Los Angeles, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKER OF AMERICA AFL-CIO, Respondent, and CALIFORNIA TABLE GRAPE COMMISSION,) Charging Party/Intervenor, and MYTYL GLOMBOSKE, RUDOLPH RICO, FATHER JOSEPH TOBIN, Intervenors.	Case Nos. 91-CL-5-EC(SD) 91-CL-5-l-EC(SD) 91-CL-l-VI 19 ALRB No. 15 (November 5, 1993)

DECISION AND ORDER

On October 14, 1992, Administrative Law Judge (ALJ) James Wolpman issued the attached decision in which he found that the United Farm Workers of America, AFL-CIO (Respondent, UFW or Union) engaged in unlawful secondary boycott activities by picketing markets owned and operated by Vons Companies, Inc. (Vons), in violation of section 1154 (d) of the Agricultural Labor Relations Act (ALRA or Act).[1] Thereafter, General Counsel, Charging Party and Intervenor California Table Grape Commission (CTGC), and the UFW each timely filed exceptions to the ALJ's decision, as well as supporting briefs and reply briefs. The Agricultural Labor Relations Board (ALRB or Board) has considered

[1] All section references herein are to the California Labor Code unless otherwise indicated.

the record and the ALJ's decision in light of the exceptions and briefs filed by the parties and affirms the ALJ's findings of fact and conclusions of law,[2] except insofar as they are inconsistent herewith, and adopts his recommended remedy, as modified herein.[3]

History of the UFW's Boycott

Arturo Rodriguez, a UFW employee for 18 years, testified that he was in charge of the Union's grape boycott. Union leaders were concerned about the effects of allegedly cancer- and birth defect-causing pesticides used in the production of California table grapes on the health of farm workers and their families. Because Vons was the largest supermarket chain in Southern California, and because its subsidiary Tianguis stores specifically catered to the Southern California Hispanic community, the Union selected Vons as a prime target of its anti-pesticide campaign.

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[2] For the reasons stated in the ALJ' s Statement and Determination of Impartiality, dated October 14, 1992, we affirm his denial of Respondent's Motion to Disqualify Hearing Officer.

[3] The ALJ has submitted to the Board a document entitled Recommendation for Board Action Against Respondent's Counsel for Misconduct Engaged in at Hearing. The Board finds that Respondent's counsel did engage in conduct that was contemptuous, as well as disruptive and abusive, and that it would have been entirely proper for the ALJ to expel him from the hearing, pursuant to Title 8, California Code of Regulations, sections 20270 and 2080D(a). The Board fully expects that counsel will comport themselves in a professional manner. Contemptuous or abusive remarks are cause for expulsion from the hearing in which such conduct occurs. The Board admonishes counsel that such behavior will not be tolerated in any further proceeding.

In 1989, UFW supporters collected signatures from customers in Vons parking lots on petitions supporting the Union's efforts to eliminate pesticides from grapes and other food. That summer, UFW leaders presented Vons' management with petitions signed by 40,000 customers and requested that Vons stop advertising and promoting table grapes. After a second meeting, Vons stopped selling table grapes in its Tianguis stores and in stores located in grape growing areas, and refrained from advertising and promoting grapes. However, after seven or eight weeks Vons resumed selling and promoting table grapes. In June or July 1990, the UFW began sending supporters to individual stores to ask customers to boycott Vons and shop elsewhere. After eight months of such boycott activity, Vons filed unfair labor practice (ULP) charges alleging that the Union was violating the secondary boycott provisions of the ALRA. A complaint issued, and the Board obtained a temporary restraining order (TRO) prohibiting the Union's picketing. Some Union supporters defied the TRO and were arrested. A hearing on the ULPs was held in late 1990, but before a decision issued Vons and the UFW reached a private party settlement in which Vons agreed to cease promoting and advertising table grapes.

In May 1991,[4] CTGC notified Vons that it intended to bring an anti-trust action for injuries which the ban on table grape promotion was causing to CTGC members. On May 31, Vons and CTGC entered into a settlement agreement in which Vons consented

[4] All dates herein refer to 1991 unless otherwise specified.

to entry of a permanent injunction requiring it to promote and advertise table grapes and forbidding it from entering into contrary agreements with the UFW. When the Union learned of the agreement, it announced that it would resume its boycott with a mass demonstration at the Tianguis store in Montebello on June 6.

Conduct Involved in the Boycott

Evidence was introduced at the hearing concerning thirty-two incidents of boycott activity occurring between March 22 and December 8. Twenty-nine of the incidents took place at five different Tianguis stores, two at Vons stores, and one at Vons headquarters.

