Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-260-D 81-CE-261-D 81-CE-121-EC 81-CE-127-EC 10 ALRB No. 11

MODIFIED DECISION AND ORDER[1/]

On March 8, 1983, Administrative Law Judge (ALJ) Robert S. Burkett issued the attached Decision in this proceeding. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions and a supporting brief, and General Counsel and the UFW each timely filed a response to Respondent's exceptions.

The Agricultural Labor Relations Board (ALRB or 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 ALJ, as modified herein, and to adopt his recommended Order with modifications.

We affirm the ALJ's conclusions that Respondent violated Labor Code section 1153(a)[2/] by denying UFW representatives access

[1/] This Decision has been modified by the inclusion of a new footnote 5 on page 3 and by the deletion of former footnote 7 on page 4.

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

to Lakeview labor camp on November 10 and 11, 1981, and to Respondent's Imperial Valley labor camp on December 7 and 8, 1981. We also affirm the ALJ's conclusions that Respondent violated section 1153(a) by forcibly ejecting UFW representatives from the Lakeview camp on November 10, 1981, and violated section I153(a) by denying UFW representatives post-certification access to Respondent's Imperial Valley fields on December 17, 1981, and January 6, 1982.[3/]

The Attorney's Fees Issue

At the close of the hearing in this matter, General Counsel moved to amend the complaint to seek attorney's fees for General Counsel and the UFW, and the ALJ allowed ten days for submission of the motion in writing. Although General Counsel did not submit its motion until approximately four weeks after the hearing closed, we find that the delay caused no prejudice to the Respondent since it had oral notice of the motion. General Counsel did not except to the ALJ's failure to award attorney's fees,[4/] but the UFW did so. We find that General Counsel waived its right to have us consider attorney's fees for General Counsel. However, we find that the issue of whether we should grant attorney's fees

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[3/] In addition to the usual post-certification access, we will also grant the UFW expanded access to Respondent's workers in the field to counteract the effects of Respondent's illegal denial of access.

[4/] In his Decision, the ALJ did not discuss or rule on the General Counsel's motion for attorney's fees.

against Respondent in favor of the UFW is properly before us.[5/]

When this Board first considered its power to award attorney's fees in Western Conference of Teamsters (1977) 3 ALRB No. 57, the general California rule was contained in Code of Civil Procedure (CCP) section 1021 which states:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Judicial decisions interpreting CCP section 1021 have created certain "equitable exceptions" to the general rule.[6/] However, these exceptions were expressly intended to recompense the beneficial conduct of parties bringing lawsuits that serve the public interest or the interest of a class of beneficiaries, rather

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[5/] Members Waldie and Henning disagree with Member Carrillo's view that attorney's fees should be awarded to General Counsel on the basis of exceptions filed by the UFW. In their opinion, no provision of the ALRA gives the UFW standing to protect the interest of the California taxpayer in the unnecessary expenditure of the General Counsel's funds.

The Union's interests in these proceedings are limited to its rights as an organization and the rights of the farm workers it represents in the collective bargaining process. Where a union raises an issue within the ambit of its legitimate interest, an appropriate remedial award will be made, regardless of the position taken by the General Counsel. (See Harry Carian Sales (1980) 6 ALRB No. 55.)

[6/] These exceptions are variously referred to as the "common fund," "substantial benefit," and "private attorney general" principles. (See D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 25; Serrano v. Priest (1977) 20 Cal.3d 25, 46-47; CCP section 1021.5.) The authority of CCP section 1021 and its exceptions have been applied to administrative tribunals when acting in a quasi-judicial capacity. (See Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d. 891.)

than to sanction improper conduct. (See Baugess v. Paine (1978) 22 Cal.3d 626, 639.)

In Western Conference of Teamsters, supra, 3 ALRB No. 57, a unanimous Board held that this Agency's authority to grant attorney's fees was not limited by CCP section 1021, because the ALRB was intended by the Legislature to have remedial powers at least as expansive as the powers of the National Labor Relations Board (NLRB).[7/] This conclusion is supported by Labor Code section 114-8 which provides that "the Board shall follow applicable precedents of the National Labor Relations Act, as amended," and by Labor Code section 1l66.3(b) which provides that "if any other act of the Legislature shall conflict with the provisions of this part, this part shall prevail."[8/]

At the time Western Conference of Teamsters, supra, 3 ALRB No. 57, issued, NLRB practice was to award attorney's fees for the limited purpose of sanctioning and discouraging frivolous litigation that needlessly clogged the Agency's docket. (See Tiidee Products, Inc. (1972) 194 NLRB 1234 [79 LRRM 1175].) We note that since Western Conference of Teamsters, the California Legislature has

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[7/] Labor Code section 1160.3 states that the ALRB shall remedy unfair labor practices by providing such relief "as will effectuate the policies of this part." This general grant of remedial authority is mirrored in section 10(c) of the National Labor Relations Act.

[8/] With changes in its membership, the Board has been divided, in recent cases, over the proper interpretation of its authority regarding attorney's fees. (See Neuman Seed Company (1981) 7 ALRB No. 35 (Members Song and McCarthy concurring); V.B. Zaninovich and Sons (1982) 8 ALRB No. 71 (Members Waldie and Perry dissenting and concurring).)

recognized a similar need for docket control by enacting CCP section 128.5(a), which provides that:

> Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.

