

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BERTUCCIO FARMS,	)	Case Nos.	80-CE-159-SAL
	)		80-CE-332-SAL
Respondent,	)		81-CE-94-SAL
	)		81-CE-96-SAL
and	)		81-CE-106-SAL
	)		81-CE-108-SAL
UNITED FARM WORKERS OF	)		80-CE-76-SAL
AMERICA, AFL-CIO,)		
	)	8 ALRB No.	70
Charging Party.)		

DECISION AND ORDER

On February 26, 1982, Administrative Law Officer (ALO) Brian Tom issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent, General Counsel and the Charging Party each timely filed exceptions and 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 attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALO as modified herein, and to adopt his recommended Order, with modifications.

Although we affirm the ALO's conclusion that Respondent did not discriminatorily discharge Gilberto Gamboa, we reject his finding that Gamboa was not particularly active in the work stoppage during the summer of 1980. Gamboa testified that

during the stoppage he spoke to foreman Eduardo Villegas concerning the reason for the crew's concerted action, and tried to speak about it to supervisor Jose Duran, who walked away from him. Duran himself testified that Gamboa was "one of the chiefs" in the stoppage. However, we affirm the ALO's conclusion that Respondent discharged Gamboa for insubordination rather than because of his protected concerted activities.

We also reject the ALO's finding that Javier Ceja was not a strong activist for the United Farm Workers of America, AFL-CIO (UFW or Union), since Ceja served for two years as a crew representative whose duties included discussing workers' problems with Respondent's management personnel. However, we affirm the ALO's conclusion that Ceja was not denied transfer to the lettuce crew for discriminatory reasons.

Although we affirm the ALO's conclusion that Jose Lopez' allegedly threatening actions on July 14, 1981, are not attributable to Respondent, we reject his finding that Lopez was a custom harvester, and note that in making that finding the ALO erroneously relied on a decision which the Board had vacated.^{1/} Rather, we find that Lopez' status as a labor contractor or custom harvester need not be decided, because in either case we should apply the principles of Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307 to establish Respondent's liability or non-liability for Lopez' conduct. We find that the ALO correctly applied those principles to find that Respondent was not liable for Lopez' coercive conduct in

^{1/} Sutti Farms (Feb. 19, 1980) 6 ALRB Mo. 11 was vacated in Sutti Farms (Nov. 23, 1981) 7 ALRB No. 42.

threatening Jose Bustamante with a gun, because Respondent had a policy against anyone carrying guns on its property, it took steps to reiterate that policy to its foremen and workers shortly after the incident, and there was no evidence that Lopez engaged in his conduct on Respondent's behalf nor that Respondent gained any illicit benefit from the conduct. (Vista Verde Farms, supra, 29 Cal.3d 307, 322, 328.)

Concerning the strike access issue, we find that Respondent unlawfully denied Union representatives access to Respondent's nonstriking workers in its fields on July 27, 1981. Although one organizer was allowed into the field at lunchtime on that date, the Union was not given the access to which it is entitled. (Bruce Church, Inc. (Aug. 10, 1981) 7 ALRB No. 20.) Furthermore, on August 7, 1981, Respondent went to court to obtain a Temporary Restraining Order which, denied the Union any further strike access to Respondent's work sites. Sufficient evidence was presented at the hearing to show that because of Respondent's extensive acreage and the great distance between some of its fields and the public roads, the Union had no effective means of communication with nonstriking field workers other than work site access.

However, we find no violation in Respondent's denial of strike access to its packing sheds. General Counsel presented no evidence that the Union lacked effective alternative means of communicating with nonstriking shed employees. Although witnesses testified that it was difficult to communicate with workers entering the shed sites in cars with windows rolled up, that situation is no different from one where workers driving through a factory

gate choose not to talk to picketers near the entrance. The shed sites herein had two entrances adjacent to public roads, and were not significantly different from industrial sites to which the National Labor Relations Board has traditionally denied direct access by picketers.

In its exceptions brief, Respondent argues that in denying strike access it was relying on the authority of ALRB v. California Coastal Farms (.1981) 117 Cal.App.3d 971, which held that there could be no unfair labor practice in denial of strike access absent a rule which authorized the taking of access. In Bruce Church, supra, 7 ALRB No. 20, we held that California Coastal Farms, supra, had no precedential value regarding the issue of whether strike access could be granted only by rule. The situation in this case is somewhat different from that in Bruce Church, in that at the time the access violations in Bruce Church took place, the California Coastal Farms Decision had not yet been issued. However, we find that Respondent herein could not reasonably have relied on California Coastal Farms as authority. At the time Respondent denied strike access, California Coastal Farms was on appeal to the California Supreme Court, which later overturned the Court of Appeal decision and affirmed the trial court's decision that it could grant limited strike access despite the absence of any Board rule governing strike access. (ALRB v. California Coastal Farms (1982) 31 Cal.3d 469.) Respondent should properly have relied on the existing Supreme Court authority in ALRB v. Superior Court (1976) 16 Cal.3d 392, which allowed the Board discretion to proceed by rule making or on a case-by-case basis.

Respondent also argues that prior to the Board's issuance of its Decision in Bruce Church, supra, there existed no decision on record enunciating any right to strike access under the Agricultural Labor Relations Act. Respondent ignores the fact that the same situation existed when the Board was considering the Bruce Church case, and yet a violation was found. If we were to follow Respondent's reasoning, the Board would never be able to establish a rule or find a violation based on a novel factual and/or legal situation.

Although we do find that a violation occurred and that the UFW is entitled to an order granting reasonable strike access in accordance with the access granted in Bruce Church, we shall omit from our Order the usual provisions for mailing of the Notice to employees and for the reading of the Notice to be done on company time. We omit said provisions because Respondent did not totally deny strike access on July 27, 1981, the only day for which we have found a violation.

ORDER

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

1. Cease and desist from:

(a) Denying reasonable access to Respondent's fields to any representative of the United Farm Workers of America, AFL-CIO (UFW) or to any other union agent for the purposes of communicating with nonstriking employees while there is a strike

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against Respondent in progress.

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

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

(a) During any period when there is a strike against Respondent in progress, permit access to its fields by UFW representatives or other union agents for the purpose of communicating with nonstriking employees. Said access takers may enter the Respondent's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one hour period shall encompass such lunch break. If there is no established lunch break, the one hour period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day. Access shall be limited to one UFW representative or union agent for every fifteen workers on the property. Said access shall continue until a voluntary agreement on access is reached by the parties, until the strike ends, or until the UFW or other certified union ceases to be the certified collective bargaining representative of Respondent's employees, whichever occurs first.