The principal witness describing the boycott activity was Adan Ortega, a senior account executive employed by the Dolphin Group, a public relations firm based in Los Angeles.[5] Ortega monitored the boycott activity at various locations, especially the Tianguis stores. He videotaped the activity, took copies of leaflets being offered, and listened to what the demonstrators said to customers.

Ortega's testimony and the videotapes in evidence indicate that, during a typical demonstration, several people wearing placards would stand on the sidewalk near the entrance to the market's parking lot. The placards said such things as, "Don't Shop Here," "Boycott Grapes," and "No Grapes," followed by the UFW logo. Demonstrators would approach cars as they entered

[5] Ortega managed the account of the Grape Workers and Farmers Coalition, a group created for the stated purpose of keeping a free and open market for California table grapes.

the parking lot and hand the occupants leaflets asking people not to shop at Vons or Tianguis because they sold table grapes treated with pesticides harmful to farm workers, their families, and consumers in general. Leaf letting also occurred as people parked their cars or approached the store entrance. Some leafletters shouted slogans or chants, such as, "Boycott Tianguis," "Boycott Vons," "Don't Shop Here," or "No Uvas" ("No Grapes"). The leafletters would often engage customers in brief conversations to explain the Union's position and ask people to shop elsewhere.

Representatives of other groups besides the UFW sometimes took part in the 1991 demonstrations. Annie Waterman testified that she was involved with two organizations, FOCUS (Families Opposed to Chemical Urban Spraying) and Action Now, which were concerned with the use of pesticides in the production of foods. When FOCUS volunteers learned that Vons was working to oppose the so-called "Big Green" ballot initiative, FOCUS decided to picket the store. Waterman stated that there were eight or nine occasions during 1990 and 1991 when FOCUS, Action Now and the UFW were demonstrating at Vons stores at the same time. At such times, Action Now had their own signs, tee shirts, buttons and literature.

Rudolph Rico, president of the Robin Hood Foundation, a civil rights organization for poor people, testified that his group also took part in the 1991 demonstrations at Vons. Rico stated that, on some occasions, the Robin Hood Foundation engaged

in independent actions against Vons in Glendale, where the foundation is headquartered.

DISCUSSION

CTGC's Standing to File Charges

Respondent asserted that CTGC is a governmental agency with no standing to file charges with the ALRB. Respondent also claimed that the Board should not act on the charges because CTGC had engaged in various sorts of misconduct directed at the UFW.

The Board's regulations permit "any person" to file an unfair labor practice charge. (Cal. Code Regs., tit. 8, § 20201.) "Person" is defined broadly in Labor Code section 1140.4(d) to include "individuals, corporations, . . . associations, ... or any other legal entity, employer, or labor organization having an interest in the outcome of a proceeding under this part." The Food and Agriculture Code, section 65551, declares that CTGC is "a corporate body" with "the power to sue and be sued, to contract and be contracted with, and to have and possess all of the powers of a corporation."

Since CTGC is, by statutory definition, a corporation, it is specifically included within the statutory definition of persons entitled to file charges with the Board. CTGC's Legislative mandate is to promote the sale of fresh grapes by advertising and other means (Food and Agr. Code, § 65572), and thus it has a legitimate interest in the outcome of these proceedings. We therefore affirm the ALJ's ruling that CTGC had standing to file the unfair labor practice charges herein.

We also affirm the ALJ's rejection of the UFW's argument that CTGC's "unclean hands" deprives the Board of jurisdiction to consider CTGC's charges. The ALJ cites NLRB v. Indiana & Michigan Electric Co. (1943) 313 U.S. 9,18 [63 S.Ct. 394] for its holding that, "Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the [National Labor Relations] Board of its jurisdiction to conduct the inquiry" into unfair labor practice charges. The UFW has failed to demonstrate that similar misconduct by a litigant before this Board would deprive the Board of its jurisdiction.

Effect of Dismissal of Previous Secondary Boycott Charges

Respondent argued that previous charges involving a 1990 Vons boycott were withdrawn "with prejudice," that the conduct at issue herein is identical to the conduct alleged in the previous charges, and that relitigation of the same issues is consequently barred by collateral estoppel. As both CTGC and the ALJ observed, the Board has previously addressed this issue and ruled that settlement and dismissal of the earlier charges brought by Vons did not bar the current proceedings. (See Administrative Order 92-5.) The Board's ruling is consistent with an order of the Los Angeles County Superior Court in a subsequent injunction proceeding. (See Ruling on Order to Show Cause Re Preliminary Injunction, UFW v. Foote, Case No. BC052037.)[6] We find no basis to disturb our previous ruling

[6] The Superior Court found that the parties to the 1990 proceedings did not intend that the dismissal of the ULP charges

(continued...)

that settlement of the earlier charges did not bar these proceedings. We therefore affirm the ALJ's rejection of the UFW's collateral estoppel defense.