Another development since Western Conference of Teamsters is the NLRB's decision in Autoprod, Inc. (1982) 265 NLRB No. 42 [111 LRRM 1521]. In that case, the NLRB awarded attorney's fees, to restore the status quo ante, against a party whose misconduct "capped a decade of contumacy and flagrant disregard of its employees' rights under the Act during which the Respondent has flouted court-enforced orders of the Board and persistently ignored its statutory obligations." We find that this language eloquently describes the efforts of Respondent herein, since 1975, to prevent the UFW from communicating with Respondent's employees on its premises. (See Sam Andrews' Sons (1977) 3 ALRB No. 45; Sam Andrews' Sons (1979) 5 ALRB No. 68; Sam Andrews' Sons (1982) 8 ALRB No. 87.) Respondent here has also flouted court orders regarding access.

On the authority of Autoprod, Inc., we shall attempt to restore the status quo ante by ordering Respondent to reimburse the Charging Party for:

> ...its costs and expenses incurred in the investigation, preparation, presentation, and conduct of this proceeding, including salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and such other reasonable costs and expenses as are found appropriate. 265 NLRB No. 42 at p. 7.

We also direct the Regional Director to seek contempt citations against Respondent for any on-going or further violations of our access orders.

The UFW shall file with the Board and serve on Respondent a memorandum of fees, costs, and expenses within thirty (30) days of the issuance of the Board's Order. The memorandum shall be supported by declarations explaining with particularity the items for which reimbursement is sought.[9/] Respondent shall file and serve any opposition to the UFW's memorandum within twenty (20) days of receipt of the memorandum. The Board will thereafter issue an order stating the amount awarded for fees, costs, and expenses or, if issues of fact are in dispute, set the issues for hearing. Any hearing on fees, costs, and expenses shall be conducted under the procedures for representation proceedings found at California Administrative Code, title 8, section 20370.[10/]

ORDER

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

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[9/] The Board will exercise its discretion in determining the amount to be allowed for each item claimed. Since there are no standards directly applicable to this determination, we will be guided by federal and state authority in areas of law in which attorney's fees have been awarded. (See Pope v. Pope (1951) 107 Cal.App.2d 537 (domestic relations) and Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974) 488 F.2d 714 (employment discrimination).)

[10/] In cases where backpay or makewhole have been ordered, disputed issues involving fees, costs and expenses may be consolidated for hearing in the Board's compliance proceedings. (Cal. Admin. Code, tit. 8, § 20290.) The award shall not include any fees, costs and expenses incurred by any party during the compliance proceedings unless the conduct of any party to those proceedings creates an independent basis for awarding fees, costs and expenses.

Respondent Sam Andrews' Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Preventing, limiting, or restraining any union organizers or agents from entering and remaining on the premises of Respondent's labor camps for the purpose of contacting, visiting, or talking to any agricultural employee on the premises.

(b) Denying United Farm Workers of America, AFL-CIO (UFW) representatives access to bargaining unit employees, at reasonable times, on the property or premises where they are employed, for purposes related to collective bargaining between Respondent and the UFW.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1151 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) At a time to be determined by the Regional Director, provide the UFW with access to its employees for one hour during regularly scheduled work time, for the purpose of talking with the employees about matters related to collective bargaining between Respondent and the UFW. Access may be taken by two UFW representatives for every fifteen employees in each of Respondent's work crews. After conferring with both the UFW and Respondent, the Regional Director shall determine the manner and most suitable time for the special access. During the one-hour access period, no

employee shall be required to be involved in the access activities. All employees shall receive their regular pay for the time away from work. The Regional Director shall determine an equitable payment to be made to nonhourly wage earners for their lost productivity.

(b) Permit UFW representatives to meet and talk with Respondent's agricultural employees on the property or premises where they are employed, at times agreed to by Respondent or, in the absence of such an agreement, at reasonable times, for purposes related to collective bargaining between Respondent and the UFW.

(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 period(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 on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine 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.

(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 with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full complaince is achieved.

(g) Reimburse the UFW for its fees and costs incurred in this matter.

Dated: July 20, 1984

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member.

MEMBER CARRILLO, Concurring:

I concur with the majority's award of attorney's fees and costs to the United Farm Workers of America, AFL-CIO (UFW) but I would also award attorney's fees and costs for General Counsel. I would not find that the award to the General Counsel of attorney's fees and costs was waived merely because he took no exception to the Administrative .Law Judge's (ALJ) failure to address the issue in his decision. The General Counsel sought attorney fees in the hearing and the UFW filed an exception to the ALJ's failure to award attorney's fees and costs to General Counsel. The matter has thus been well litigated and is therefore properly before this Board. (See Board Regulations, section 20286(b).) Even absent an exception, this Board is not compelled to act as a mere rubber stamp for its ALJ. (See National Labor Relations Board v. WTVJ, Inc. (5th Cir. 1959) 268 F.2d 346 [44 LRRM 2364]; Yellow Taxi Company of Minneapolis (1982) 262 NLRB 702 [110 LRRM 1346].;

