Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
ANDREWS DISTRIBUTION COMPANY, INC.,	)	
Respondent,	)	Case No. 88-CE-14-VI
and	)	15 ALRB No. 6
FRESH FRUIT & VEGETABLE WORKERS, LOCAL 78-B UFCW, AFL-CIO, CLC,	)	
Charging Party.	)	

DECISION AND ORDER

On December 21, 1988, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions to the Decision of the ALJ with a supporting brief. General Counsel filed a brief in response to Respondent's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the ALJ's Decision in light of the record and the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions, and to adopt her Order.

Although our dissenting colleague acknowledges that Respondent denied access in violation of the Act, she nonetheless would also find that Respondent did so on the basis of a good faith, albeit erroneous, interpretation of the law.[1/]

[1/] The alleged good faith which Member Ramos Richardson perceives simply finds no support in the facts. While Respondent, on the one hand, finally conceded that the Union was entitled to access, it, nevertheless, in practice, continued to frustrate access at every turn.

Accordingly, she would tailor the remedy in accordance with the extent of, as well as the motive for, the unlawful conduct. As her approach would appear to be premised solely on the deservedness of punishment for the wrongdoer, it is anathema to the purely compensatory nature of remedies under our Act. The majority is persuaded that the ALJ has properly fashioned a remedy which seeks to compensate for the violation of section 1152 rights which effectively prevented the employees from having any work site communication or contact with the petitioner prior to the election.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Andrews Distribution Company, Inc. (ADO, its officers, successors, and assigns shall:

1. Cease and desist from:

(a) Denying representatives of the Fresh Fruit & Vegetable Workers, ("FFVW" or "Union") Local 78-B, UFCW, AFL-CIO, CLC access to its Kern County vacuum cooler pursuant to Title 8, California Code of Regulations section 20900 and following (all section references hereafter are to Title 8, California Code of Regulations unless otherwise noted);

(b) Preventing or otherwise interfering with communication between FFVW organizers and ADC employees at ADC's vacuum cooling facility in Bakersfield, California, at permissible or agreed upon times for said access; and,

(c) In any like or related manner interfering with,

restraining or coercing agricultural employees in the exercise of their rights guaranteed in Labor Code Section 1152.

2. Take the following affirmative actions designed to effectuate the policies of the Agricultural Labor Relations Act:

(a) Allow the FFVW representatives, during the next period in which the FFVW files a Notice of Intent to take Access, to organize among Respondent's employees at ADC's vacuum cooling facility in Bakersfield, California, (all references hereafter to "Respondent's employees" shall be so construed) during the hours specified in section 20900(e)(3), and permit the FFVW, in addition to the number of organizers already permitted under Section 20900(e)(4)(A), to have one additional organizer for each 15 employees;

(b) Grant to the FFVW, upon its filing a written Notice of Intent,to Take Access pursuant to Section 20900(e)(1)(B), one access period during the Union's next organizational drive in addition to the four periods provided for in Section 20900(e)(1)(A);

(c) Provide, during the FFVW's next organizational drive among Respondent's employees, the FFVW with access to Respondent's employees during regularly scheduled work time for one hour, during which time the FFVW may disseminate information to and conduct organizational activities among Respondent's employees. The FFVW shall present to the Regional Director its plans for utilizing this time. After conferring with both the Union and Respondent concerning the Union's plans, the Regional Director shall determine the most suitable times and manner for

such contact between Union organizers and Respondent's employees. During the times of such contact, no employee will be required to engage in work related activities. All employees will receive their regular pay for the one hour away from work. The Regional Director shall determine an equitable payment to be made to non-hourly wage earners for their lost production time;

(d) Provide, during the FFVW's next organizational drive among Respondent's employees, the ALRB with an employee list as described by Title 8, California Code of Regulations section 20910(c) upon the FFVW's filing of a Notice of Intent to Take Access as described by Section 20900(e)(1)(B). The list shall be provided within five days after service on Respondent of the Notice of Intent to Take Access. Respondent shall maintain such an employee list containing the current street addresses of all its agricultural employees;

(e) 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 below;

(f) 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;

(g) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at

any time between April 14, 1988 and April 14, 1989;

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the Notice, in all appropriate languages, to all Respondent's 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 and/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; and,

(i) Notify the Regional Director, in writing within thirty (30) days after the of issuance of this Order, as to what steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him periodically, thereafter, in writing, what further steps have been taken in compliance with the order.

DATED: July 21, 1989

BEN DAVIDIAN, Chairman[2/]

GREGORY L. GONOT

JIM ELLIS

[2/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

MEMBER RAMOS RICHARDSON, Concurring and Dissenting:

While I concur in the majority's decision to affirm the ALJ's finding of pre-certification access violations on April 14 and April 15, 1988, I respectfully dissent from the Board's remedial order insofar as it provides for a paid, one-hour access period during company time. (See Board's Order, ¶ 2(c).)

My review of ALRB case law indicates that this remedy has generally been granted only in those cases where the Board has found extensive evidence of pervasive unfair labor practices, including substantial interference with the Board's access rules. (Jackson & Perkins Company (1977) 3 ALRB No. 36; Anderson Farms Company (1977) 3 ALRB No. 67; McAnally Enterprises, Inc. (1977) 3 ALRB No. 82; and Dave Walsh Company (1978) 4 ALRB No. 84.) In Jackson & Perkins Company, supra, the Board first announced its expanded access remedy of a two-hour paid access period as a

remedy for an employer's pervasive access violations. Prior to this decision, the Board had only included a cease-and-desist order together with standard notice remedies (i.e., mailing, posting and reading of the notice) for access violations. (See, Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14; Pinkham Properties (1977) 3 ALRB No. 15; D'Arriqo Brothers Co. of California (1977) 3 ALRB No. 31.)

In Jackson & Perkins Company, at pages 1-2, the Board found the employer, through its agents and individuals acting under its express direction and control, had engaged in an active and systematic policy of denying access to union organizers who were acting in compliance with the access rule by "(1) directing sheriffs to detain organizers when they appeared at lunch time and only release them when the lunch period was over; (2) using trucks and farm machinery to prevent organizers from entering the property; (3) posting security and supervisory personnel at the entrance to the fields and the parking lot adjacent to its packing shed; and on numerous occasions stationing personnel in radio-equipped vehicles from one to two miles away from its property along routes ordinarily used by union organizations coming to talk to employees in order to give warning to security and supervisory personnel that union organizers were approaching." By such conduct, the Board found the employer had completely denied access to over 800 employees, had succeeded in disrupting the union's organizational efforts, and had prevented the union

from garnering the showing of interest necessary to trigger a representation election among the affected employees. Finding the traditional notice remedies inadequate to remedy the violations in the case, the Board fashioned several new access remedies, including a provision for a two-hour paid access period during company time. The Board stated that this extended access remedy was necessary in order to redress the imbalance created by the employer's deliberate conduct in denying its employees the right to receive information under the access rule.