General Counsel's Remark That Union "Finally Got It Right"

In an interim appeal of the ALJ's ruling denying its motion to dismiss, the UFW argued that General Counsel's remark to Respondent's counsel in June 1991 to the effect that the Union "finally got it [the language in its leaflet] right" should estop the Board from subsequently claiming the leaflet was untruthful. In Administrative Order 92-5 the Board rejected this argument, saying it failed to see how the remark was material to the dispute herein, or how a party could reasonably rely on such a remark. When Respondent sought to introduce the remark at the hearing, the ALJ ruled that the effect of the Board's ruling was to foreclose further litigation of the issue.

We affirm the ALJ's conclusion that further litigation of this issue was precluded by the Board's ruling in Administrative Order 92-5. In so doing, we note that General Counsel's alleged comment related only to a UFW leaflet and did not amount to a declaration by General Counsel that all of the Union's boycott activities were lawful. Further, the UFW failed to make an offer of proof that it relied to its detriment on General Counsel's comment. In any case, such an "off-the-cuff"

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[6](...continued)
therein would immunize any party from proceedings involving subsequent conduct. We note that the instant case involves different parties as well as different events from the previous case.

remark by the General Counsel, acting in his prosecutorial capacity, cannot be held to estop the Board from making its own evaluation of the contents of the UFW's leaflets.

UFW Engaged In Picketing Which Constituted An Illegal Secondary Boycott

Under Labor Code section 1154 (d), it is an unfair labor practice for a union to threaten, coerce or restrain any person with the object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, or to cease doing business with any other person. In United Farm Workers of America, AFL-CIO (The Careau Group dba Egg City) (1989) 15 ALBS No. 10 (Egg City), the Board analyzed the secondary boycott language of section 1154(d) and compared it to similar language contained in section 8(b)(4) of the National Labor Relations Act (NLRA). Egg City noted that to the extent the language of section 1154(d) parallels that of section 8(b)(4), the Board is bound by Labor Code section 1148[7] to construe section 1154(d) in conformity with precedents interpreting NLRA section 8(b)(4).[8]

Employing the Egg City analysis herein, the ALJ outlined the four basic requirements for finding an illegal secondary boycott in the instant case:

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[7] Labor Code section 1148 requires the Board to follow applicable precedents of the NLRA, as amended.

[8] The provisions of our Act which differ most notably from the national act are the "publicity provisos" following Labor Code section 1154(d)(4).

1. The UFW' s primary dispute must have been with California table grape growers (the primary employers) rather than with Vons (the secondary employer);

2. An object of the UFW's boycott activity must have been to force Vons to cease selling or otherwise dealing in table grapes produced by California growers;

3. The UFW must have engaged in conduct which threatened, coerced or restrained Vons; and

4. These requirements must not be construed in a manner which would infringe on conduct protected by the four provisos following subsection (4) of section 1154.

First, the ALJ concluded that the UFW's primary dispute was with California table grape growers rather than with Vons. He found that the UFW chose the Vons boycott as a means of forcing the growers to stop using pesticides. That is, if Vons could be induced to stop promoting and advertising table grapes, sales would diminish enough to cause economic harm to growers and lead them to give in to the UFW's demand that they stop using the pesticides.

We affirm the ALJ's finding that the UFW's primary dispute was with California table grape growers. The leaflets distributed by the Union emphasize the harm which pesticides have allegedly inflicted on farm workers and their families, criticize growers for using dangerous chemicals on their grapes, and criticize Vons for supporting the growers by advertising and promoting grapes. Most of the leaflets acknowledge that the

Union's dispute is with the table grape industry's "abusive use" of pesticides. The ALJ correctly found that this was a reference to growers, not supermarkets, since growers are the ones who "use" pesticides on grapes.

The ALJ also concluded that an object of the UFW's demonstrations was to force Vons to cease selling California table grapes. He found that the Union sought to force Vons to stop promoting and advertising grapes in order to curtail the sale of grapes produced by California growers, thereby diminishing the volume of business between Vons and those growers. So long as an object of the Union was to curtail Vons' business dealings with the growers, the ALJ reasoned, it made no difference that the Union may have had further objects, such as halting the use of pesticides in the fields.

