of the flags was not shown to be detrimental to the work performed by the employees or to the respondent. Accordingly, the acts of the respondent in requiring the workers to remove the flags as a condition of continuing work constituted an interference with their rights under Section 1152 and 1153(a) and (c) of the Act.

This incident happened on Saturday. On the following Monday, Jesus and Ramiro Perez reported to work without flags. They were told that respondent had not had see his attorney, and there would not be am Word was sent to them later that day that they should the following day, Tuesday.

On Saturday, the two workers were given the choice of working without flags or, if they wanted to work with the flags, then leaving work. The chose to leave work and take their flags. On the following Monday they returned without the flags. Failure to put the workers back to work on Monday without flags constituted a reprisal for their having supported the Union by leaving work on the previous Saturday. Failure to put the two workers back to work without flags violates their rights under Section 1152 and Section 1153(a) and (c) of the Act.

7. Case Number 79-CE-309-SAL

The Complaint in this matter charges two things.

First, that the respondent unilaterally ceased paying employees extra time for work on Sunday in violation of Labor Code Section 1153(e).

Second, that on May 18, supervisor Jose Duran threatened to fire Jesus Perez and Ramiro Perez due to their support of and activity in behalf of the Union.

From approximately the first of the year, 1979, through the time of the hearing in this matter in October 1979, bargaining negotiations were going on between the Union as the bargaining representative of the employees and the respondent.

The respondent admits that extra pay for work on Sunday was not the subject of bargaining with the Union.

The respondent questions whether there was a policy of paying for time not worked on Sunday.

The evidence is clear that Sunday is not a regular work day on the ranch.

I find that the evidence supports that an extra hour of time, and thus extra pay, was given to the workers for time not worked on Sunday prior to May, 1979. In May, 1979, this policy ceased.

This change was made unilaterally by the respondent.

As such, it constitutes a violation of Section 1153(e) of the Act.

Second, Jesus Perez was conceded to be a good worker. There was no indication that Ramiro Perez was not a good worker. The Perez family had been employed a the Bertuccio Ranch for over a decade.

On May 18, 19^9, an interchange took place between supervisor Jose Duran and Jesus and Ramiro Perez, who were working in the field. He criticized their work; when they protested, he said that he could fire them even if they were members of the Union.

This interchange occurred shortly after the incident of May 12 involving the flags.

A chronology of treatment of Jesus and Ramiro Perez by the respondent is sat forth above.

I find that the incident involved in this matter was harrassment of Jesus and Ramiro Perez because of their Union activity, and interfered with their rights guaranteed under the Act and constituted a violation of Sections 1152 and 1153(a).

8. Case Number-79-CE-311-SAL

Complaint in this matter alleges that, on or about August 2 and August 17, 1979, respondent, through supervisor Jose Martinez, refused to give Rodrigo Navarette irrigation work because of his Union activities in support of the UFW.

The issues in this matter are narrow. Navarette testified in the hearing, reported in 5 ALRB 5.

In this hearing, Navarette testified about certain Union activities; some of those activities were described in the report of the previous case. Matters such as requiring Navarette to pay for water for his garden are not included in the Complaint in this case.

It is clear, from the testimony of respondent himself in this hearing that he was angry at Navarette and viewed him as a poor worker.

Navarette was considered in the decision and order of the Board in 5 ALRB 5. I have taken judicial notice of that decision relating to the history between Bartuccio and Navarette. A finding was made that respondent questioned Navarette about Union activities, that he deducted money from his paycheck for electricity and for the water pump, which were violations of the Act. The Hearing Officer found that there was not evidence at that point, of discrimination upon work assignment.

In this hearing it has been established that Navarette has worked for respondent since 1959. His principal job is irrigator; in addition, he shovels and hoes, and

sometimes he may prune.

During the Winter months, he works pruning off of respondent's ranch. In the Spring, he commences irriga tion work, and continues through the end of the irrigation system, until Fall when he may also continue doing other work at respondent's ranch after the irrigation season is over.

Because of an injury to his arm, he can do only irrigation involving running water and pipes, and cannot do sprinkler irrigation because the equipment is too heavy.

During the organizing effort by the Union, he was active on behalf of the Union in obtaining names and addresses of employees of the respondent. He supported the Union during the election and has continued to do so after-ward.

His immediate supervisor is Manuel Areola, who in turn is supervised by Jose Martinez.

Areola testified in this hearing that he knew Navarette was a Union supporter and gathered names and addres-ses for the Union. Navarette testified in this hearing about a meeting in 1977 with respondent Bertuccio. That meeting is described in Board decision reported in 5 ALRB 5.