The remedy was also granted in Anderson Farms Company (1977) 3 ALRB No. 67, a consolidated representation and unfair labor practice case, where the Board set aside a representation election in light of the employer's pervasive unfair labor practices. There, the Board found the employer had (1) made coercive and threatening statements to its workers during the pre-election campaign; (2) terminated three employees because they accepted union authorization cards while in the presence of the company's ranch superintendent; (3) engaged in post-election interrogation of the company's employees; (4) terminated six employees because they spoke with union organizers during an access period; (5) announced an unlawful promise of medical benefits during the organizational campaign; (6) engaged in surveillance of union organizational activity by photographing and recording a union organizer's meeting with forty employees during a lunchtime access period; (7) denied labor camp access to union

organizers on two occasions; and (8) interfered with union work-site access on two occasions. With respect to the latter conduct, the Board found that company personnel driving company vehicles had surrounded and blocked the exit of a union organizer who was in his car in a company field. The company personnel then detained the union organizer until he was searched and arrested by deputy sheriffs, and his car towed away. In another incident, company personnel sought to interfere with union access by going from field to field and blocking the field entrances as organizers arrived to speak with employees and by forcing union organizers to take lunchtime access while supervisory personnel and sheriff deputies remained on the work site.

Finally, in McAnally Enterprises, Inc. (1977) 3 ALRB No. 82, the employer hired a uniformed guard and constructed a gate across the entrance to the ranch after a union organizational campaign got underway. The Board found the employer had violated the access rule by preventing union organizers from entering the ranch property in order to speak with employees. The employer's conduct resulted in denials of access to the company's parking lot, the employees' lunchroom, and to the employees' homes on the property. The employer also made citizen arrests on two occasions, once because three organizers were outside the gate leafletting employees in their cars, and a second time when organizers tried to contact employees after work. Like the Jackson & Perkins and Anderson Farms cases, the Board here also granted the union a company-paid access period.

In each of these cases, the Board's remedial order included a one or two hour paid access provision because of the pervasive unfair labor practices found, including flagrant access denials. In the instant case, there has been no finding by the Board that the Respondent engaged in pervasive unfair labor practices, and the two access denials which are found, are not flagrant, but rather are based on the Respondent's good faith, though mistaken, view of the law concerning the Board's jurisdiction over agricultural employers. By failing to make distinction between cases involving non-flagrant access violations, as occurred here, and cases involving pervasive unfair labor practices with flagrant access violations, as occurred in Jackson & Perkins, Anderson Farms, and McAnally Enterprises, the majority has improperly fashioned a remedy in this case which is far disproportionate to the conduct of the Respondent and is therefore punitive, and has so blurred the standards for granting this remedy that henceforth the Board's duty to follow its own precedent will require it to grant this remedy in all but the most extraordinary cases. For the above-stated reasons, I would strike paragraph 2(c) of the Board's remedial order and find that the Board's remaining expanded access remedies (¶ 2(a), (b) and (d))

are sufficiently tailored to remedy the access violations found in this case.

DATED: July 21, 1989

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

Andrews Distribution Co. (FFVW)

15 ALRB No. 6
Case No. 88-CE-14-VI

Background

In a prior case involving the Employer herein, the Agricultural Labor Relations Board (ALRB or Board) held that employees in the Holtville, California, vacuum cooling facility of Andrews Distribution Company (ADC or Employer) were engaged in agriculture. Accordingly, the Board held that it had jurisdiction to conduct a representation election. In that election, the employees voted to be represented by the Fresh Fruit & Vegetable Workers Union, Local 78-B (Union). The Board certified the Union as the exclusive bargaining representative of all ADC employees in the Holtville plant. ADC had contended that since more than 10 percent of the produce handled by its employees was grown by an independent grower, that amount was sufficient under the National Labor Relations Act to render the company non-agricultural and not under the jurisdiction of the ALRB. The Board found that the alleged independent grower in that instance was merely an investor in what otherwise was a single employing enterprise and, therefore, ADC employees performed tasks which were in conjunction with and incidental to the primary growing operation. (Andrews Distribution Company (1988) 14 ALRB No. 19.) A similar issue is central to the instant case where the Union filed a petition for certification in which it sought to represent employees in ADC's Bakersfield cooling plant. The Union did not prevail in that election and filed an unfair labor practice charge in which it alleged that ADC's denial of access to Union organizers, on the grounds that the employees were not agricultural, constituted unlawful interference with employees' statutory rights to engage in mutual aid and protection and/or to decide to join a union or to refrain from joining a union. At the time of the alleged violation, the Board had not yet issued its decision in the earlier ADC matter.

ALJ Decision

The ALJ found that employees in ADC's Bakersfield facility, unlike those in Holtville, did process crops produced by independent growers but that the amount of such produce was not sufficient to render them commercial rather than agricultural. Having thus determined that the Board had jurisdiction, she proceeded to examine the alleged denial of access, concluding that Respondent did in fact deny access in contravention of the Board's access rule. As a remedy, she invoked the Board's standard cease and desist, mailing and notice provisions and, in addition, required that should the Union again attempt to organize ADC's Bakersfield employees, the Union will be permitted to meet with employees for up to one hour on paid work time.

Board Decision

The Board affirmed the ALJ's Decision in all respects, including her recommended remedial provisions.

Concurring and Dissenting Opinion

Member Ramos Richardson concurred in the majority opinion insofar as it determined that the denials of access violated the Act, but dissented from the majority's inclusion of a one-hour work time access period as part of its remedial order. She would find the grant of this expanded access remedy appropriate only in those cases where the Board has found extensive evidence of pervasive unfair labor practices, including violations of the Board's access rules. As these factors were not present in this case, she would find the expanded access remedy to have been inappropriately granted in this case.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia 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 by:

> Failing and refusing to provide the Fresh Fruit and Vegetable Workers, Local 78-B, UFCW, AFL-CIO, CLC (hereafter "Union") with access to our employees at the vacuum cooling facility in Bakersfield, California, on April 14 and 15, 1988.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do and also want to tell you that the Agricultural Labor Relations Act (hereafter "Act:) is a law that gives you and all farm workers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer 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 tht you have these rights, we promise that:

> WE WILL allow Union representatives to come on the property at the Bakersfield cooler during their next organizational campaign to talk to you about your rights under the Act.