(b) During any period when there is a strike against Respondent in progress, permit access to its labor camps

by UFW representatives or other certified union agents for the purpose of communicating with nonstriking employees.

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

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

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees during their lunch period and, if necessary, before and/or after working hours, on Respondent's property, the nonwork time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity during nonwork time, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act.

(f) 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

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to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: September 28, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, 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 which 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, during the period of July to August 1979, by refusing to allow UFW organizers and other union agents to take access to our property during a strike in order to speak to nonstriking employees. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

Because it is true that you have these rights, we promise that:

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

WE WILL NOT refuse to allow agents of your certified bargaining representative to enter our property at reasonable times during a strike at our property so that they can talk to the employees who are working.

Dated: BERTUCCIO FARMS

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California, 93907. The telephone number is (408) 443-3160.

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

Bertuccio Farms (UFW)

8 ALRB No. 70
Case Nos. 80-CE-159-SAL
81-CE-332-SAL
81-CE-94-SAL
81-CE-96-SAL
81-CE-106-SAL
81-CE-108-SAL
80-CE-76-SAL

ALO DECISION

The ALO found that the Employer had not discriminatorily threatened, assaulted, or discharged any of its employees. The ALO found that the Employer had committed an unfair labor practice by denying striking employees and United Farm Workers of America, AFL-CIO (UFW) representatives reasonable access to its premises during a strike.

BOARD DECISION

The Board affirmed the ALO's conclusion that the Employer had not discriminatorily threatened, assaulted or discharged any of its employees, but rejected the ALO's findings that Gilberto Garnboa was not particularly active in the 1980 work stoppage and that Javier Ceja was not a strong UFW activist. The Board also rejected the ALO's finding that Jose Lopez was a custom harvester.

The Board found that the Employer unlawfully denied UFW representatives access to the Employer's fields, but found no violation in the Employer's denial of strike access to its packing sheds. The Board issued an Order granting reasonable strike access to its fields, but omitted from its Order the usual provisions for mailing of the Notice to employees and for the reading of the Notice to be done on company time.

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This case summary is furnished for information only and is not an official statement of the case, or of the Agricultural Labor Relations Board.

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STATE OF CALIFORNIA
BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:)	Case Nos: 80-CE-159-SAL
	)	80-CE-322-SAL
	)	80-CE-76-SAL
BERTUCCIO FARMS,	)	81-CE-94-SAL
	)	81-CE-96-SAL
Respondent.	)	81-CE-106-SAL
	)	81-CE-108-SAL
)	
and)	
)	
UFW,)	
)	
Charging Party.)	



Appearances:

Eduardo R. Blanco, Esq.
Salinas, California, for the
General Counsel

Dressier, Quensenberg, Laws & Barsamian, by
Lewis P. Janowsky, Esq., of
Newport Beach, California, for the Respondent

DECISION OF THE ADMINISTRATIVE LAW OFFICER
STATEMENT OF THE CASE

BRIAN TOM, Administrative Law Officer:

This case was heard before me on October 27, 28, 29, 30, and
November 6 and 9, 1981,^{1/} in Hollister, California.

The Second Amended Complaint, dated September 3, is based on
seven charges filed by the United Farm Workers of America, AFL-CIO
(hereinafter the "UFW or Union"). The charges were duly served on the
Respondent, Bertuccio Farms, on July 25, 1980; December 11, 1980; June
8, July 14, July 17, August 6, and August 7, 1981.

1/. All dates refer to 1981, unless otherwise noted.

The seven cases were consolidated pursuant to Section 20244 of the Agricultural Labor Relations Board Regulations by order of the Regional Director.

The Amended Complaint alleges that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter "Act").

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs after the close of the hearing.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the argument and briefs submitted by the parties, I make the following:

FINDINGS, ANALYSIS AND CONCLUSIONS

I Jurisdiction

Respondent is engaged in agriculture in San Benito County, California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

The UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act, and I so find. II The Alleged Unfair Labor Practices

The General Counsel's Second Amended Complaint alleges, inter alia, that Respondent, and/or Respondent's agents, interfered with, restrained and coerced and is interfering, restraining and coercing its employees in violation of its employees' rights as guaranteed in Section 1152 of the Act by:

1.

1. On or about July 16, 1980, threatened its employees with a handgun for the purpose of coercing, restraining and interfering with the rights of its employees in the exercise of protected Union activities. (80-CE-159-SAL)

2. On or about December 9, 1980, threatened employee, Gilberto Gamboa, with a knife because of his participation in protected concerted Union activities. (80-CE-332-SAL)

3. On or about December 9, 1980, discriminatorily discharged employee, Gilberto Gamboa, because of his participation in protect concerted Union activities and for having testified against Respondent at unfair labor practice hearings before the ALRB.

(80-CE-332-SAL)

4. On or about May 4, 1981, discriminatorily refused to: promote or transfer Javier Ceja to the lettuce crew because of his participation in protected concerted Union activity. (80-CE-76-SAL)

5. On or about July 14, 1981, brandished a weapon to wit: a handgun at Respondent's employees in an unlawful and threatening manner. (81-CE-94-SAL)

6. On or about July 16, 1981, attempted to assault Javier Ceja with an automobile on Southside Road for the purpose of intimidating, coercing and restraining said employee in violation of his rights as guaranteed under Section 1152 of the Act.

(81-CE-96-SAL)

7. Commencing on or about July 29, 1981, denied representatives of the UFW the opportunity to effectively communicate with its agricultural employers by denying them reasonable and limited access to Respondent's work sites without there being any other effective alternative means of communication. (81-CE-106-SAL)

8. On or about August 5, 1981, threatened Ruben Martinez in violation of his rights as guaranteed under Section 1152 of the Act. (81-CE-108-SAL)

PRELIMINARY FACTS

Respondent is engaged on a year-round basis in the agricultural business of producing and/or packing lettuce, onions, gourds, walnuts, green peppers, apricots, tomatoes, squash, cardoon, anise, and sugar beets.

On November 17, 1978, the UFW was certified as the representative of the agricultural workers at Bertuccio Farms. Thereafter, negotiations ensued between representatives of the UFW and Respondent. The negotiations were unsuccessful. On or about July 9, 1981, the Union called a strike which was still in effect at the time of the hearing.

As each charge in the complaint, when taken alone, arises 'lout of separate and distinct set of facts, each will be summarized, discussed and resolved, in chronological order.