I fail to understand the logic behind the majority's unwillingness to grant attorney fees and costs to the General Counsel in this case. Clearly, such fees and costs are appropriate for the General Counsel for the identical reasons we are granting them to the Charging Party. The majority fails to realize that their refusal to grant these appropriate remedies is contrary to well established National Labor Relations Board (NLRB) precedent. It is well settled by the NLRB that while the General Counsel has sole and exclusive prosecutorial discretion in issuing and litigating unfair labor practice complaints, it is the exclusive province of the Board to remedy unfair labor practices. It matters nothing whether the General Counsel or any other party approves or opposes any specific remedy; indeed it is immaterial whether the General Counsel even seeks a remedy in its complaint. The Board has full and unlimited authority to remedy unfair labor practices. (See NC Coastal Motor Lines (1975) 219 NLRB No. 143 [90 LRRM 1114] affd. (4th Cir. 1976) 542 F.2d 637; Schnadig Corporation (1982) 265 NLRB No. 20 [112 LRRM 1331]; Nabco Corporation (1983) 266 NLRB No. 130 [113 LRRM 1025].) By failing to award an appropriate remedy solely because the General Counsel did not take exception to the ALJ's failure to address the remedy, the majority is abdicating its statutory responsibility under Labor Code section 1160.3 for fully and effectively remedying unfair labor practices.

This Board has broad discretion in fashioning remedies which will effectuate the policies of the Agricultural Labor

Relations Act (Act). (Butte View Farms v. Agricultural Labor Relations Board (1979) 95 Cal.App.3d 961.) In this case, the appropriate remedy is the award of attorney's fees and costs to General Counsel as well as to the UFW. We should not allow the failure of General Counsel to except to the ALJ's failure to recommend such a remedy to limit our discretion and power to do so when we feel such a remedy is appropriate and will effectuate the policies of the Act.

Dated: July 20, 1984

JORGE CARRILLO, Member

CHAIRMAN SONG, Concurring and Dissenting:

I concur in the majority's findings of Labor Code section 1153(a) violations herein. However, I dissent from the majority's holding that we are authorized to award attorney's fees in this case.

I believe that the statutory proscription in Code of Civil Procedure (CCP) section 1021 against awarding attorney's fees, unless specifically provided for by statute or agreement of the parties, prevents us from awarding such fees herein. In Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d 891 [160 Cal.Rptr. 124], the California Supreme Court held that the provisions of CCP section 1021, and its equitable exceptions, were applicable to an administrative agency acting in a quasi-judicial capacity. The Public Utility Commission's (PUC) constitutional and statutory powers, like this agency's statutory powers, include no specific provision for the granting of attorney's fees. However, in Consumers Lobby the court found that the "common

fund" equitable exception to CCP section 1021 applied to the PUC's reparations proceeding in that case, and the court allowed an attorney's fee award to the plaintiffs under that exception. As the majority herein concedes, none of the equitable exceptions to CCP section 1021 is applicable to the instant case.

The majority finds that this agency's authority to grant attorney's fees is not limited by CCP section 1021 because the Board's authority under Labor Code section 1160.3 to provide such relief "as will effectuate the policies of this part" is "at least as expansive" as the powers of the National Labor Relations Board (NLRB).

In Consumers Lobby, the California Supreme Court examined the constitutional and statutory grant of power to the PUC. The court noted that the PUC is a constitutionally created state agency with far reaching duties, functions and powers and broad, "open-ended" authority to "do all things ... which are necessary and convenient in the supervision and regulation of every public utility in California." Furthermore, "[T]he commission's authority has been liberally construed" by the courts. (Consumers Lobby Against Monopolies, supra, 25 Cal.3d at 905-906.) However, the court did not find that an attorney's fee award could be based on the PUC's broad remedial statute; rather, the court found that the fees could be awarded within the equitable exceptions to CCP section 1021.

I do not believe that the Legislature's grant of remedial power to this Board is any broader than the remedial power granted to the PUC. Nor do I believe that, in considering an attorney's fee request in our proceedings, we can ignore the limitations of

CCP section 1021. The statute and its equitable exceptions are applicable to our quasi-judicial proceedings just as they are to such proceedings of the PUC. Thus, we cannot grant attorney's fees absent specific provision by statute, or applicability of one of the equitable exceptions.

Labor Code section 114.8 requires this Board to follow applicable precedents of the National Labor Relations Act (NLRA). In Autoprod, Inc. (1982) 265 NLRB No. 42 [111 LRRM 1521], the NLRB awarded attorney's fees against an employer that had flagrantly disregarded its employees' rights, flouted court-enforced orders of the NLRB, and persistently ignored its statutory obligations. Although I agree with the majority that Respondent has engaged in comparable conduct herein, I do not believe that Labor Code section 1148 requires or allows us to follow the NLRB's criteria for awarding attorney's fees in its cases. The NLRB is not subject to the statutory restriction against granting attorney's fees (CCP section 1021) that we, as a quasi-judicial California agency, are. I am not convinced that the Legislature, in giving a general direction that we follow applicable NLRA precedent, could have intended that we ignore the specific prohibition in CCP section 1021 against awarding attorney's fees in the absence of specific statutory or contractual provision.

The majority cites Labor Code section 1166.3(b) as supporting its assertion that the Legislature intended this agency to have the same power to award attorney's fees as the NLRB has. However, the need to apply section 1166.3(b) does not arise herein, because CCP section 1021 does not conflict with Labor Code section

1148. Section 1148 requires us to follow only applicable NLRA precedent. If NLRB decisions grant attorney's fees in situations wherein California courts and quasi-judicial agencies may not do so (i.e., in the absence of contractual provision, specific statutory authorization, or a recognized equitable exception to CCP section 1021), then such decisions are not applicable precedent for this Board.