ANDREWS DISTRIBUTION COMPANY, INC

_____

(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 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ANDREWS DISTRIBUTION COMPANY, INC., Respondent, and FRESH FRUIT & VEGETABLE WORKERS, LOCAL 78-B UFW, AFL-CIO, CLC, Charging Party.	Case No. 88-CE-14-VI

Appearances:

Larry Dawson Dressier
& Quesenbery El
Centro, California for
the Respondent

Derek Ledda
ALRB Visalia Regional Office
for the General Counsel

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE: Administrative Law Judge:

I. STATEMENT OF THE CASE

This case was heard by me on September 29, 1988,[1] in Visalia, California. It arises out of a charge filed by the Fresh Fruit & Vegetable Workers, Local 78-B, UFW, AFL-CIO, CLC (hereafter "FFVW" or "Union") on April 20, against Andrews Distribution Company, Inc. (hereafter "ADC," "Employer," or "Respondent"), alleging that ADC denied the Union access to employees of ADC's vacuum cooling facility (hereafter "cooler") in Bakersfield, California.

A complaint issued on July 18, alleging that Respondent denied access to the Union on April 14 and 15 in violation of section 1153(a) of the Agricultural Labor Relations Act (hereafter "ALRA" or "Act"). Respondent filed its answer on July 29 wherein it denied having been served with the charge,[2] denied that it is an agricultural employer within the meaning of the Act, denied that it refused access on April 15 and admitted that it refused access on April 14. Respondent asserted two affirmative defenses: (1) that it is not an agricultural employer within the meaning of the Act, and therefore the Agricultural Labor Relations Board (hereafter "ALRB" or "Board") has no jurisdiction in this matter; and (2) that the alleged violations are diminimus.

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[1]All dates herein are 1988 unless otherwise noted.

[2]At the pre-hearing conference, Respondent admitted proper service

General Counsel and Respondent appeared through counsel,[3] were given full opportunity to participate in the hearing and filed post-hearing briefs. Upon the entire record, including my observation of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and conclusions of law.

II. THE EMPLOYER ISSUE

A. Facts

1. Background

In addition to the Bakersfield cooler at issue herein, ADC operates a similar facility in Holtville, California. As noted, ADC claims this Board has no jurisdiction in the instant matter because ADC is not an agricultural employer. ADC made the same claim regarding its Holtville operation in a representation case, Andrews Distribution Co., Inc. (Case No. 88-RC-l-EC) (hereafter ADC I), which I heard earlier this year. My decision in ADC I issued on August 3, and ADC has appealed it to the full Board.

In ADC I, ADC claimed that approximately 22 percent of the lettuce it processed at Holtville was owned by an independent entity, one Jerry Neeley, and therefore the Holtville facility was a commercial operation. Its claim rested on business agreements

[3]Charging Party did not intervene.

entered into between Neeley and Fred Andrews and also between Neeley and Rainbow Ranches, Inc. (hereafter Rainbow). Fred Andrews is the sole shareholder in both ADC and Rainbow.

These agreements were entered into evidence in ADC I and are also part of the record in the instant case. (Joint Ex. 1 and Joint Ex. 2.) They pertain to lettuce grown in the Imperial Valley and processed in the Holtville facility, lettuce grown in the Palo Verde Valley (being the area around Blythe, California) and also lettuce grown in the San Joaquin Valley which is the lettuce processed at the Bakersfield cooler. (Joint Ex. 3, pp. 46-47.)[4] The parties have stipulated that the evidence in ADC_I applies equally here and also have stipulated to introduction here of the transcript in ADC_I which was admitted as Joint Ex. 3.

In ADC_I, I found that Neeley was not an independent entity, and thus the percentage of his interest did not render the Holtville cooler a commercial operation. I also found that, in any event, ADC failed to establish Neeley's actual percentage interest because at the time of hearing the final accounting had not been done[5] and because his percentage was based not only on

[4]References to the transcript in ADC_I will be denominated by "Joint Ex. 3" followed by the page (s) of the transcript. Reference to the transcript of the instant hearing will be cited "Tr. page."

[5]The final accounting still had not been completed as of the close of the instant hearing.

the amount of lettuce processed in Holtville but the total amount of lettuce processed in all three deals, namely: (1) Holtville; (2) Bakersfield, and (3) the Palo Verde Valley. (Joint Ex. 1.)

There is but one significant factor here not present in ADC I. In the spring 1988 lettuce season, the Bakersfield cooler processed not only lettuce cooled pursuant to the Andrews/Neeley arrangement but also lettuce from two growers, to wit: (1) John Barton and (2) Terry and Garry Barton.

2. The Bartons

John Barton has been actively involved in agriculture as a grower for over 15 years and has owned his current business since 1980. The growing of lettuce is a minor part of his business, and, since 1980, he has grown lettuce only about four times. There are two lettuce seasons in Kern County: October/November and March/April. Thus, out of approximately 16 seasons (8 years multiplied by 2 seasons), he has grown lettuce in 25 percent of them. (16 seasons divided by 4 seasons).

John Barton farms about 1,000 acres, and he verbally agreed with Fred Andrews for the spring 1988 season to cool lettuce from 40 acres, or four percent, of his land at the Bakersfield cooler.[6] He decides on a season to season basis

[6]Lettuce from only 19 acres was actually harvested and cooled at ADC because the remaining acreage could not be harvested due to a disease (tip burn) affecting the lettuce.

whether to grow lettuce. His decision to cool lettuce at ADC's cooler is also made on a season to season basis. For the 1988 fall season already underway at the time of this hearing, he had planted 35 acres which he intends to cool at ADC's cooler.[7]

Terry and Carry Barton, John's brothers, have been active as growers for over 20 years and have been partners in their present farming operation since 1980. Lettuce is also a small part of their operation. They have grown lettuce four or five times since 1980. (25-31 percent of the available seasons.) Like John, they decide on a season to season basis whether to plant lettuce. In the spring 1988 season, Terry and Carry grew lettuce on 21.5 acres which they cooled at the Bakersfield cooler. They have not planted any lettuce for the 1988 fall season.

3. The Amount Of Lettuce Procgssed At The Cooler

In that season, ADC was scheduled to cool lettuce grown on 397.5 acres. (336 acres of Andrews/Neeley lettuce[8] plus 40

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[6]Respondent proffered other evidence relating to various future arrangements at the cooler. (pp. 73-77 and Resp. Exs. 1 and 2.) I rejected it because the agreements had not been finalized and were subject to modification. Consequently, the terms and nature of the relationships were subject to change and were not a reliable indicator of the future. (pp. 76-77.)