There was no history evidenced that any reprisal actions or reassignment was taken against Navarette during the irrigating season in 1978. The Complaints by Navarette relate to 1979.

He referred to three occasions: once in the Spring at the start of irrigation; and twice in August, 1979. The

incident in the Spring is not the subject of a charge. With respect to the August, 1979 incidents, Navarette was net laid off, but complains that he was reassigned to shoveling or hoeing work before he had finished irrigating fields. The evidence is uncontroverted that custom and practice was that a worker finished a field which he started to irri gate. He might be assigned to some other work then, or assigned to another field to irrigate.

Navarette complained that he was not put on in the Spring when irrigation started, as he had been in the past. However, he testified (transcript, Vol. 5, page 93) that when he was to start it rained and there wasn't irriga tion work, and the company put him to work hoeing. When irrigation started, Carmen Jiminez, Nicholas Areola, and Miguel Gonzales were sent first (transcript, Vol. 5, pace 122). Carmen is a member of the Union; all had worked previ ously in irrigation. Carmen and Guadalupe Jiminez, and Navarette, were the oldest irrigators, and usually sent first to irrigate (Vol. 5, page 123). Navarette and a man who was not a Union supporter were not sent out first (Vol. 5, page 125). When Navarette asked for irrigation work, his supervisor, Areola, told him that foreman Martinez did not want to give him work.

In August, when Navarette complains that he was taken from a field before he finished, on one occasion (Vol. 5, page 127), he was replaced by a Union supporter. On the other occasion, he was replaced by two men who were not Union supporters.

On two occasions - one in the Spring and one in August, 1979 - he was told by supervisor Areola that foreman Martinez did not like the way he worked. Areola testified that he could not see anything wrong with Navarette's work.

Respondent Paul Bertuccio testified that he knows Navarette was engaged in Union activity, and had a conversation with him that he could do it all he wanted, but on his own time. He characterized Navarette as a poor employee who leaves irrigation water running while he goes to do other things. He complained that Navarette has been stealing water from their pumps. His conversations with Navarette about not doing Union business on company time was in 1977. (Vol. 8, page 27, et seq.).

Charges in this matter relate to two incidents in August, 1979. Considering all of the evidence in this matter, I find that the General Counsel has failed to sustain the burden of proof that Navarette's conditions of employment were changed because of activity protected under the Act. It is questionable whether Navarette was actually removed as an irrigator before he had completed the job. He testified that he knew that he had been replaced, because he went back two or three days later and saw that there had been more work done in the field. Taking the testimony as a whole, I am not convinced that he was actually taken off the job. Witness Areola, his supervisor, testified (Vol. 7, page 34), that Martinez told him that he did not like Navarette's work and wanted him taken off the job, but Areola let him finish the

field.

When Navarette left the field, he was assigned to shoveling and hoeing work, which Navarette testified he did when he wasn't irrigating.

It is apparent that Martinez did not like his work. Navarette testified that Areola told him Martinez did not like his work in the Spring. Areola testified in this hearing (Vol. 7, page 34), that Martinez told Areola that he did not like Navarette's work. However, in order to establish a violation of the Act, there must be conduct on the part of the respondent which discriminates against Navarette because of his Union activity. I do not find that respondent refused to give Navarette irrigation work because of his Union activities and support of the UFW.

9. Case Number 79-CE-351-SAL

This case was settled during the trial and the settlement approved.

Upon the basis on the entire record, the Findings of Fact, the Conclusions of Law, and pursuant to 1160.3 of the Act, I hereby issue the following recommended

ORDER

By authority of Labor Code Section 1160.3, it is ordered that the respondent, Paul W. Bertuccio and Bertuccio Farms, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Threatening employees with layoff, termination, demotion or change in the terms of conditions of employment because

Union membership or activities, or display of Union insignia in a manner which does not interfere with work or deface company property.

b. Discharging, laying-off, terminating, demoting or changing the terms and conditions of employ ment of employees because of their Union membership or activities, or display of Union insignias in a manner which does not interfere with work or deface company property.

C. Changing the terms and conditions of employ ment of employees without the agreement of the UFW, as the collective bargaining agent of such employees.

d. In any other manner interfering with, restrain- ing, or coercing any employee in the exercise of rights guaranteed by Section 1152 of the Act.