I The Alleged Threat by Jose Martinez to Striking Employees

On July 16, 1980, Ramiro Perez (hereinafter "Perez"); Maria Jimenez (hereinafter "Jimenez"); and three or four other UFW representatives arrived at Respondent's apricot orchard located on Southside Road. Jose Martinez (hereinafter "Martinez"), a labor contractor,^{2/} employed by Respondent, along with his crew was working at that location. Perez was the president of the negotiating committee and, at that time, an employee of Respondent. Jimenez was also an employee and the secretary of the negotiating committee.

2/. The parties stipulated that Jose Martinez was a labor contractor employed by Respondent

The Union members were there at that location to hand out leaflets and talk to the workers about the then on-going negotiations.

According to Jimenez, when she and the other UFW members arrived at the location, Martinez asked them what they were doing there. Perez replied that they were there to hand out fliers and talk with the workers. Martinez told them that they had to have permission from either Paul or Tina Bertuccio before he would allow them to go in to talk to the workers.^{3/}

During the conversation, Perez testified that Martinez moved his coat back and, as a result, Perez could see a small, dark colored gun in Martinez's belt. Martinez made no reference to the gun while he spoke with Perez, nor did he touch it. Perez testified that he was "scared" of the gun.

Jimenez testified that Martinez had his hand out at his waist, that there was something at Martinez's waist, but that she could not see what it was.

Martinez then left the area to go to the company offices. In his absence, the UFW members distributed leaflets and talked

3/. There is a dispute between the parties as to the terms of a post-certification access agreement in effect at that time. According to Tina Bertuccio, the agreement allowed access at lunchtime and required a Union representative to telephone her prior to taking access. She in turn would tell the Union the location of the crew to which the Union sought access and also notify the foreman of the crew. Perez claims that the telephone notification was required only when the Union did not know where a particular crew was located. However, Jimenez testified that they always notified the employer when they were going to speak to a crew. Under the circumstances, I find that the access agreement either required notice or that in practice notice was always given. This conclusion also explains Martinez's conduct at the time in question.

to some of the workers. Martinez returned after a short period of time. According to Jimenez, Martinez then went up to Perez and engaged him in conversation. Perez testified, however, that he did not talk to Martinez after he returned. Martinez was not called as a witness.

There was, of course, no verbal threat addressed at any of the UFW members on the day in question. Martinez was simply stating what he thought was the access agreement; that the Union workers could not take access without notice.

The General Counsel's position apparently is that the mere movement of Martinez's jacket which made visible a gun on Martinez' belt constitutes a threat.^{3/a} However, I am unaware of any case that has so held. The evidence in this case leads me to conclude that no threat was ever made. The evidence is not clear that Martinez moved his jacket in a threatening manner. Certainly, he did not call attention to the gun. Equally important, Perez made no comment about the gun at the time of the incident. Rather he and his colleagues went ahead and completed their mission of talking to workers and distributing leaflets. Under these circumstances, I find that no threat was made. I will, therefore, recommend dismissal of this charge.

II Incidents Involving Gilberto Gamboa

Gilberto Gamboa (hereinafter "Gamboa") started working for Respondent some time in 1976. He spent the majority of his time thinning and packing chiles, onions and potatoes. In 1980, he began working in the lettuce as a cutter. In May of 1980, he was

^{3/a} This charge is not raised in General Counsel's post-hearing brief.

elected crew representative of the lettuce crew by his co-workers. Antonio Escobar (hereinafter "Escobar") was elected his co-representative.

In the summer of 1980, there was a work stoppage on the lettuce crew which resulted in the crew being released from work. According to Gamboa, the reason for the work stoppage involved the number of boxes the crew was expected to harvest. In addition, he testified the stoppage was only one hour in length. According to Jose Cortez, a co-worker, and Escobar, the work stoppage was because the Respondent was not negotiating in good faith. Escobar testified there were several work stoppages. While the record indicates that Gamboa was one of the crew representatives in the lettuce crews and that he spoke to Eduardo Villegas, a supervisor, regarding the stoppage, the record does not indicate my further

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activity on the part of Gamboa on the work stoppage.

As a result of the work stoppage, the whole crew, including Gamboa, was replaced. Approximately three months after the work stoppage, Jose Duran, a supervisor for Respondent,^{4/} sent a note to Gamboa asking him to go back to work. Gamboa did so, and began working in the anise and the cardon. He was subsequently transferred to the lettuce crew. It appears that other workers were recalled at about the same time, and of those recalled, some of them came back to work.

Gamboa was discharged on December 9, 1930, by Duran. The lettuce crew works in teams of three with two persons cutting and one person packing. On the 9th, Gamboa was working with Cortez and Jalacio Munoz. Duran had had problems with lettuce boxes for the two days prior to the 9th because the lettuce boxes were not being packed heavy enough. The minimum weight of a lettuce box should be 45 pounds. Lettuce will tend to weight less if the lettuce is very soft or comprised mainly of leaves.

At approximately 4:30 p.m. on the 9th, Duran and Ines Villegas (hereinafter "Villegas"), a supervisor, were watching the workers in the lettuce crew when Duran noticed that Gamboa was packing very soft lettuce into a box. Duran told Villegas to go and check the box. Villegas weighed the box with a portable scale in front of Gamboa. The box weighed 34 pounds. When Villegas pointed this out to Gamboa, Gamboa responded to Villegas with "bad words." Villegas then called Duran over to where he was standing with Gamboa. At that point, according to Duran, the

4/. The Respondent stipulated that Jose Duran was a supervisor.

following conversation ensued:'

A: (By Duran) I told him, "The job you're doing is not right. Why do you do that? You're giving us a reason to fire you."

Q: And what, if anything, occurred next?

A: He just said, "Well, if you have the authority in this ranch to fire me, go ahead you son-of-a-bitch."

Q: And what, if anything, occurred after Gamboa said this do you?

A: I told him, "If you hadn't answered me with those bad words, I would have given you another chance, but just to show you that I have the authority, I'm going to fire you."

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This conversation was corroborated by Villegas.

Gamboa's testimony, however, set forth a different set of facts. According to Gamboa, Villegas said nothing to him that day. When Duran came up to speak to him, Duran said he was packing lot of tender lettuce and that there was no more work for him. After Duran told him this, Gamboa asked for his check.

After Duran discharged Gamboa, Duran went to the office to jet Gamboa's check. Having gotten the check, Duran then returned to the field and gave the check to Gamboa. At the same time, he asked for the knife and boots back from Gamboa. The knife and boots belonged to Respondent; similar knives and boots are given to each of the members of the lettuce crew. According to Duran, he then put the boots into his pickup. He may have kept the knife in his hand in order to cut lettuce. After Duran put the boots into his pickup, Gamboa tried to enter the fields, but Duran stopped him by saying that he no longer worked there. Gamboa then went home.