[8]In ADC I, Fred Andrews testified the arrangement with Neeley in the San Joaquin Valley encompassed some 600 acres. (Joint Ex. 3, p. 35.) There was no explanation as to why this figure was reduced to 336. I note that this discrepancy points up the danger of relying on anticipated events.

acres of John Barton and 21.5 acres of Terry and Garry Barton.) The 336 acres constitutes nearly 85 percent of the total acreage on which lettuce which was processed at the cooler was grown. (336 acres divided by 397.5 acres) Conversely, the 61.5 acres of the Bartons would have comprised 15 percent of the total. Since, however, the actual acreage of the Bartons which was harvested (because of the tip burn) was only 40.5 acres, the Barton acreage actually accounted for only 11 percent of the total. (40.5 acres divided by 376.5 acres being the 336 acres of Andrews/Neeley plus John's 19 acres and Terry and Carry's 21.5 acres.)

Comparing acreage, however, is not a very accurate way to assess the amount of lettuce from each arrangement which was actually processed by the cooler since the amount of lettuce actually harvested on the respective acreage obviously varies. For example, John Barton had 19 acres of marketable lettuce which yielded 11,685 cartons of lettuce. That is a yield of 615 cartons/acre. (11,685 divided by 19.) The 21.5 acres of Terry and Carry yielded 11,823 cartons of lettuce or 549.91 cartons/acre. Neeley and Andrews had 336 acres which yielded 272,350 cartons or 810.57 cartons per acre. Thus, more lettuce per acre as well as more lettuce in total was processed for Andrews/Neeley.

Joint Ex. 4 shows the total number of cartons of lettuce processed by ADC which were grown by the Bartons. The Bartons accounted for 7.95 percent of the total of all cartons processed

and for 7.68 percent of the total of all gross sales for lettuce processed through the cooler. Thus, the Neeley/Andrews arrangement accounted for 92.05 percent of total cartons and 92.32 percent of total gross sales. Gross sales price per carton ranged from $2.50 to $7.75.

As can be seen from the foregoing, the lettuce grown by the Bartons comprised only a small percentage of the actual amount of lettuce processed in the Bakersfield cooler. Respondent, in fact, acknowledged that even without the participation of the Bartons, the lettuce from the Andrews/Neeley arrangement was sufficient to warrant the cooler operation. (Joint Ex. A, ¶5.)

4. Andrews' Relationships with Neeley and the Bartons

The parties stipulated that the nature of the business relationship between Jerry Neeley and Fred Andrews, ADC and Rainbow is the same as described in ADC I. Further, the nature and extent of Neeley's interest in, responsibility for, control over and involvement in ADC's Bakersfield cooler is the same as it was regarding ADC's Holtville cooler as described in ADC I. The same letters of agreement pertain in the instant case as did in ADC I. (Joint Exs. 1 and 2.)

The only additional evidence adduced at the instant hearing is Fred Andrews' testimony that Neeley had input into Andrews' decisions selecting seeds and determining planting dates

in the spring Bakersfield season.[9] (Tr. pp. 72-73.) Andrews gave "guidance" to Neeley who was a "quick learner." (Id.)

Mr. Andrews noted that seed companies publish lists of seed varieties and recommended time frames the varieties are to be planted. For example, a list would indicate which varieties could be planted between September 1 and September 15. (Tr. p. 90.) Only Andrews, and not Neeley, reviewed the lists. Andrews then told Neeley what should be planted when. Neeley relied on Andrews' review of the lists. (Tr. pp. (90-91.)

Based on the foregoing, I find that Andrews made the decisions regarding seed selection and planting schedules although he discussed them with Neeley. The remaining facts regarding the relationship with Neeley are the same as those I considered in ADC I, and I see no reason to change the findings I made in my decision in ADC I.[10] I adopt those findings as set forth in that decision.

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[9]Respondent in its brief (Footnote 3 at p. 6) objects to my ruling based on judicial economy that it could not introduce evidence herein regarding the Holtville operation which it could have introduced in ADC I where it litigated precisely the same issue. In point of fact, Respondent ultimately proffered no such evidence and, with regard to the spring 1988 season, sought only to introduce the evidence regarding seed selection and planting times which, of course, was admitted.

[10]Respondent sought to introduce evidence regarding future arrangements with Mr. Neeley (Tr. pp. 74-77 and Respondent's Exs. 1 and 2). Assuming arguendo that future arrangements with Neeley would be relevant to determining whether ADC was an agricultural employer when the petition for certification was filed in April 1988, since the agreements regarding the future arrangements were not finalized at the time proffered by Respondent but were still subject to change, I rejected the proffered evidence.

With regard to the Bartons, they were solely responsible for the growing of the lettuce on their acreage. Andrews, however, took responsibility for harvesting, transporting, processing and marketing the lettuce. He charged the Bartons $3.00 per carton of lettuce for these services, but when the sales price of the lettuce did not cover these costs, he did not seek to recover them.

Andrews' agreements with the Bartons regarding cooling their lettuce at the ADC cooler were verbal and, as noted earlier, the Bartons decide from one season to the next whether to grow lettuce at all and, if they do, whether to cool it at ADC.

B. Analysis and Conclusions

My analysis of applicable legal precedent regarding the employer issue is set forth in my decision in ADC I. I adopt that discussion as if set forth fully herein. In a nutshell, I found that pursuant to both National Labor Relations Board (NLRB) and ALRB precedent, operations such as the cooler typically are found to be agricultural operations if 10 percent or less of the product processed comes from independent entities. Conversly, if 15 percent or more of the product comes from independent entities, the facility generally is held to be commercial. Between 10 percent and 15 percent is a gray area. I found in ADC I that

Neeley is not an independent entity. There are no material differences between that case and this one regarding the Neeley/Andrews relationship.

For the reasons set forth in my decision in ADC I, I find that Neeley was not an independent entity as regards the Bakersfield cooler. [11] His input into the selection of seeds and planting dates does not alter my conclusion since I have found that Andrews actually made the decisions. Moreover, as in ADC I, Neeley's actual percentage has still not been determined because the accounting has not been completed. Finally, as I found in ADC I, and on the same basis as set forth therein, Neeley's percentage is based on all three components of his arrangement with Andrews, to wit: not only the Bakersfield operation but that combined with Palo Verde Valley and the Imperial Valley.