The majority appears to find CCP section 128.5(a), which permits trial courts to order a party to pay attorney's fees incurred by another party as a result of frivolous actions or delaying tactics, applicable herein. The majority fails to specify in what way Respondent herein may have violated the statute—what "frivolous action" or "delaying tactic" Respondent engaged in that resulted in attorney's fees being incurred by the UFVJ. Furthermore, the majority inexplicably ignores the procedural requirements set forth in CCP section 128.5(b):

> Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

Since the procedural requirements of CCP section 128.5(b) have not been met herein, the statute, by its own terms, cannot be applied in the instant case.

While I do not believe the Board may award attorney's fees herein, I concur in the majority's conclusion that costs should be awarded to the UFW. CCP section 1021 provides, in part, that "parties to actions or proceedings are entitled to costs and

disbursements, as hereinafter provided." CCP sections 1031 and 1032 provide for the awarding of costs to prevailing parties in municipal, justice, and superior court actions. Courts have held that an administrative agency, when acting in a quasi-judicial capacity, may award costs to prevailing parties under the CCP provisions relating to costs. (See, e.g., Consumers Lobby Against Monopolies, supra, 25 Cal.3d 891.) This Board, as a quasi-judicial agency, is thus authorized to award costs to prevailing parties in its proceedings, and I believe that Respondent's flagrant misconduct justifies such an award herein.

Dated: March 13, 1984

ALFRED H. SONG, Chairman

MEMBER McCARTHY, Concurring and Dissenting:

I join in Chairman Song's Dissent to the majority opinion. I do not, however, agree with his concurrence in the award of costs to the Charging Party. Costs may be awarded to the prevailing party in an administrative proceeding, but the terms of the statutory provisions concerning costs must first be met. The right to recover costs is entirely statutory, and the measure of the statute is the measure of the right. (Muller v. Robinson (1962) 206 Cal.App.2d 674-; Cooper v. State Board of Public Health (1951) 102 Cal.App.2d 926.)

As used in Code of Civil Procedure section 1021 et seq., the term "costs" has consistently been defined as "those fees and charges which are required by law to be paid to the courts, or some of their officers, or an amount which is expressly fixed by

law as recoverable as costs." (Gibson v. Thrifty Drug Co. (1959) 173 Cal.App.2d 554; Moss v. Underwriters' Report (1938) 12 Cal.2d 266; Wilson v. Board of Retirement of Los Angeles County Emp. Retirement Ass'n (1960) 176 Cal.App.2d 320.[1/] The term "costs" has been construed to include inter alia the cost incurred in the taking of a deposition (Simpson v. Gillis (1934) 1 Cal.2d 42, 55),[2/] paying the statutory per diem fees of ordinary witnesses, Fay v. Fay (1913) 165 Cal. 469, 475, and paying the mileage fee of a witness for travel to and from the place of trial, Richards v. Silveira (1929) 97 Cal.App. 166, 170, but only where the cost was necessarily incurred by a party in prosecuting or defending an action or proceeding (Moss v. Underwriters' Report, supra; People v. One 1950 Ford (1956) 140 Cal.App.2d 647, 649; Code of Civil Procedure section 1033). Expenditures incurred by the prevailing party for his or her own benefit in preparation of his or her case are not considered as being items allowable for costs. (Murphy v. E.D. Cornell Co. (1930) 110 Cal.App. 452.) The right to reimbursement for costs depends upon the relevant statutory provisions and not upon the views of the litigant or his or her counsel as to the necessity for the outlay. (Escrow Guarantee Co. v. Savage (1963) 213 Cal.App.2d 595.) In determining whether

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[1/] Code of Civil Procedure section 1021 speaks of "costs and disbursements". However, as used in that section, those terms are synonymous. (Gibson v. Thrifty Drug Co. supra, 173 Cal.App.2d 554.)

[2/] The allowability of depositions as a cost has recently been codified in Code of Civil Procedure section 1032.7. They will still be disallowed as a cost if the court does not find them to be necessary.

there is a statutorily cognizable need for the outlay, the courts will consider whether the item for which monies were expended "was necessary to protect the rights of [the party seeking costs]." (Hoge v. Lava Cap Gold Mining Corp. (1942) 55 Cal.App.2d 176, 186-188.)

Turning to the situation in the case at hand, it must first be noted that the party seeking costs, the UFW, was not responsible for the prosecution of the unfair labor practice complaint. As an intervenor it had the right to participate in the hearing, but not to direct the course of the litigation, which is the sole prerogative of the General Counsel. (See Mann v. Superior Court (194-2) 53 Cal.App.2d 272, 280.) The UFW has made no attempt to show that it incurred any costs that were necessary for the prosecution of the case or that were necessary in order to protect its rights. Its only contention in this regard is that costs must be awarded to the UFW, and to the General Counsel (who, incidentally, does not seek an award of costs), because such an award would serve as a deterrent to future unlawful conduct by the Respondent. The award of costs is further justified by Chairman Song as a penalty for Respondent's "flagrant misconduct." This however overlooks the nature of costs:

> They are not a penalty imposed on the losing party for his misconduct. 'They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court.' (20 C.J.S. 257; Purdy v. Johnson (1929) 100 Cal.App. 416, 418 . . . .)
>
> (Rosenfield v. Vosper (1943) 57 Cal.App.2d 605, 610-611.)