We affirm the ALJ's conclusion that an object of the UFW's demonstrations was to force Vons to cease selling California table grapes. The facts clearly show that the UFW hoped to curtail Vons' sale of grapes so that the Union would gain economic leverage with the growers on the issue of pesticide use.

The ALJ also found that the UFW engaged in conduct which threatened, coerced and restrained Vons. Citing federal court cases decided under the NLRB's secondary boycott provisions, he noted that the determination of whether a union's activity has threatened, coerced or restrained a neutral employer depends upon two factors:

1. whether the union picketed the neutral employer (as opposed to merely engaging in non-picketing conduct such as handbilling); and

2. If picketing was involved, whether the picketing was aimed at inducing customers not to patronize the neutral employer rather than not to buy the product of the primary employer.

Under federal caselaw interpreting the secondary boycott provisions of the NLRA, picketing includes at least two elements:

> (1) patrolling, that is, standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy. (NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 [Tree Fruits] (1964) 377 U.S. 58, 77 [84 S.Ct. 1063] (Justice Black, Concurring).)

As the ALJ notes, the U.S. Supreme Court has extended the full measure of constitutional protection to handbilling and, apparently, other forms of publicity, so long as they do not involve picketing. (DeBartolo Corp. v. Bldg. & Constr. Trades (1988) 485 U.S. 568, 575-577 [128 LRRM 2001].) However, picketing is qualitatively different from other forms of communication because it involves elements of both speech and conduct (i.e., patrolling), and,

> because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. (Citations omitted.) (Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. (1963) 391 U.S. 308, 313 [88 S.Ct. 1601].)

The ALJ found that UFW supporters engaged in picketing herein when they wore placards, stationed themselves in parking lots adjacent to Vans or Tianguis markets, approached customers as they parked and exited their vehicles and asked them to support the Union boycott and refrain from shopping at Vons. The ALJ found that the demonstrators who stood on the sidewalk adjacent to the parking lots and displayed signs and banners urging a boycott of Vons and of grapes were also engaged in picketing.[9]

The ALJ acknowledged that there may have been instances in which handbills were distributed by union supporters who were not wearing placards. However, he concluded that such conduct could not be deemed noncoercive and protected, since the NLRB and the federal courts have repeatedly held that handbilling in conjunction with picketing is to be deemed an extension and integral part of the picketing. (National Association of Broadcasting Employees And Technicians (1978) 237 NLRB 1370 [99 LRHM 1534], enforced, (D.C. Cir. 1980) 631 F.2d 944 [104 LKRM 3121].)

We affirm the ALJ's conclusion that UFW supporters engaged in picketing when they stood or walked back and forth

[9] The ALJ found that the demonstration which occurred at Vons' headquarters on November 20 did not involve unlawful secondary picketing. Apparently no customers were present during the incident, and the ALJ concluded that the demonstrators' conduct did not threaten, coerce or restrain Vons in the manner contemplated by Tree Fruits, supra. 377 U.S. 58. We affirm the ALJ's dismissal of the allegations concerning the November 20 incident.

along sidewalks in front of Vons and Tianguis stores, carried banners or flags and large signs urging people to boycott grapes and not to shop at Vons or Tianguis, and sometimes chanted boycott slogans or approached cars as they entered the parking lot and asked the occupants not to shop at the stores. To the extent that handbilling inside the parking lots occurred simultaneously and in the same general area as the sidewalk picketing, we affirm the ALJ's conclusion that the handbilling should be viewed as an extension and integral part of the sidewalk picketing. (National Association of Broadcasting Employees And Technicians, supra, 237 NLRB 1370; Local 732, International Brotherhood of Teamsters, Etc. (1977) 229 NLRB 392 [96 LRRM 1128]; Kroger Co. v. NLRB (6th Cir. 1973) 477 F.2d 1104 [83 LRRM 2149].)

We also affirm the ALJ's finding that parking lot conduct which involved the wearing of placards, speaking to store customers, distribution of leaflets, and patrolling by handbillers who walked up and down the parking lot aisles and vigorously approached store customers with their leaflets constituted picketing. (Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., supra, 391 U.S. 308, 313-314; Tree Fruits, supra, 377 U.S. 58, 77.)