The remaining question then is whether involvement of the Bartons renders the cooler a commercial operation. I find it does not.

Respondent argues that if one compares the number of acres of lettuce grown by the Bartons to that under the Neeley/Andrews arrangement, the Bartons' acreage accounts for 15

[11] Since my decision in ADC I is on appeal to the Board, my findings therein are not res judicata. By adopting them herein as noted, I merely avoid repeating the same analysis and factual findings and conclusions of law where I have determined not to depart from them.

percent of the total acreage committed to the cooler. As noted, using actual acreage figures, the Bartons accounted for only 11 percent of the total acreage.

Pursuant to applicable case law, which I discussed in my decision in ADC I, that amount would result in the cooler being classified as a agricultural operation. This is especially true since the other two measures, number of cartons and gross sales, show that significantly less than 10 percent (7.95% and 7.687% respectively) of the lettuce processed by the cooler came from the Bartons.

Moreover, the cases show a decided preference for measuring the amount of product handled by the cooler. The cases focus on the work that the employees do. Here, more than 92 percent of the lettuce the employees processed came from the Neeley/Andrews arrangement. Thus, the cooler employees' time at work was primarily devoted to handling lettuce from that source.

The number of cartons and, to a lesser extent, the gross sales are a significantly more accurate reflection of the work performed than the number of acres planted. As acknowledged by Respondent and reflected by the facts of this case, the amount of product harvested is affected by many different forces (e.g. weather market prices, birds, plant diseases). Over half of John Barton's acreage could not be harvested. I see no reason to use the potential acreage to be harvested as a basis of measurement.

Even using the actual acreage harvested is not particularly useful. As noted previously, the yield per acre can

vary significantly. Here, the amount of lettuce processed per acre from Terry and Carry Barton's acreage was only about two-thirds (68% to be exact) of the amount of lettuce processed per acre from the Neeley/Andrews acreage. In view of the variations and imprecisions in using acreage or potential acreage as indicative of the amount of lettuce processed, I find it appropriate to rely primarily on the number of cartons processed by the cooler to determine the percentage of Barton lettuce.

Since substantially less than 10 percent of the lettuce cartons processed came from the Bartons, and the gross sales are similarly below the rule of thumb used by the NLRB and this Board, I find that the cooler is not a commercial facility but rather is incidental to agriculture. [12] Therefore, this Board has jurisdiction over the alleged access violations.

II. THE ALLEGED DENIAL OF ACCESS

A. Facts

On Monday, April 11, Fritz Conle[13] of the Union filed a Petition for Certification and a Notice of Intent to Take Access

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[12] For purposes of this discussion I have considered the Bartons to be independent entities. Since Andrews controlled the harvesting of the Barton's lettuce, harvesting clearly being an agricultural enterprise, it may well be that the cooling of the Barton's lettuce is also incidental to agriculture. I do not find it necessary to decide that issue, however, given my resolution based on the amount of lettuce contributed to the cooler from their operations.

[13] The transcript spells the name "Conley", but I have used the spelling "Conle" which is that used by the parties in their stipulations. Mr. Conle is a union representative and organizer for FFVW.

seeking to represent the cooler employees and to gain access. When he served these documents, he noted that the cooler and the parking lot where employees parked their cars was fenced and was accessible only through a main gate where a security guard was stationed. The guard told Conle he was to allow admittance to the cooler only to ADC employees, to certain sales people and to others as notified by ADC.

On Thursday morning, April 14, Conle telephoned Respondent and spoke to Respondent's counsel, Larry Dawson, seeking access since Conle had not yet sought access pending the Board's resolution of ADC's claim that it was not an agricultural employer. At that time, Respondent admittedly denied the Union access to the cooler on the grounds that the Board's Regional Director of the Visalia office had not resolved Respondent's claim that it was not an agricultural employer. The next day, April 15, the Regional Director's decision that ADC was an agricultural employer was communicated to the employer sometime between 10:00 a.m. and 10:30 a.m. according to Jennie Diaz the Board agent-in-charge of the election. [14]

[14]The parties stipulated Sthat if recalled to testify, Ms. Diaz would state that her file notes indicate she spoke to Elaine Wakelin, the personnel director of ADC, between 10:00 a.m. on the 15th and also spoke with Larry Dawson, the attorney for ADC, at approximately the same time. (p.109.)

According to Larry Dawson, he received a call from Ms. Diaz at 10:45 a.m. on April 15 informing him of the decision.[15] He then telephoned Fritz Conle of the Union at 11:05, but Mr. Conle was not in his office.

Dawson left a message for Conle that, in view of the Regional Director's determination, the company would allow access between noon and 1:00 p.m. that day and each day until the election. (The 15th was on a Friday, and the election was scheduled for Monday the 18th.) Conle did not receive the message until he telephoned his office just before noon,[16] at which time he determined he could not make it to the cooler in time to take access because he was in Terra Bella a town some 40 miles from Bakersfield.

Later that same day, the 15th, the pre-election conference was held. Present for the employer were Fred Andrews and Elaine Wakelin, the personnel director. Fritz Conle attended on behalf of the Union. Board agents Jennie Diaz, Ed Perez and Ed Cuellar conducted the meeting.

As the meeting broke up, Mr. Conle told Mr. Andrews and Ms. Wakelin that he wanted to arrange for access that evening. Conle testified that Andrews responded that he had no right to

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[15]Ms. Diaz confirms it could have been as late as 10:45.

[16]The parties stipulated that Dawson would testify that when he did not reach Conle, he telephoned another Union representative, Mike Lyons and personally spoke with Lyons. According to Dawson, he told Lyons that access would be permitted between noon and 1:00 p.m. on the 15th and at other times as required by law. Dawson

access, but Elaine Wakelin intervened and said the company would give access as required by law. Conle then stated he wanted to take access at the supper break, and Andrews responded there was no formal supper break. Thereupon, Conle said he wanted to take access after work.

According to Conle, Andrews replied that people would be getting off work at 8:30 p.m. Conle replied that he would like to get into the parking lot before 8:30 because he did not want to be driving in as the workers were driving out. Conle said Andrews refused to allow Conle into the area before work had ended and said he would so instruct the security guard. (Tr.p. 53.)

Conle pressed the point and asked whether the workers might get off earlier than 8:30 p.m. Andrews said, "no" and emphasized that Conle would not be allowed in before 8:30. (.Id.) Conle testified that he was concerned to know the quitting time because it was not typical in operations such as the cooler for

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said Lyons replied he would pass the information on to Don Mayfield in the Union's Salinas office. The parties stipulated that Lyons would deny that he discussed access with Dawson and does not believe he even spoke to Dawson since Lyons was in Mendota working on another matter.