Gamboa's version of this sequence of events is different

There is some confusion in Gamboa's testimony as to whether he turned over the knife and boots to Duran before Duran went to get the check or afterwards. In any event, he testified that after Duran put the boots in his pickup, Duran kept the knife in his hand. As Duran is talking to Gamboa, Duran kept the knife pointed at Gamboa's stomach. Duran said that, "If I said anything about this, then he and I would set matters straight outside." In addition, Gamboa testified that Duran said if he (Gamboa) did not shut up, then he would hit him. Finally, as Gamboa was leaving, Duran said that, "If I said anything, then he (Duran) would fix me." And that, according to Gamboa, was the end of the conversation. Escobar, a crew member, was present during the "knife incident," and he testified that Duran had the knife in one hand with both arms fully extended, down by his sides. Duran moved his arms backwards about one foot. At the same time, Duran made this movement, he told Gamboa he wasn't worth a damn, he wasn't good for anything.

Paul Bertuccio, Respondent's owner, testified regarding Respondent's disciplinary policies and stated that there was an unwritten policy that if a worker is not performing satisfactorily' after three warnings, he can be discharged. He also testified that he leaves it up to Duran to decide for what reason a worker can be discharged. Tina Bertuccio, Paul's wife and manager, also testified regarding the disciplinary procedures, and she confirmed the three-warnings rule.

Finally, Gamboa said that he had testified at three previous ALRB hearings involving Bertuccio Farms though he does not recall when he so testified.

In order to establish a prima facie case of discriminatory discharge in violation of Section 1153 (c) and (a) of the Act, the General Counsel has the burden of providing by a preponderance of the evidence that the employee was engaged in protected activity, that Respondent had knowledge of his employees' protected activity and that there was some connection or causal relationship between the protected activity and the discharge. Jackson and, Perkins Rose Co., 5 ALRB No. 20. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected ; activity. Nishi. Greenhouse, (1981) 7 ALRB No. 18.

In regard to the events surrounding the discharge, I have decided not to credit Gamboa's version of the events on that day. base this finding on Gamboa's demeanor while testifying as well as the content of his testimony which was evasive, confusing and contradictory. I credit Duran's version of the discharge.

The General Counsel points out that in August of 1980, Gamboa was the "apparent leader of the crew and the moving force behind this stoppage." The General Counsel argues that as a result of Gamboa's role in the work stoppage, Respondent discharged him in December, 1980.

The record does not reflect that Gamboa was particularly active in the work stoppage. True, he was a co-crew representative; however, there is nothing in the record indicating what, if any, his activities were in that role during the work stoppages. Apparently, according to Escobar, a co-crew representative, the crew was already in agreement that work stoppage takes place.^{5/}

5/. Escobar does not remember whether Gamboa ever spoke to a company supervisor or foreman during the work stoppage.

Thus, Gamboa may have had a minimal role to play during that period.

The record indicates that the entire crew was replaced at time of the work stoppage. Some three months after that, all the crew members including Gamboa were offered their jobs back. Some of the crew members did in fact return to work, including Gamboa. Nothing in the record indicates that Respondent was obligated to offer employment back to the replaced workers. After Gamboa worked for Respondent for two months, the discharge in question occurred.

Under the facts as discussed, I conclude that the General Counsel has not shown by a preponderance of the evidence that there was a causal connection between the discharge and the concerted activity. The lapse of time, the fact that Respondent re-hired Gamboa after the protected activity, the "bad words" by Gamboa to Duran convinces me that the cause of the discharge is directly linked to Gamboa's insubordination; and I so find.

Similarly with the knife incident, I do not credit Gamboa's testimony. Escobar, the co-crew representative, was present at the incident, and his version of what took place was inconsistent with Gamboa's testimony. The fact that Duran had the knife in his hand is not in itself critical as over 30 crew members had similar knives. I find that Gamboa and Duran traded insults but that no threats were made. In addition, I find that there is no causal connection between the concerted activity and the knife incident.

Accordingly, I recommend that this charge involving Gamboa be dismissed.

Finally, with regard to the charge that Gamboa's discharge was motivated by Gamboa's prior testimony at ALRB hearings, I find that the General Counsel has presented little or no evidence in support of this charge and will recommended that this charge be dismissed.

III The Refusal by Respondent to Transfer or Promote Javier Ceja :
_ ___to the Lettuce Crew

Javier Ceja (hereinafter "Ceja") first began working on Bertuccio Farms in 1976. He was employed two weeks that year. He next worked for Respondent in 1978 and continued working there until November, 1980, when he requested a two-week leave of absence to go to Mexico. He returned from Mexico at the end of February, 1981, and started work again at Bertuccio Farms on the first of March and continued to work there until the strike in July, 1981. .

During the time Ceja has been employed by Respondent, he worked at a number of different jobs. He worked in the cardon, anise, cabbage and lettuce. In 1980, he asked Duran if he could be transferred to the onion shed. This request was granted after a one-week lay off from another job. Ceja remained in the packing shed until his leave of absence in November, 1980. After his return in March, he was assigned to the field along with a number of other workers who had previously worked in the onion shed.

Ceja was a Union crew representative in 1980. In 1980, his duties as crew representative were to distribute literature and to keep the workers informed as to the status of the negotiations , with Respondent. He was elected crew representative of the field general laborers in May of 1981. His duties as crew representative

in 1981 do not appear in the record.

During the time he was a crew representative in 1980, he would have occasion to speak to Villegas and Duran. When asked what he would speak to Duran about, he responded as follows:

"Well, for example, if some worker wasn't doing the job right, he (Duran) would come to me and say, "If that worker doesn't straighten out, I will have to let him go .. . ' And further, well, for example, if some workers wanted to change jobs, to be moved, he would come and ask me if I would talk to Duran, and I would go and talk to him and ask him about it."

Duran was aware that Ceja was a Union member and also that he was part of the Union negotiating committee, though when he became aware of these activities is unclear from the record. Duran was also aware that Ceja had testified at ALRB hearings involving Respondent.

Further, in reference to Ceja's activities, Duran made the following responses:

Q: (By Mr. Blanco) Did Mr. Seja (sic) during 1980 cause problems amongst the workers at Bertuccio Farms?

A: Several

Q: And these involved some activities on his part on behalf of the UFW?

A: It's probable, that's possible.