Since this Agency can only award costs to the extent allowed by Code of Civil Procedure section 1021, et seq., and since

those sections require a showing of necessity and never contemplated the award of costs as a penalty for misconduct, we should not be making an award of costs to the Charging Party in this case. Although I agree that Respondent did unlawfully interfere with union access to its employees,[3/] to include an award of attorney's fees to the Union in the remedy would be impermissible and to include an award of costs would be inappropriate.

Dated: March 13, 1984

JOHN P. McCARTHY, Member

[3/] An expanded access remedy would be appropriate in light of Respondent's history of access violations.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano 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 by denying representatives of the United Farm Workers of America, AFL-CIO (UFW) access to our labor camps in November and December 1981 and to our fields in December 1981 and January 1982.

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 allow the UFW to take access to our labor camps or fields and WILL NOT otherwise interfere with the legitimate efforts of the UFW to communicate with our employees.

WE WILL reimburse the UFW for any attorney's fees and legal costs it incurred in challenging our refusal to allow the union access.

Dated: SAM ANDREWS' SONS

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 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

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

Sam Andrews' Sons
(UFW)

10 ALRB No. 11
Case No. 81-CE-260-D,
et al.

ALJ DECISION

The ALJ concluded that Respondent violated Labor Code section 1153(a) by denying union representatives post-certification access to Respondent's employees at the labor camps and in the fields on numerous occasions in November and December 1981 and January 1982.

BOARD DECISION

The Board affirmed the ALJ's Decision with regard to the access denials. Although the ALJ did not discuss the issue of attorney's fees in his Decision, Members Waldie, Carrillo and Henning held that the Board has the power, under California statutes and NLRB case law, to award attorneys' fees and costs for two purposes: to discourage frivolous litigation and to sanction flagrant and repeated acts of misconduct. In this case, attorneys' fees and costs were awarded to the Charging Party due to Respondent's long history of access denials and defiance of Board Orders. Fees and costs were not awarded to the General Counsel because they were not requested.

CONCURRING OPINION, Member Carrillo

Member Carrillo would award attorneys' fees and costs to General Counsel as well as to Charging Party. Charging Party's exception to the ALJ's failure to award General Counsel attorneys' fees and costs was sufficient to bring the issue before the Board.

CONCURRING AND DISSENTING OPINION, Chairman Song

Chairman Song concurred in the majority's findings of Labor Code section 1153(a) violations, but dissented from the majority's holding that the Board was authorized to award attorneys' fees in the instant case. Chairman Song would have held that the statutory proscription in Code of Civil Procedure section 1021 against awarding attorneys' fees, unless specifically provided for by statute or agreement of the parties, prevented the Board from awarding such fees herein.

CONCURRING AND DISSENTING, Member McCarthy

Member McCarthy joins in Chairman Song's dissent. Unlike the Chairman, however, he would not award costs to the Charging Party. He notes that the General Counsel, not the Charging Party, is responsible for the prosecution of the case and that the UFW has made no attempt to show that it incurred any costs that were necessary in order to protect its rights. He points out that Code of Civil Procedure section 1021 does not contemplate the award of costs as a penalty for misconduct.

Member McCarthy agrees with the majority that Respondent unlawfully interfered with access to its employees and finds that an expanded access remedy would be sufficient to remedy the violation.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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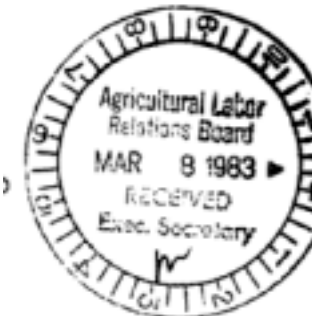
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	
SAM ANDREWS' SONS,	)	Case Nos. 81-CE-127-EC
Respondent,	)	81-CE-260-D
and	)	81-CE-261-D
UNITED FARM WORKERS	)	
OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

Appearances:

Darrell Lepkowsky
El Centro, California
for the General Counsel

Patricia J. Rynn
Newport Beach, California
for the Respondent

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

ROBERT L. BURKETT, Administrative Law Judge: These consolidated cases were heard by me in Bakersfield, California, on July 27 and 28, 1982.

The complaint alleges various violations of section 1153(a) of the Agricultural Labor Relations Act (hereinafter the Act) by Sam Andrews' Sons (hereinafter Respondent).

All parties were given full opportunity to participate in the hearing and after the close of the hearing, the General Counsel and Respondent each filed a brief in support of its respective position.

Upon the entire record, including by observation of the demeanor of the witnesses, and at the consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent admits that it is an agricultural employer within the meaning of section 1140.4(c) of the Act. I find that the United Farm Workers of America, AFL-CIO, (hereinafter UFW) is a labor organization as defined in section 1140.4(f) of the Act on the basis of the pleadings and undisputed evidence.

II. The Unfair Labor Practice Allegations

The complaint as amended makes the following substantive allegations against Respondent:

1. On or about November 10, 1981, the UFW was denied access to the Respondent's Lakeview Camp.

2. That on or about November 11, 1981, the UFW was again

denied access to Respondent's Lakeview Camp.