I do not find it necessary to resolve the conflict in their testimony. Even if Dawson did not speak with Lyons, I find it sufficient that Dawson informed Conle's office that access would be allowed. Further, there is no indication Conle would have received notice from Lyons any earlier than when Conle telephoned his office and learned of Dawson's message, and also no indication that there was anyone besides Conle the union could have sent to take access had Lyons been notified.

employees to get off at a precise time.[17]

Further, Conle said he had asked Andrews during the pre-election conference about access on the weekend, and Andrews had said there would be no one working.[18] Thus, he pointed out to Andrews and Wakelin, that Friday evening would be the last opportunity to take access before the election on Monday morning. Andrews again indicated Conle could not come into the fenced area until the workers got off at 8:30 that night.

In order to be sure to reach the workers, Conle arrived at the cooler at approximately 7:55 p.m. or 35 minutes early. While he was driving to the cooler, he met a couple of cars coming from that direction. When he arrived at the security gate, there was no activity at the cooler. The parking lot was empty, and the security guard was locking the gate. He asked the guard where the workers were and when the guard said that they had all left and Conle had just missed them, Conle turned around and went back to Bakersfield. I credit Andrews' testimony that the workers left early because a truck driver who was supposed to arrive that night

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[17]Conle explained that the time the workers quit was dictated primarily by when the last truck was loaded with cooled lettuce to ship. If a truck comes in earlier than expected, and the lettuce is on hand, the workers may leave earlier than anticipated. If, on the other hand, the truck comes in later than expected, the workers may stay later. (Tr. p. 62.) Andrews testified to the same effect. (Tr. p. 62.)

[18]Mr. Andrews testified he did not say there would be no work at the cooler on Saturday but that he might have said they would not be cutting lettuce. He explained at hearing, that if all the trucks had come in to pick up lettuce on Friday night, as expected, there would have been no workers at the cooler on Saturday. As it

telephoned and said he would not be there. Since there was one less truck to load than had been anticipated, work finished early.

Although Andrews admitted that what time the employees quit is dependent on several variables and one does not say he is "going to hold everybody til 8:30 or 7:30 or 6:30" (Tr. p. 68). Andrews acknowledged that he told Conle that work "definitely" would be over at 8:30 p.m. and that he did not discuss any contingent factors which might affect the time work ended.[19] (Tr. pp. 67-68.)

Although Andrews further testified he invited Conle to drop by earlier if he saw fit (Tr. p. 67), he acknowledged that he made it very clear to Conle that Conle could not come inside the gate until work was over.[20] (Tr. p. 93.) Andrews indicated Conle

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turned out, one truck did not arrive on Friday; thus, two employees worked at the cooler for a short time Saturday morning. Clearly, the company did not expect anyone to be working on Saturday. The Board agents who testified, Jenny Diaz and Ed Perez, so understood as did Fritz Conle. Based on the testimony of these three witnesses, I find that whether Andrews said they would not be cutting lettuce or would not be working, the message communicated was that the employees would not be at the cooler over the weekend.

[19]Although Andrews also testified that the 8:30 time represented his judgment as to when they would finish based on "the kind of load we had that day" (Tr. p. 68, 91), it is clear that what he communicated to Conle was that the employees would quit at 8:30 with no qualifications expressed.

[20]I find it unnecessary to resolve whether either Andrews or Wakelin told Conle they would advise the security guard that Conle was not to be admitted inside the fenced area until 8:30 when the employees finished work since Andrews made that fact very clear to Conle.

did not make any response other than to nod or say "ok." (Tr. p. 93.) Andrews also said he did not think Conle made an issue of coming in earlier than Andrews offered. (1:96.)

Elaine Wakelin testified that Conle asked Andrews if the Union could have access that day, and Andrews replied it could, after work ended. (Tr. p. 99.) She herself told Conle that the union could have access before work, after work and at lunch time each day. Wakelin testified further that Conle did reply to Andrews' statement that work would end at 8:30 p.m. and inquired whether the workers would really quit at 8:30 and also asked if he could come before. She stated that Andrews told Conle he was welcome to come earlier, but the workers would get off at approximately 8:30. (Tr. p.100.)

In most respects, I credit Conle[1]s version of the conversation because it is consistent with the demeanor I observed in each of the witnesses and it is frequently corroborated. Thus, I find that Andrews' first reaction to Conle's seeking access was to reply that Conle had no right to access.

Wakelin tried to ameliorate Andrews' response by telling Conle, in effect, that he would be granted access as required by law.[21] Wakelin's conduct is consistent with her efforts to soften

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[21]I discount Wakelin's testimony that she specified he could have access before work, one hour at lunch and after work each day since the only access period remaining was after work that very evening.

Andrews' firm statements that the employees would quit at 8:30 p.m. and that Conle could not come in until then. She testified that Andrews said "approximately" 8:30 and "invited" Conle to come earlier if he wished. [22]

I also credit Conle that he asked for access to the parking lot before 8:30 p.m. so he could talk to workers before they got in their cars and started driving through the gate. First, it seems logical that Conle would make such a request since he wanted to talk to the workers. Further, Andrews did not deny that Conle made such a request but merely said he did not think Conle made an issue of it. Given Andrews' candid observation that he tended to recall what was important to him and not other details, I find it perfectly reasonable he might not recall Conle's statement. Further, Wakelin essentially corroborates Conle. (Tr. p. 100.)

On the same basis, I credit Conle that he questioned Andrews about the accuracy of the 8:30 quitting time and sought access earlier. Since Conle was aware that a definite quitting time was not usual, it is logical that he would raise the issue. Second, Wakelin corroborates that he so inquired.

Finally, I have already found that Andrews told Conle and the Board agents that no one would be working at the cooler on Saturday. Because the one truck did not arrive on Friday night,

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[22]Both Wakelin and Andrews sought to show their co-operativeness with the Union by asserting that Andrews generously invited the Union to be present when Board agents came out to ADC to explain the election process to the workers. (Tr. 70; 107.) In point of fact, Andrews simply insisted on Ms. Wakelin being present and

two employees did work on Saturday morning. Although the company knew that the information it had given the Board and the Union was no longer true, Respondent did not attempt to notify the Union that employees would be at work just as it did not attempt to notify the Union after the company knew that employees would be leaving earlier than Andrews had told Conle.