According to Ceja, in 1981, he requested to be transferred to the lettuce crew on three separate occasions. The first time was either in March or April and after Ceja made his request, Duran said, "There's no job for you here."

Then later in April, Ceja renewed his request and again he was turned down with Duran saying, "There's no room for you there." Finally in May, Ceja renewed his request again. This time, Ceja asked why there was no room for him in the lettuce

crew when Ramon Escobar, another worker, was assigned there, and Ramon had only worked one year for Respondent. According to Ceja, Duran said, "I can't change you any place. You go and talk to Tina." Ceja also claims Duran said, "Because you have created alot of problems here in this ranch."

Ceja also claims to have asked for a transfer to the lettuce crew in 1979 and several times in 1980, each time without success.^{6/} He distinctly remembers that he made such a request on the day the lettuce crew was released for work stoppages, which would have been in August, 1980. However, it was only in July that he had made a request to go to the onion shed which was granted.

Duran testified that Ceja had only asked him once about a transfer into the lettuce crew and that was in May, 1981. In response to Ceja's request, Duran told him that he did not know that Ceja was interested in working in the lettuce. When Ceja asked Duran why Ramon Escobar was given a job cutting lettuce when he had no experience, Duran testified that Escobar's uncle asked on his behalf, and he gave him a chance. He told Ceja that he had a book of experienced workers and that if Ceja was interested to go talk to Tina Bertuccio. Tina Bertuccio testified that some time early in June, Ceja came to see her about transferring to the lettuce. According to her, she was surprised that Ceja wanted to work in the lettuce fields because she was under the impression that he wanted to work in the onion shed. She told Ceja that she did not think that Duran had an opening

6/. Ceja testified that in November, 1979, he worked cutting lettuce to put in the bins, not for packing boxes, which is a different position than at issue here.

in the lettuce fields at that time.

The Respondent has a policy of assigning to the lettuce fields those workers with prior experience. If there are no workers with experience, then workers with no experience are offered positions there. Had Ceja been assigned to the lettuce crew and the work was steady, his pay would have increased by \$100 per week.

Proving a prima facie case of discriminatory refusal to promote or transfer imposes upon the General Counsel the same burden as a discharge discussed above. The General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of the protected activity and that there was a causal connection between the refusal to transfer and the protected activity. Jackson and Perkins Rose Company, supra.

While the General Counsel in his post hearing brief characterizes Ceja as a strong Union activist, there is nothing in the record to support such a characterization. True, he had been elected as crew representative in 1980 and 1981, but the record indicates that his duties there in 1980 were limited to distributing some leaflets and talking to workers. His contacts with Duran and Villegas, as he described them in his testimony, were in the nature of cooperation with management.

The timing of the denial of his requests for transfer to the lettuce crew does not appear to show any discriminatory motivation on the part of Respondent. In 1979, Ceja made his first request to be transferred to the lettuce crew. In 1980, he made the request several times. In addition, that same year, he also

requested a transfer to the onion shed which was granted. As Ceja admits, the work is easier in the onion shed than in the fields; and, therefore, this transfer was a desirable one.

The transfer to the onion shed was allowed even though Duran quite obviously knew of Ceja's Union activities. There is no evidence that Duran was treating Union members differently from non-Union members. Ramon Escobar was a Union member, however, he was placed on the crew at the request of one of his uncles, and Duran decided to accede to that request. No other inexperienced worker was placed on the lettuce crew during the time in question. The mere fact that Ceja was a Union member or even a crew representative does not in itself give Ceja any right to work in the lettuce crew.

According to Ceja, he made numerous requests to be transferred into the lettuce crew, both before, so far as the record shows, any involvement with the Union, and afterwards. His treatment by Duran did not change; he was denied his request: to transfer because of Respondent's labor requirements at the time of the request.^{7/} While there are suggestions that more was at stake in the relationship between Ceja and Duran, namely Duran's ambiguous answers related above, nothing appears in the record of any substantive nature what, if any, problems Ceja caused Respondent, either during Duran's testimony or Ceja's

7/. Helasio Munoz, a witness and worker called by the General Counsel, testified that he made three requests to transfer to Duran prior to receiving a transfer into the lettuce crew, though the record indicates that he was an experienced lettuce cutter, having first started in the lettuce in 1978, and making his requests for transfer in 1980. The denials were apparently based on Respondent's labor needs.

testimony.^{8/}

Duran had the responsibility for assigning the workers into positions where they were needed. The record indicates that many of Respondent's employees were assigned to different parts of Respondent's operations from time to time including Ceja. General Counsel's position appears to be that Respondent is somehow obligated to accede to Ceja's transfer request merely because Ceja desires it. However, Board precedent is to the contrary. In Rod McLellan Co., 3 ALRB No. 71 (1977) at pp. 2-3 the Board held:

. . . An employer has a fundamental right to assign duties and arrange work schedules in accordance with its best judgment. Absent contractual restrictions, the time, place, and manner of employment are employer decisions. [Citation omitted] It is not within our province to disturb such employer decisions absent proof that the assignment was intended to inhibit the exercise of section 1152 rights or that the adverse effect of the charge on employee rights outweighed the employer's business justification.

Accordingly, I find that the General Counsel has not sustained his burden of proof by a preponderance of the evidence that Ceja's protected activities were a motivating factor in Respondent's failure to transfer Ceja and recommend dismissal of this charge.

IV Incident Involving Jose Lopez Brandishing a Handgun at Respondent's Employees

8/. I do not credit Ceja's testimony where he states that when he made his request for transfer in May, Duran responded in part that, "You created alot of problems on this ranch." It appears peculiar that of the numerous requests for transfer that Ceja testified he made to Duran, it is only the one in issue where Ceja claims Duran made a reference to "problems."

A. Jose Lopez

Respondent, in 1981, began its annual harvest of apricots as usual, picking the apricots by hand with workers supplied by Jose Martinez, a labor contractor. After the harvest had been under way for four to six days, the Union called a strike. Unable to continue the harvest by manual picking, Paul Bertuccio accepted an offer by Jose Lopez (hereinafter "Lopez") to harvest the apricots by machine.