3. On or about December 7 and 8, 1981, Respondent refused to permit UFW organizers and/or representatives to take access to Respondent's labor camp, located in the Imperial Valley.

4. On or about December 17, 1981, Respondent refused to permit the UFW to take access to Respondent's fields located in the Imperial Valley.

It is further alleged that Respondent forcefully evicted UFW spokespeople from the Lakeview Labor Camp on November 11, 1981.

Respondent stipulated that it denied United Farm Worker's representative access to the Lakeview camp on November 10, 1981, to its Imperial Valley camp on December 8, 1981, and to its agricultural fields located in the Imperial Valley on or about December 17, 1981 and on or about January 6, 1982. Respondent claims that the only reason access was denied on the 11th of November was that the individuals asking for access did not have the proper identification.

Except as to the factual background of the November 11 "access denial", all factual issues in this matter have been resolved by stipulation. This whole question to be considered in each instance in which "denial" was stipulated is whether or not the employer's conduct, under the facts of this case, could properly be deemed unlawful.

III. General Background

Sam Andrews' Sons is a farming concern with operations both in Kern County and the Imperial Valley. The company maintains labor camps at Lakeview, in Kern County, and in Holtville, in the Imperial

Valley, which houses workers employed by the company.

The UFW is the certified bargaining representative of all Respondent's agricultural workers.

On November 10, 1981, David Villarino, director of the UFW's Lament Field Office, attempted to take access to the Lakeview Camp in the company of other UFW representatives. After conversing with workers in their living quarters for a few minutes, he and most of his companions were ejected from the camp (though the circumstances of their ejection is in dispute in this matter).

The following evening, the UFW again attempted access under the color of a temporary restraining order. Access was again denied, assertedly because the UFW representatives did not produce proper identification.

During the harvest in Imperial Valley, access was denied to UFW at Respondent's Imperial Valley camp on December 8, 1981, and to its agricultural fields located in the Imperial Valley on or about December 17, 1981, and on or about January 6, 1982.

FINDINGS OF FACT

1. The November 10 and November 11 Denials of Access

Counsel for Respondent vigorously argued that the charges in this matter be dismissed on the ground that precisely the same issues had been litigated in a hearing held on November 30, 1981, in Case No. 81-CE-258-D, then on review before the Board. General Counsel conceeded that the application of law to the facts would be exactly the same in both cases, but she nevertheless opposed the motion contending that the facts in this case of denial of access differed from the denials occurring in the previous case. I denied

the motion at that time, but I did agree to incorporate those portions of the record in Case No. 81-CE-258-D and corresponding exhibits which contained testimony of witnesses for Respondent.

Subsequently, the Board issued its opinion in Case No. 81-CE-258-D, 8 ALRB No. 87, Sam Andrews' Sons, and UFW. My findings of fact in this matter is identical to that of the Board, which found that,

> Lakeview Labor Camp is located south of Bakersfield, California, about 12 miles from Mettler and 28 miles from Lament. The camp is a large, fenced-in compound containing, inter alia, two barracks, a kitchen and dining facility, and separately fenced storage areas. Respondent admits that it denied access on the stated dates, but argues that the Union should be denied all access to Respondent's labor camp because alternative means of communication are available, because workers' rights to receive visitors are outweighed by other workers' rights to privacy, and because a no-access rule is necessary for protecting camp security.

They found that none of the defenses to denial of access raised by Respondent were applicable to the circumstances at Respondent's Lakeview Labor Camp.

Respondent argued that the November 11 denial of access was reasonable in that all that was required was proper identification, that the individuals were in fact UFW representatives. Given the fact that Respondent admits that it was aware that David Villarino was a UFW representative and that Mr. Villarino was in fact vouching for the other individuals, Respondent's explanation is without merit. Respondent has demonstrated a course of action designed to inhibit access to the UFW, and this denial is just one part of the overall demonstrated pattern. I find that Respondent, through its agents actions on November 11, 1981, did deny access to UFW representatives to its Lakeview Camp, and did so knowing full well

that there was an outstanding temporary restraining order requiring access.

There is a factual dispute as to whether or not David Villarino and other workers were on November 10, 1981, forceably ejected from the Lakeview Camp. I found that the testimony of the key witness for Respondent, Steven Rodriguez, lacked credibility. He claimed that he did not use physical force and then stated that he pushed them out the door. He first testified that he gently escorted Mr. Villarino from the room and then demonstrated that he had to grab him by the arm and persuade him to leave.

Respondent argues that the UFW representatives were repeatedly warned to leave before they were "escorted" off the premises. Since David Villarino and his companions were calmly conversing with the workers and since the ejection order was clearly in violation of the law in that it denied access to the UFW, the warnings given by Respondent's agents are no defense to a separate finding of an unfair labor practice violation.

2. The Imperial Valley Labor Camp

Sam Andrews' Sons leases and operates a labor camp located off Fulton Road, just west of Holtville in the Imperial Valley. The camp has one entrance and is composed of four concrete block buildings, only two of which are occupied by Sam Andrews' Sons employees. The buildings are sleeping quarters which are approximately 20 feet by 70 or 75 feet in size. One building houses the kitchen and dining facilities, and another contains the shower and bathrooms.