B. Analysis and Conclusions

1. The Denial of Access on April 14

Respondent argues that because it ceased denying access once the Board's regional director in Visalia denied Respondent's claim that it is not an agricultural employer this action somehow relates back to its original denial and nullifies it. I find absolutely no merit in this argument. The denial of access on April 14 stands on its own. Either it is an unfair practice or it is not.

Leaving resolution of that issue aside for the moment, I wish to address two other general arguments raised in Respondent's brief. Respondent cites the case of Belridge Farms v. Agricultural Labor Relations Board (1978) 21 Cal.3d 551 for the proposition that "[t]he denial of access is not an unfair labor

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acquiesced when the Board agents stated that the Union should also be present if the employer were going to be present. (Tr. pp. 70, 103, 107.) I do not credit Andrews' and Wakelins' implication that Andrews was welcoming the Union on this occasion which infers it did so when Conle requested access.

practice per se unless such denial also consitutes restraint or coercion." The court in Belridge, supra, however, was construing section 1154 of the ALRA which applies to union unfair labor practices and which is worded differently than the correlative Labor Code section 1153(a), which applies to employers.

It is manifestly incorrect to equate the language of 1154 which contains only the words "restrain or coerce"23 with 1153 which contains the words "interfere with, restrain or coerce."[24] Belridge, supra, is patently inapplicable.

Respondent's second argument is similarly unpersuasive. Respondent argues that its denial of access on the 14th was "substantially justified" because Respondent sought to protect" a valuable employer right to prevent the solicitation of its employees at the worksite, consistent with NLRB precedent." (Respondent's brief p. 16.)

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[23]Labour Code section 1154(a)(1) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents to do any of the following: (a) To restrain or coerce: (1) Agricultural employees in the exercise of the rights guaranteed in Section 1152

[24]Labor Code section 1153(a) provides:

> It shall be an unfair labor practice for any agricultural employer to do any of the following: (a) To interfere with, restrain or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

This Board has promulgated a regulation guaranteeing unions the right to access.[25] The Board's regulation has been upheld by the California Supreme Court[26] which recognized the critical importance of access in the agricultural setting.[27] Respondent cannot justify its denial of access on the 14th by arguing that it was seeking to avoid worksite access which is guaranteed under the ALRA.

I find that Respondent acted at its peril in denying the Union access pending the Board's determination of the claim that ADC is not an agricultural employer. This policy applies in any number of situations, and General Counsel's brief cites to several.

The reasoning in this Board's decision in F & P Growers Association (hereafter F_&_P) (1984) 10 ALRB No. 28 is particularly applicable even though the Board there was discussing post-certification access. In F_&_P, the employer refused to engage in bargaining pending the appeal in court of its position that it had no obligation to bargain because the union had lost its majority support among Respondent's employees. Because no bargaining was occurring, the union could not work out access arrangements at the bargaining table as had been envisoned by the Board.

[25]Title 8, California Code of Regulations, Section 20900.

[26]Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d~392.

[27]Respondent argues that the conditions usually present in agriculture which warrant access are not present at a cooler but

The Board found the employer's refusal to bargain pending determination of whether it had an obligation to bargain was an unlawful act. The Board pointed out that without continued access, the Union could not determine the needs and wishes of the employees and would not be in a position to commerce bargaining if the court determined the employer had an obligation to do so.

Similarly, here, if Respondent were permitted to deny access pending the Board's determination of Respondent's claim that it is not an agricultural employer, and therefore had no obligation to permit access, the Union would not be able to communicate with workers about the upcoming election and would not be in a position to be ready for the election.

A balancing of the equities mitigates in favor of holding that Respondent acts at its peril when it refuses to allow access as it did here. In addition to the concerns already set forth, I note that holding Respondent harmless for its admitted denial of access would mean that a Respondent could delay its obligation simply by raising issues that must be resolved. Such a situation presents a

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cites no facts in support of its argument. For example, it is not clear why it would be easier to talk to employees who drive through a guarded fenced area to park their cars to go to work at the cooler than to contact employees who are bused to work who typically gather at a central pick-up point. Similarily, there is no evidence in the record showing that the employees at the Bakersfield cooler can more easily be reached by telephone or at permanent addresses nearby than can field employees.

prime opportunity for mischief. Given the very short time within which elections are held, the potential for serious interference with employees' rights to be informed about election issues is quite significant.[28]

For all these reasons, I find that Respondent's denial of access from April 14 until it notified the Union that access would be permitted in accordance with law violated section 1153(a) of the Act.

2. The Alleged Denial of Access on April 15

I find that Respondent made reasonable efforts to contact the Union once it learned of the Regional Director's determination that it was an agricultural employer. Thus, I find no denial of access at lunch time on April 15, even though had Respondent not unlawfully denied access on the 14th, the Union would have been able to have access at this time.

I do find that Respondent unlawfully denied access on the evening of the 15th. Both Conle and Andrews knew that quitting time varied depending on various factors which only the employer would have knowledge of such as what kind of load they had at the cooler that day and when trucks were scheduled to arrive. Despite Conle's queries of Andrews as to whether the employees might not get off earlier than 8:30 p.m., Andrews flatly stated work would

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[28]Respondent argues that if the Union needed more time for access it should have requested a delay in the election. Although it is true that an election is not necessarily invalid if it is held more than seven days following the filing of the petition for certification, the Board is still bound by the statutory stricture

end at 8:30, and Conle could not come in until that time. Under these circumstances, I find Andrews' statements amounted to an assurance which effectively misled Conle.[29] I need not decide whether Andrews' intended to mislead Conle since motive is not an element in a violation of section 1153(a). (Jackson & Perkins Company (1977) 3 ALRB No. 36.)

Further, I find that Respondent violated the Act by refusing to allow Conle access to the parking lot until the employees quit work. The Union is entitled to effective access. (Nagata Brothers Farms (1979) 5 ALRB No. 39) The employees exited through the locked, guarded gate. Once they were in their cars and preparing to exit, Conle could not effectively communicate with them. If he stopped the first car, the remaining cars would be stuck in line no doubt causing irritation to the waiting workers and preventing the guard from locking up. Conle's only effective access was to already be in the parking lot as the workers came out so he could approach them before they got into their cars.

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and cannot simply decide to ignore it at will. Respondent's denial of access is not excused by the Board not postponing the election beyond the period mandated in the Act, nor by the Union's failure to request that the Board do so.

[29]This conclusion is not altered by the fact that Conle tried to insure against missing the employees by coming to the plant earlier. He was still acting based on Andrews' statement but merely tried to provide a bit of insurance by arriving earlier.