The record is unclear as to who owned the apricot harvesting machines. Tina Bertuccio credibly testified that Respondent neither owned nor leased any apricot harvesting machines while Lopez was on Respondent's farm. The General Counsel produced several witnesses that claimed Lopez told them he did not own the machines. However, that evidence does not eliminate the possibility that Lopez may have rented or leased the machines. In view of the fact that Respondent did not own or lease the machines, the short time involved to complete the harvest and Paul Bertuccio's testimony that he contracted with Lopez to complete the harvest, and that none of Respondent's employees were involved in the harvest except for Correra, a fair inference can be drawn that Lopez supplied machines to harvest the remaining apricots on Respondent's property. Robert Correra (hereinafter "Correra"), Respondent's foreman normally in charge of the apricot harvest, testified that his duties changed during the time Lopez was harvesting the apricots from his duties in prior years. In prior years when Martinez was brought in as a labor contractor, Correra would oversee the work of Martinez. Among his duties then were to give Martinez instructions, to

watch Martinez's crew, to tell them if the proper fruit in terms of ripeness were being picked, to see that workers did not break branches, and to see that the pickers were not dropping too much fruit on the ground. In addition, he saw that the crew had enough boxes to put the fruit in. After Lopez came in, Correra's job changed radically. He did not tell Lopez or the workers what to do. He was limited to bringing bins to the field for Lopez's crew. Correra also testified that he was not familiar with the apricot harvesting machines, and, in fact, had not seen them before Lopez started using them. Correra further testified he had no communication with either Lopez or the ten or twelve men Lopez brought in to operate the machines.

B. The Gun Incident

Jose Bustamante (hereinafter "Bustamante"), a Bertuccio Farm employee for over 18 years, joined the strike called by the Union on July 9th. Bustamante testified that on July 12th, he was a member of a picket line outside Respondent's apricot orchards when he was approached by a man whom he did not know. This man engaged him in conversation and invited him into the orchard. Bustamante declined this invitation, and in the course of their conversation, the man pointed a pistol at Bustamante and order him to drop a UFW flag he was carrying. Bustamante did so. The incident ended when the rest of the pickets came towards Bustamante, and the man put his pistol back into his belt and left.

Jose Sandoval, a striking Bertuccio Farm worker, was also on the picket line that day, though he testifies that the incident took place on July 14th. Sandoval corroborates the testimony of Bustamante on the incident and was able to identify the person

with the gun as Lopez. Lopez was not called as a witness by either party.

Tina Bertuccio heard some time after the incident that Lopez was in possession of a pistol. After learning of this accusation, Tina Bertuccio confronted Lopez as follows:

"Well, that afternoon when they brought the machines in to clean them and to wash them, I approached him, and I told him what I heard, and I told him then that I would not have any of his people, whoever they were that to have any guns or knives or anything because I wouldn't tolerate that, and if I find out that he did, that he wouldn't be able to finish the job."

She also caused to be distributed to all employees and foremen on the farm a letter, dated August 5, signed by Paul Bertuccio, outlining the company's policy on carrying weapons. This letter is in evidence as General Counsel's Exhibit 7. The letter essentially states the Respondent's policy on weapons as follows: Neither workers or foremen are permitted to possess firearms or weapons while working for Respondent. Any worker or foreman found in possession of a weapon or firearm will be immediately discharged.

The testimony regarding this charge is almost all uncontroverted, and I find the witnesses who testified on this charge credible witnesses.

Respondent argues that Lopez was a custom harvester and, therefore, the acts of Lopez cannot be attributable to Respondent. The General Counsel on the other hand claims that Lopez was simply another labor contractor and, therefore, Respondent is liable for Lopez's conduct. In addition, General Counsel also argues that Respondent would be liable under the doctrine enunciated under Vista Verde Farms v. Agricultural Labor Relations Board, (1981)

Turning first to the issue regarding custom harvester. The Board has in several cases considered the distinction between a custom harvester and labor contractor, most recently in Sutti Farms, 6 ALRB No. 11 (1980). The Board in the Sutti Farms case stated that:

"In previous cases requiring the Board to decide whether a particular business entity should be considered a labor contractor or a custom harvester, we have not looked to any single factor but rather to the whole activity of the entity whose status is in question. [Citation omitted] However, in all such cases one or both of the following conditions has been considered essential to the custom harvester status: the providing of specialized equipment and the exercise of managerial judgment in the cultivation or harvesting of crops. See, eg, Kotchevar Brothers, 2 ALRB No. 45" (1976); Jack Stowells, Jr., 3 ALRB No. 93 (1977); the Jarin Company, 5 ALRB No. 4."

Applying the teachings of the Sutti case to the case at bar, I find that Lopez is a custom harvester. Lopez provided specialized equipment along with the crew necessary to operate said equipment. The equipment was not merely simple items such as staple guns, staple wire and water cans, items which the Board has found not to be specialized equipment. The Garin Company, (1979) 5 ALRB No. 4. Rather, Lopez provided sophisticated equipment described by Correra as big machines with canvases on them which would seal up a tree and knock down the fruit. After the fruit was on the canvas, elevators would transport the fruit to bins.

Correra, Respondent's only employee having any contact with the apricot harvest after the strike started, testified credibly that he, himself, had no knowledge about how to operate the equipment. In addition, the record is quite clear that Lopez exercised managerial control over the harvest. Once Paul Bertuccio

decided upon using Lopez to harvest his apricot orchards, his managerial responsibilities, in contrast to earlier harvests, ceased. Neither Paul Bertuccio nor Correra had to make decision regarding whether the fruit was properly ripe for harvest, as the machine was unable in any event to distinguish between the ripe and unripe fruit. Rather, the managerial responsibilities then revolved around the operation and control of the machines, duties that quite naturally fell to Lopez as they were his machine: and his crew. Accordingly, under the facts of this case, I find that Lopez was a custom harvester.

Respondent argues that if Lopez is found to be a custom harvester, liability will not attach to Respondent as Lopez is a separate agricultural employer. No authority is cited for this proposition. Under the liberalized agency theory set forth in Vista Verde Farms, supra, Respondent may still be liable for Lopez's conduct. The test as enunciated in the Vista Verde Farms is as follows:

"... even when an employer has not directed, authorized or ratified improperly coercive actions directed against its employees, under the ALRA an employer may be held responsible for unfair labor practice purposes (1) if the workers could reasonably believe that the coercing individual was acting on behalf of the employer or (2) if the employer has gained an illicit benefit from the misconduct and realistically has the ability either to prevent the repetition of such misconduct in the future or to alleviate the deleterious effect of such misconduct on the employees' statutory rights." Vista Verde Farms, supra, at p. 322.

Applying this test, I find that no evidence was entered, into the record wherein either Bustamante or the other pickets could reasonably believe Lopez's conduct regarding the gun was either

engaged in on the employer's behalf or reflects employer's policy, nor do I find that Respondent gained any illicit benefit from Lopez's conduct. Accordingly, I will recommend dismissal of this charge.