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

a. Offer Jesus Perez and Ramiro Perez full rein statement to the former position of each in the packing sheds and give them preference for work in the packing sheds, which each has done in the past, unless and until such preference is changed by a collective bargain ing agreement negotiated with the UFW .

b. Make whole Jesus Perez and Ramiro Perez for any loss of any pay or other economic loss which Jesus Perez may have suffered after February 9, 1979, and Ramiro Perez may have suffered after March 21, 1979, to the time that each was assigned to work in the packing sheds of the respondent in 1979 pursuant to the formula set forth in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

c. Make whole Jesus Perez and Ramiro Perez for loss of pay and any other economic losses which each of them may have suffered as a result of being laid off on March 12, 13~9, pursuant to the formula set forth in Sunny-side Nurseries, Inc., 3 ALRB Mo. 42 (19").

d. Pay all employees working on each Sunday, from and after May 31, 1979, one additional hour of pay to the date respondent has ccm-menced to bargain in good faith and thereafter bargains to a contract or to a bona fide impasse with respect to the issue of extra pay for Sunday work. (See Adams Dairy, 4 ALRB Mo. 24, and O. P. Murphy Produce, 5 ALRB No . 63.)

e. Preserve, and upon request, make available to the Board or its agents for examination and copying, ail payroll records, social

security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due, and the right of preferential hiring under the terms of this Order. The manner and method of determining employees entitled to extra Sunday pay and communicating such right to the employees shall be determined by the Regional Director, and respondent shall comply with the same.

f. Sign the Notice to Employees attached hereto after its translation by a Board Agent into appropriate language. Respondent shall promptly reproduce sufficient copies in each language for the purpose set forth herein.

g. Post on its premises copies of the attached Notice in all appropriate languages for 90 consecutive days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

h. Mail copies of the attached Notice in all appropriate languages within thirty (30) days after issuance of this Order to all employees employed since March 1 , 1979 and hand a copy of this Notice, in the appropriate language, to each employee hired within

days following date of issuance of this Order.

i. Arrange for a representative of respondent, or a Board agent, to distribute and read the attached Notice in all appropriate languages to its employees, assembled on company property at times and places 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 of Employees Rights under the Act. The Regional Director shall determine a reasonable rate of compensation which shall be paid by respondent to all non-hourly wage employees to compensate them for time lost at this reading and question and answer period.

j. Notify the Regional Director within 30 days after issuance of this Decision and Order of the steps it has taken to comply herewith, and continue to report periodically at the Regional Director's request, until full compliance is achieved.

Dated: October 22, 1980

CLAYTON O. ROST
Administrative Law Officer

# NOTICE TO EMPLOYEES

(READ LAST PARAGRAPH TO CLAIM EXTRA PAY FOR SUNDAY WORK)

After a hearing, at which each side had a chance to present its facts and state its position, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act. The Board has told us to send and post this Notice.

We will do what the Board has ordered, and we also tell you the following.

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

1. To organize themselves;

2. To form, join or help Unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act, together with other workers, to try to get a contract, or to help or protect one another;

5. To decide not to do any of these things.

Because this is true, we promise that:

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

Especially:

WE WILL NOT ask you whether or not you belong to the UFW or any other Union or how you feel about any Union.

WE WILL NOT discharge, layoff, demote, change or otherwise discriminate against employees because of their support of the UFW or any other Union.

WE WILL NOT threaten workers with any of the foregoing.

WE WILL NOT fail or refuse to notify and bargain with the UFW before making any change in work or pay of our agricultural employees.

WE WILL NOT interfere with the workers' rights to display Union insignia in a manner which does not interfere with work or deface our property.

WE WILL place Jesus Perez and Ramiro Perez on a preferential hiring list for work in the sheds in the same manner that they worked in the past, and WE WILL give them back pay plus interest at 7% for any loss of time or wages from February 9, 1980 and from March 21, 1979, respectively, to the time they started work in the packing sheds in 1979.

WE WILL PAY AN EXTRA HOUR OF PAY TO EACH WORKER FOR EACH SUNDAY THAT THEY WORKED FROM MAY 31, 1979 TO THE TIME THAT WE REACH AGREEMENT OR AN IMPASS WITH THE UFW REGARDING EXTRA PAY FOR SUNDAY WORK. IF YOU WORKED ON ANY SUNDAY AFTER MAY 31, 1979, CONTACT THE UFW OR THE AGRICULTURAL LABOR RELATIONS BOARD OFFICE TO CLAIM YOUR PAY.

Dated:

Signed,

PAUL W. BERTUCCIO
BERTUCCIO FAMRS

By: _____
Representative
(Title):

THIS IS AN OFFICIAL NOTICE OF THE
AGRICULTURAL LABOR RELATIONS BOARD,
AN AGENCY OF THE STATE OF CALIFORNIA.

DO NOT REMOVE OR MUTILATE