In the sleeping quarters there are two rows of double bunks

with plywood partitions forming small cubicals around four double bunks. The bunks are four feet apart, arranged in a fashion very similar to the barracks at the Lakeview Camp.

There is a policy restricting visitation to the Imperial Valley camp similar to the one in effect at Lakeview. No trespassing signs are posted at the camp. Camp residents, however, are free to come and go as they please. Most of the residents of the camp are Filipinos. There is only one crew at the camp from approximately one month during the lettuce harvest season. When the two crews are camped together, there are about 40-50 total camp residents. Approximately 70-80 percent of two crews that live in the Imperial Valley camp work in the Bakersfield area as well as in the Imperial Valley.

Respondent concedes that one or about December 8, 1981, the UFW representatives were denied access to the Imperial Valley Labor Camp. Respondent argues that the strike remained in progress through December of 1981 and Sam Andrews' Sons officials became aware for the first time in January during injunctive proceedings that the UFW was not advocating a strike of Sam Andrews' employees in the Imperial Valley. The company's position with respect to its refusal to allow visitors both into its Imperial Valley Labor Camp and its Lakeview Labor Camp was that sufficient opportunity already existed for meaningful discussions between UFW agents and non-striking employees through court-ordered field access and other means, and given the violent nature of the strike, allowing strikers and UFW agents into the camps without restrictions would significantly increase the chance of violent confrontation, possibly

resulting in physical injuries or property damage. It further argued that policy in effect at the camp already allowed for visitaiton and discussions between non-residents, including UFW representatives, and representatives of the camps.

Respondent further admits that access to its fields was denied but argues that the record in this case shows that the alternative means of communication available excused its denial of access.

CONCLUSIONS OF LAW

The denials of access on November 10 and 11, 1981, are identical to the denials of access in Case No. 81-CE-258-D, 8 ALRB No. 87, as was stated by counsel for Respondent. I therefore incorporate by reference the ALRB's Decision and Order and find it unnecessary to make additional conclusions of law.

I further find that the denial of access on or about December 7 or 8, 1981, at the Imperial Valley Labor Camp which Respondent admits is very similar to the labor camp at Lakeview is a violation of section 1153(a) and again incorporate by reference the Decision and Order in Case No. 81-CE-258-D, 8 ALRB No. 87. It should be noted that Respondent's defense to denial of access at its Imperial Valley camp was virtually identical to its denial of access at the Lakeview camp.

The Forceable Ejections on November 10, 1981

The Board has stated on numerous occasions that the forceable removal of union representatives from a labor camp constitutes a violation of the Act independent of any violation found for having denied the access itself. Anderson Farms Co.

(1977) 3 ALRB No. 67.

Indeed the California Supreme Court in Vista Verde Farms v. A.L.R.B. (1981) 29 Cal.3d 307, stated at page 316-317:

> As the ALRB has stated on numerous occasions 'physical confrontations between union and employer representatives are intolerable under the Act. Absent compelling evidence of an imminent need to act to secure persons against danger of physical harm or to prevent material harm to tangible property interests, resort to physical violence of the sort revealed here shall be reviewed by this Board as violative of the Act. Such conduct has an inherently intimidating impact on the workers and is incompatable with the basic processes of the Act.' Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14, p. 11, aff'd (1979) 24 Cal.3d 335 (156 Cal.Rptr. 1, 595 P.2d 579); see e.g., Greenbrier Nursing Home, Inc. (1973) 201 NLRB 503 (82 LRRM 1249, 1250); Sullivan Surplus Sales, Inc. (1965) 152 NLRB 132, 149 (59 LRRM 1041, 1042, 1045). One of the principal goals of the ALRA is to 'insure peace in the agricultural fields' in California (Stats. 1975, 3 Ex. Sess; Ch. 1, section 1, p. 401)', and the physical pushing, shoving and threats of a fight engaged in by the labor contractor in this case plainly conflict with the objectives of the Act.

In the present case, David Villarino and his companions were forcible and violently ejected from the Respondent's premises by an agent of Respondent. This forceable ejection thus constitutes a separate violation of section 1153(a) of the Act.

Denial of Access to Imperial Valley Fields.

The leading ALRB case on field access is O. P. Murphy (1978) 4 ALRB No. 106. In this instance, the UFW was also denied access after certification to Respondent's fields. The Board in Murphy acknowledged that after certification the union has a continuing need for taking field-to-worksite access based upon its right and duty to bargain collectively on behalf of all the employees it represents. Most significantly, the Board set forth the following guidelines to govern future denial of access violations:

1. There is a presumption that whenever a certified bargaining representative seeks to communicate with unit employees in the field or work sites, that no alternative means of communication exists.

2. A certified bargaining representative is entitled to take post-certification access at reasonable time and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit.

3. The labor organization must give notice to the employee and seek his or her agreement before entering the employer's premises.

4. The labor organization must give such information as the number and names of the representatives who wish to take access and the times and locations of such desired access.

5. Where an employer does not allow the certified bargaining representative reasonable pro-certification access to the unit employees at the work site, henceforth such conduct will be considered as evidence of a refusal to bargain in good faith.

6. Where the bargaining representatives wish to observe employees while they are working in order to obtain information for job evaluations, to conduct safety investigations, or for similar purposes, we shall follow applicable NLRB precedent.

7. The parties must act in good faith to reach agreement about post-certification access which is not a mandatory subject of bargaining.