V Incident Involving Kenny Gibson and Javier Ceja on or about July 16, 1981 6

Kenny Gibson (hereinafter "Gibson") has been employed by Respondent as a forklift operator for over two years. He has had the same job duties since he started working at Bertuccio Farms. He operates a forklift around the packing shed area and office. When Paul and Tina Bertuccio are not in the office, he is responsible for taking phone messages. Gibson is paid the same hourly rate as the other three or four forklift drivers that work near the packing shed area. Since being employed at Bertuccio's, he has not hired or fired anyone. He does not tell the other forklift drivers how to do their job. He does, however, relay orders to them from time to time.

The strike at Bertuccio Farms had been in progress for a week at the time of the alleged incident. On July 16, Ceja, Oswaldo Perez and ten to twelve of their friends were crossing Southside Road when Ceja and Perez noticed a yellow pickup driven by Gibson headed towards them. When they first noticed the pickup, it was moving at a slow rate of speed. However, as the pickup approached them, it accelerated. Oswaldo Perez then grabbed Ceja and pulled him out of the path of the oncoming pickup just as the pickup passed them. The pickup missed Ceja by a foot. As Gibson passed Ceja, he made an obscene gesture to him.

Gibson admits being on Southside Road and driving by Ceja.

However, as he remembers the incident, he was driving at a normal rate of speed when he approached Ceja. Ceja then stopped in the middle of the road and bent down to scratch his ankle. As he did so, he used his other hand to give Gibson "the finger." According to Gibson, after Ceja did not move, Gibson had to maneuver his vehicle around Ceja. He estimated the closest he came to Ceja was ten feet.

Based upon my observation of the demeanor of Gibson, I have decided not to credit his testimony regarding this incident. Rather, I credit the testimony of Ceja and Oswaldo Perez. Having found that the incident took place as alleged by the General Counsel, I now turn to the question of Respondent's liability for Gibson's conduct.

The evidence clearly established that Gibson was not a supervisor. Labor Code Section 1140.4 (j) provides that:

"The term 'supervisor' means any individual having the authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The evidence shows that Gibson was one of several forklift drivers who occasionally answered the telephone when the Bertuccios were absent from the office. He had no authority to hire, fire, suspend or discharge any employees. On occasion, as part of his duties to take phone messages, he relayed orders to other forklift operators. Quite clearly, under these facts, Gibson was not a supervisor.

Respondent argues that "an employee's conduct will only be attributable to the employer if the employee in question is a supervisor," citing Anderson Farm Company, 3 ALRB No. 67 (1977). However, the Board in the Anderson Farm Company case did not rule on the issue of an employer's liability for a non-supervisory employee's conduct. Rather, the Board held, inter alia, that a certain employee was a supervisor, and, thus, his conduct was attributable to the employer.

In Superior Farming Company, Inc., 7 ALRB No. 39, the Board ruled directly on the issue of whether non-supervisors can effectively bind an employer. Citing Vista Verde Farms v. ALRB, supra, and Perry Plants, Inc., (1979) 5 ALRB No. 17, the Board resolved the issue in the affirmative adopting the test set forth in Vista Verde Farms, supra, referred to in the Lopez charge above, namely, that an employer may be held responsible for unfair labor practice purposes for any improperly coercive actions which employees may reasonably believe were either engaged in on the employers behalf or reflect the employers policy or if the employer gained an illicit benefit from the misconduct. No evidence was introduced to indicate that the employees could reasonably believe Gibson's conduct was on the employer's behalf or reflects employer policy, nor was there evidence introduced on any illicit benefit gained by the employer. Rather, the evidence indicates that Gibson's conduct was a spontaneous, one-time occurrence of a personal nature.

Accordingly, I find that Gibson's conduct is not attributable to the Respondent and recommend dismissal of this charge.

VI Threat to Ruben Martinez

Ruben Martinez (hereinafter "Ruben"), one of Respondent's employees, then on strike, testified that on August 5, 1981, around 4:35 p.m., he and Marcelino Romero (hereinafter "Roraero") were on their way to Saul Villegas's (hereinafter "Saul") house to borrow a paint gun when they were stopped by Duran. Saul lives with his father, Ines Villegas, a Bertuccio Farm foreman, on farm property.

Four witnesses testified as to what happened after Ruben entered Bertuccio Farms property on his way to the Villegas house.

According to Ruben, three vehicles blocked the roadway as he was driving toward the Villegas house, As he approached the vehicles, he saw Duran, Villegas and Manual Arrerola engaged in conversation. He stopped his car and asked Duran for permission to pass. He told Duran he wanted to go and see Saul. Duran asked him if he knew he was on Bertuccio property. Ruben replied in the affirmative. Duran then said that "he already knew how things were going with the strike and with Bertuccio." Ruben again said yes. Duran then went to his pickup and talked to someone on his CB radio. After speaking on the radio, he told Saul he could pass. Duran also told Arreola to move his station wagon out of the roadway. Duran then went to his pickup and took out a machete. Duran took the machete and made a crossing motion with it toward the ground. He did not say anything as he was doing this. After that, Ruben said he drove to Saul's house. Romero then got out of the car and went to Saul's door. One of Saul's sisters said he wasn't there. Romero left the doorway and got back into the car. He drove back to where Duran was. The road was blocked.

Ruben stopped and told Duran he wanted to get out. Duran said no; that Paul Bertuccio wanted to talk to him. Ruben said okay that he would wait for him. Ruben then exited the car and went up to Duran to talk. Duran told him he had a machine gun and that "he was going to kill four or five, he didn't care if he had to spend the rest of his life in jail." Ruben understood the four or five meant four or five strikers. Ruben did not respond. After the conversation, Paul and Tina Bertuccio arrived. Paul Bertuccio asked Saul if he knew he was on private property, and Saul said he knew but that Duran had let him pass. The sheriff arrived shortly thereafter and Ruben then left.

The General Counsel called Romero to testify and he essentially corroborated the testimony by Ruben.

Duran's version of the above events is different. According to Duran, he was working in the corn with his machete when he saw a vehicle enter onto the Bertuccio property. He claims he did not stop Ruben nor talk to him when Ruben was on his way to the Villegas house. His testimony regarding Villegas' contact with Ruben is somewhat unclear. He initially testified that he saw Villegas talking to Ruben. He then changed his testimony and said Villegas only told him he was talking to Ruben.

Villegas, however, testified that Ruben did not stop nor did he talk to him as Ruben drove onto Bertuccio Farms property. Villegas saw the vehicle go pass him, then up to the front of his house, where it then proceeded to turn back around at a very slow rate of speed. According to Villegas, the vehicle did not stop at his house. After Ruben turned around, Duran called Paul Bertuccio on the CB radio. Duran stopped Ruben as he was driving

out and asked him if he realized the ranch was on strike, that Ruben was involved in it and that they were on private property. He also told them that Paul Bertuccio was coming and that they would have to wait.