I note in Gourmet Harvesting and Packing (1978) 4 ALRB No. 2 the Board found no excess access where union representatives as they were quitting work even though there were several shifts with different quitting times which spanned several hours. I also note Coachella Imperial Distributors (1979) 5 ALRB No. 73 in which the Board found no violation where Union organizers entered the fields to talk to workers who were leaving in stages. The Board noted that the Union had not had access earlier because the employees had been on layoff, and the election was only two days away. Similarly, here, the Union had no prior access and was told there would be no other opportunity for access before the election Monday because no workers would be at the cooler over the weekend.

While these cases are not directly analogous since they concern whether unions took excess access, I find the underlying reasoning applicable because it recognizes a union's right to meaningful, effective access under the given factual circumstances.

Thus, I find here that Respondent unlawfully denied the Union access, in violation of section 1153(a), when it refused to allow Conle to enter the parking lot prior to the employees quitting work. An argument that there was no harm to the union because the workers had already left the parking lot when Conle arrived is unavailing. The test is not whether access was actually prevented but whether the employer's conduct reasonably tends to interfere with, restrain or coerce the exercise of rights.

Finally, General Counsel contends that Respondent had an affirmative duty to notify the Union that some employees would be working on Saturday, April 16. I find no such duty. Conle knew the workers had left early the night before. He could have inquired to find out if, because they left early, there was work remaining which would be done over the weekend.

3. Respondent's De Minimus Argument

Respondent argues its actions are de minimus, and therefore it should not be held to have violated the law. In support of its argument, it cites this Board's decision in Mitch Krego (hereafter Krego) 3 ALRB No. 32.

I find Respondent's denials were not de minimus. In Krego, supra, the Board relied on the fact that there was one isolated instance when a supervisor injected himself into a casual conversation between union organizers and employees and ultimately asked the organizers to leave.

Here, there were several denials of access, to wit: from the time Conle sought access on April 14 until mid-day April 15 and also on the evening of April 15. Second, these denials resulted in the Union having no worksite access between the time the petition for certification was filed and the actual conduct of the election. This is a significant infringement on the Union's right to access and on the employees' Section 1152 rights.

As noted in Nagata, supra, this Board has recognized the crucial importance of access. The Supreme Court has also recognized its critical importance. (Superior Court, supra.)

I find Respondent's denials of access were a significant infringement of that right. Consequently, based on my foregoing findings and conclusions, I find that Respondent's refusal to allow access from April 14 until April 15 and its denial of access on the evening of April 15 violated section 1153(a) of the Act, and I issue the following recommended order.[30]

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Andrews Distribution Company, Inc. (ADO its officers, successors, and assigns shall:

1. Cease and desist from:

(a) denying access to its premises to wit: its Kern County vacuum cooler, to representatives of the Fresh Fruit & Vegetable Workers, ("FFVW" or "Union") Local 78-B, UFCW, AFL-CIC, CLC seeking to engage in organizational activity under the access provision of Title 8, California Code of Regulations section 20900 and following (all section references hereafter are to Title 8, California Code of Regulations unless otherwise noted):

(b) preventing or otherwise interfering with communication between FFVW organizers and ADC employees at ADC's

[30]At the close of hearing, I granted General Counsel's request to amend the complaint to modify the remedy sought so as to apply only to employees of ADC at the Bakersfield vacuum cooling facility. (Tr. p. 110.)

vacuum cooling facility in Bakersfield, California, at permissible or agreed upon times for said access; and

(c) in any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed in Labor Code Section 1152;

2. Take the following affirmative actions designed to effectuate the policies of the Agricultural Labor Relations Act:

(a) Allow the FFVW representatives, during the next period in which the FFVW files a Notice of Intent to Take Access, to organize among Respondent's employees at ADC's vacuum cooling facility in Bakersfield, California, (all references hereafter to "Respondent's employees" shall be so construed) during the hours specified section 20900(e)(3), and permit the FFVW, in addition to the number of organizers already permitted under Section 20900(e)(4)(A), to have one additional organizer for each 15 employees;

(b) Grant to the FFVW, upon its filing a written Notice of Intent to Take Access pursuant to Section 20900(e)(1)(B), one access period during the Union's next organizational drive in addition to the four periods provided for in Section 20900(e)(1)(A);

(c) Provide, during the FFVW's next organizational drive among Respondent's employees, the FFVW with access to Respondent's employees during regularly-scheduled work time for one hour, during which time the FFVW may disseminate information

to and conduct organizational activities among Respondent's employees. The FFVW shall present to the Regional Director its plans for utilizing this time. After conferring with both the Union and Respondent concerning the Union's plans, the Regional Director shall determine the most suitable times and manner for such contact between Union organizers and Respondent's employees. During the times of such contact, no employee will be required to engage in work-related activities. All employees will receive their regular pay for the one hour away from work. The Regional Director shall determine an equitable payment to be made to nrp-hourly wage earners for their lost production time;

(d) Provide, during the FFVW's next organizational drive among Respondent's employees, the ALRB with an employee list as described by Title 8, California Code of Regulations section 20910(c) upon the FFVW's filing of a Notice of Intent to Take Access as described by Section 20900(e)(1)(B). The list shall be provided within five days after service on Respondent of the Notice of Intent to Take Access. Respondent shall maintain such an employee list containing the current street addresses of all its agricultural employees;

(e) 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 below;

(f) 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;

(g) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between April 14, 1988 and the date of the mailing;

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the Notice, in all appropriate languages, to all Respondent's 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 and/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 ready and during the question-and-answer period; and

(i) Notify the Regional Director, in writing within thirty (30) days after the date of issuance of this Order, as to what steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him

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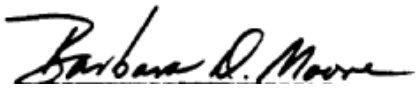
periodically, thereafter, in writing, what further steps have been taken in compliance with the order.

DATED: December 21, 1988



BARBARA D. MOORE
Admistrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by:

> Failing and refusing to provide the Fresh Fruit and Vegetable Workers, Local 78-B, UFCW, AFL-CIO, CLC (hereafter "Union") with access to our employees at the vacuum cooling facility in Bakersfield, California, on April 14 and 15, 1988.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do and also want to tell you that the Agricultural Labor Relations Act (hereafter "Act") is a law that gives you and all farm workers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer 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 Union representatives to come on the property at the Bakersfield cooler during their next organizational campaign to talk to you about your rights under the Act.

ANDREWS DISTRIBUTION COMPANY, INC.

_____

(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 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209)627-0995.

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

DO NOT REMOVE OR MUTILATE.