8. The right of access does not include conduct disruptive of the employer's property or agricultural operations.

Again, the facts in the matter are not in dispute. David Villarino, who is director of the UFW's Lamont Field Office, spoke with one of Respondent's owners, Bob Andrews, relaying the UFW's intent to take access. Mr. Andrews stated that he would call him back and never returned the call.

Later that day, Mr. Villarino spoke with the company attorney with regard to the taking of field accesss; the attorney merely stated that he was unsure of the company's position get with regard to field access in the Imperial Valley.

Mr. Villarino testified that his purpose in contacting the workers was to service workers their needs, to inform them of collective bargaining processes and negotiations, to get feedback on proposals that were being contemplated or pending on the table, and to update them about the legal cases that were pending before the ALRB.

All the above reasons are permissible under O. P. Murphy.

Even if there were a strike taking place at Respondent's fields at this time, the UFW continued to have a duty of fair representation during the strike as well as a need to communicate with the strikers. Bruce Church, Inc. (1981) 7 ALRB No. 20. However, I find that there being no strike conduct alleged or shown to have existed by Respondent with regard to the Imperial Valley farming operations, there was no "strike" in progress insofar as this denial of access is concerned.

Even if strike access were an issue in this matter, it is clear that the conditions prescribed by the Board in Bruce Church, supra, were in effect. The union was in the middle of contract

negotiations which may have required worker input, as well as the strike situation in Kern County which would have a possible effect on workers in the Imperial Valley.

Even more significant is the fact that the union had no viable alternative means of communicating with the majority of the workers. They were precluded from contacting the two crews of Filipino workers in the labor camp and as the union representatives testified at the hearing, they did not have the correct addresses for many of the field workers so that it was impossible to contact many of them in their homes. In addition, the union was unsure of who exactly comprised each crew.

Though Respondent put on exhaustive testimony in an attempt to demonstrate that alternative means of communication existed to contact the employees, the Board has categorically rejected these means as viable alternatives to field access communications:

> Repsondent contends that the evidence in this case supports the conclusion that the Union did have other effect means available, namely, loud speakers, radio, and the personal encounters described by witnesses. As a general matter, we first note that, in adopting our organizational access regulation, 8 Cal. Administrative Code section 20900, we have already determined that these are not effective means of communication and we do not understand how the mere fact of a strike could convert ineffective means of communication into effective ones. . . . Bruce Church, supra, p. 26.

The Board took a similar stance in the Growers Exchange, Inc. case (1982) 8 ALRB No. 7.

The actions taken by the Respondent Sam Andrews in the field in the Imperial Valley are part and parcel of the same company policies denying access to the UFW during numerous occasions during the past year. I therefore find that the denial of access in the

field is in violation of section 1153(a).

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

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

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Sam Andrews' Sons, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Preventing, limiting or restraining any union organizers or agents from entering and remaining on the premises of Respondent's labor camps for the purpose of contacting, visiting or talking to any agricultural employee on the premises.

b. In any like or related manner, interfering with, restraining, or coercing agricultural employees in their right to communicate freely with the union organizers or agents on the premises of Respondent's labor camps.

c. Preventing, limiting, or restraining any union organizers or agents from entering and remaining on the Respondent's fields for the purpose of contacting, visiting or talking to any agricultural employee on the premises.

d. In any like or related manner, interfering with,

restraining or coercing agricultural employees in their right to communicate freely with union organizers or agents in the Respondent's fields.

e. The use of physical force or violence against UFW representatives engaging in conduct protected under the Agricultural Labor Relations Act.

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

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

b. Mail copies of the attached notice, in all appropriate languages, within 30 days after the day of issuance of this order, to all agricultural employees employed by Respondent at any time during the period from October 28, 1981 until the date on which the said notice is mailed.

c. Post copies of the attached notice, in all appropriate languages, in conspicuous places on its property for sixty days, the period and place 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.

d. Arrange for a representative of Respondent or a Board agent to distribute and read the attached notice, in all appropriate languages, to all of its agricultural employees on company time and property at a time and place 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 question the employees may have concerning the notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

e. Notify the Regional Director in writing within thirty days after the date of issuance of this order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request until full compliance is achieved.

DATED: March 8, 1983

Robert S. Burkett

ROBERT S. BURKETT

Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by United Farm Workers of America, AFL-CIO, the certified exclusive bargaining agent for our agricultural employees, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, Sam Andrews' Sons, 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 denying union organizers access to agricultural employees at our Lakeview Labor Camp and our Imperial Valley Labor Camp. Additionally, the Board found that we violated the law by denying access to union representatives at our Imperial Valley fields. Additionally, the Board found that we did violate the law by forcefully ejecting union representatives from the Lakeview Labor Camp premises. 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 farmworkers 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 hereafter prevent or restrain any organizers or agents from entering and remaining on the premises of our labor camps or fields for the purpose of contacting, visiting, and/or talking with any agricultural employee. Nor will we forceably evict any agent or organizers from our premises who are there for the purpose of contacting, visiting, and/or talking with any agricultural employee.

WE WILL NOT in any other manner restrain or interfere with the right of our employers to communicate freely with any union organizers or agents on the premises of our labor camps and fields.

Dated: SAM ANDREWS' SONS

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.

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

DO NOT REMOVE OR MUTILATE