So far as the machete incident is concerned, I find no threat was made. While the General Counsel's position at the hearing seemed to be that Duran threatened Ruben with the machete, he does not argue this point in his post-hearing brief. Even under Ruben's version of the facts, I would not find a threat. According to Ruben, Duran swung his machete twice towards the ground while Ruben was in his van. Duran did not say anything when he did this. I fail to see how these facts amount to a threat.

So far as the alleged reference to the machine gun is concerned I do not credit the testimony of Ruben and Romero based upon their demeanor while testifying. Their reference to the machine gun and killing or shooting four or five appeared more rehearsed than truthful. Accordingly, I will recommend dismissal of this charge.

VI The Denial of Access

As indicated earlier, the Union went on strike on July 9, 1981. It appears that for the next month, the Union set up pickets at some of Respondent's work sites. In addition, the Union took access at two labor camps where some of Respondent's workers lived. The record is clear that so far as the labor camps are concerned, there was no denial of access to the Union.

During July, in addition to picketing, the Union tried to talk to non-striking employees as they entered Respondent's work site, This effort, however, was not very successful as the work sites were some distance from the public road where the Union

representatives were located. In addition, the non-striking workers would drive onto Respondent's property with their cars without stopping where the Union representatives were. As a further means of communicating with non-striking employees, the Union used bull horns at Respondent's packing sheds to speak with the workers. While the Union felt that this was effective initially, Respondent soon stacked bins near the entrance to the packing sheds creating a barrier between the Union representatives and the workers. On July 27, the Union tried to take access at Respondent's packing shed. After some discussion with Tina Bertuccio, one Union representative was allowed access to the non-striking workers at lunchtime.

On August 6, the Union again asked for access to the work site Paul Chavez called Tina Bertuccio in the morning on that day and requested access, and Tina Bertuccio said no. The Union then attempted access around noon of that day. They were refused access. A number of Union members were arrested. The Respondent sought and received a temporary restraining order from the San Benito County Superior Court on August 7, barring access to Respondent's work site.

In the third week of August, the temporary restraining order was vacated. Since that time, the Union has not been restrained in its access, and the evidence indicates that they have in fact had access to Respondent's work site, though the terms of the access does not appear in the record.

The parties are in agreement that the Union is entitled to work-site access during a strike pursuant to the Board decision in Bruce Church, Inc., and UFW, 7 ALRB No. 20.

Respondent asserts three affirmative defenses to their denial of access to Union.

Respondent first argues that the Union had effective, alternative means of communicating with Respondent's non-striking employees since the strike started. By alternative means, Respondent apparently refers to the fact that the Union had access to labor camps that some non-striking employees resided at. In addition, Respondent also refers to bull horns and picketing and possibly a list of employees given the Union by the labor contract. So far as the access to the labor camp is concerned, the evidence is uncontroverted that only some of Respondent's non-striking workers resided there, along with a number of employees who did not work for Bertuccio Farms. I, therefore, find that this access to labor camps was not an effective, alternative means of communicating with all of Respondent's non-striking employees.

As for the other "means" available to the Union, these are very similar to the means the Board in the Bruce Church, Inc., supra, case held was insufficient, alternative means of communication.

I, therefore, find no merit to this affirmative defense.

The Respondent also asserts as an alternative defense that "UFW representatives were lawfully restrained from taking access to Respondent's work sites," However, the evidence established that access was denied on August 6, and the Temporary Restraining Order not issued until August 7; and, therefore, this defense is without merit.

Finally, Respondent argues that they relied on California Coastal Farms, (1981) 117 Cal. App. 3d 971. Respondent argues that at the time they denied access, Coastal Farms, supra, was in

full force and effect and they, therefore, relied on it. However, in the Bruce Church case, the Board held that California Coastal Farms did not have precedential value in regards to the issue of whether there could be an unfair labor practice in the denial of strike access absent a rule which authorized the taking of it. Rather, the Board found that the issue was controlled by the preeminent authority of Agricultural Labor Relations Board v. Superior Court, (1976) 16 Cal. 3d 392, which allowed the Board to decide whether to proceed by rule making or case by case basis. Accordingly, I find this affirmative defense to be without merit. For all of the foregoing reasons, I find that Respondent violated Section 1153 (a) of the act by denying reasonably access to Union representatives and striking employees at its premises from July 29 to August 6 and that such denial interfered with the rights guaranteed to employees by Section 1152 of the Act.

Accordingly, I hereby issue the following recommended Order:

ORDER

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

1. Cease and desist from:

(a) Denying reasonable access to Respondent's premises, including labor camps, to any UFW representatives or other Union agent for the purpose of communicating with non-striking employees while there is a strike in progress at Respondent's premises.

(b) In any like or related manner interfering with, restraining and coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any and all such activities.

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

(a) During any period when there is a strike in progress at Respondent's premises, permit access to its premises by UFW representatives or other Union agents for the purpose of communicating with non-striking employees. Said access takers may enter the Respondent's property for a period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the access period shall encompass such lunch break. If there is no established lunch break, the access period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day. Access shall be limited to one UFW representative or Union agent for every fifteen workers on the property. Said access shall continue until a voluntary agreement on strike access is reached by the parties or until the Union ceases to be the collective bargaining representative of Respondent's employees, whichever occurs first.

(b) During any period when there is a strike in progress;, permit access to its labor camps by UFW representatives or other Union agents for the purpose of communicating with non-striking employees.

(c) Sign the Notice to Agricultural Employees attached here to and, after its translation by a Board agent into appropriate

languages, reproduce sufficient copies in each language for the purpose set forth hereinafter.

(d) 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.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees by Respondent at any time during the period from July 27 until August 6.

(f) 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 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 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.

(g) Notify the Regional Director in writing, within 30 days after the 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: February 26, 1982

BRIAN TOM
Administrative Law Officer

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 hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law in 1981 by refusing to allow UFW organizers and other union agents to take access to our property during a strike in order to speak to nonstriking employees. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

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

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

Because it is true that you have these rights, we promise that:

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

Especially:

WE WILL NOT refuse to allow agents of your certified bargaining representative to enter our property at reasonable times during a strike at our property so that they can talk to the employees who are working.

Dated:

BERTUCCIO FARMS

By _____
Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3160.

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

DO NOT REMOVE OR MUTILATE