We find the case cited by our dissenting colleague, Storer Communications, Inc. v. National Assn. of Broadcast Employees and Technicians, AFL-CIO (6th Cir. 1988) 854 F.2d 144 [129 LRRM 2129] (Storer), distinguishable. In Storer, as in the

case before us, union members offered handbills to approaching customers at store entrances and as they drove into the parking lots or exited from their cars. However, in Storer the court found no evidence that the union members ever carried signs or placards or walked or marched in a definite pattern, or otherwise signaled to the public that they were doing anything other than peacefully passing out handbills. In the instant case, UFW supporters wore placards as they patrolled up and down the parking lot aisles, confronting customers with handbills and verbal exhortations as they attempted to exit their cars.[10] Generally, while this was occurring, other UFW supporters bearing placards were posted at various locations, while still others were moving about carrying and shouting their messages. As previously noted, the handbilling in this case was so integral to the overall picketing activity that it could not be perceived or

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[10] Differentiation based on the presence of placards is significant. Picketing, unlike handbilling, "does not depend entirely on the persuasive force of the idea," because it "calls for an automatic response to a signal rather than a reasoned response to an idea." (NLRB v. Retail Store Employees Union Local 1001 (1980) 447 U.S. 607, 619 (Stevens, J., concurring.) The display on signs, whether carried as placards or on sticks by demonstrators, of the Union's name and insignia with a call for a full consumer boycott of the secondary retail employer, by creating the appearance of a primary dispute, may have its main effect even before the consumer comes close enough to receive a handbill, and constitutes picketing. Therefore, we do not believe that DeBartolo, which avowedly did not apply to picketing, extends to the totality of conduct in the parking lots here. DeBartolo seeks to protect the pure appeal to reason contained in and conveyed by a handbill, not the creation of the appearance of a primary labor dispute by the posting of demonstrators with signs bearing union insignia and the call for a store-wide boycott.

considered as a separate activity of peaceful handbilling, within the meaning of Debartolo, supra.

Under both the NLRA and the ALRA, a union may engage in secondary picketing of a neutral employer so long as it seeks only to persuade customers not to buy the struck product. (Tree Fruits, supra, 377 U.S. 58, 72; Egg City, supra, 15 ALRB No. 10.) However, if the union's picketing is aimed at inducing customers not to patronize the neutral, then the union's conduct threatens, coerces and restrains the neutral employer. (Honolulu Typographical Union No. 37 v. NLRB (D.C. Cir. 1968) 401 F.2d 952, enf'g (1967) 167 NLRB 1030.) In conducting its picketing activities at Vons and Tianguis, the UFW and its supporters clearly sought—through leaflets, banners, placards, speeches, chants and comments—to induce customers not to shop at Vons or Tianguis stores rather than simply to refrain from purchasing California table grapes. Therefore, we affirm the ALJ's conclusion that on those occasions when the Union supporters engaged in picketing, it constituted do-not-patronize picketing. To the extent that the Union engaged in do-not-patronize picketing of the neutral employer, Vons, it engaged in conduct which unlawfully threatened, coerced and restrained Vons. (Id.)

Having found that the UFW's conduct threatened, coerced and restrained Vons, the ALJ next considered whether the Union's

conduct was protected by any of the four provisos to section 1154(d) of the ALRA.[11]

The first proviso provides that section 1154(d) shall not be construed to prohibit picketing or other publicity against a primary employer's product, so long as the publicity does not have the effect of requesting the public to cease patronizing the neutral employer. Because the UFW did engage in do-not-patronize picketing herein, we affirm the ALJ's conclusion that the first proviso is inapplicable.

The second proviso permits do-not-patronize picketing only if the union is currently certified as the representative of the primary employer's employees. As the ALJ correctly found, the UFW's grape boycott was directed at all producers of California table grapes, not just those with whom it held certifications. Thus, the second proviso would have protected the UFW's do-not-patronize picketing of Vons only if the Union had been currently certified as the representative of the employees of all California table grape growers. Since the UFW was certified only at approximately 12 of the 830 table grape growers in California, the second proviso does not provide protection for the Union's conduct.

The third proviso provides protection for publicity other than picketing, including peaceful distribution of do-not-

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[11] We disagree with our dissenting colleague's assertion that the second and third provisos merely qualify the first proviso. See discussion of the four provisos in Egg City, supra, 15 ALRB No. 10, pp. 7-11.

patronize literature, if the union has not lost an election for the primary employer's employees within the preceding 12-month period, and no other union is currently certified as the representative of the primary employer's employees. We affirm the ALJ's finding that this proviso is inapplicable because all of the demonstrations conducted by the Union involved picketing.

The fourth proviso states that nothing contained in section 1154(d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution. Case law clearly holds, however, that because secondary do-not-patronize picketing "spreads labor discord by coercing a neutral party to join the fray," the prohibition of such picketing does not impose impermissible restrictions upon constitutionally protected speech. (NLR3 v. Retail Store Employees Union, Local 1001 (1980) 447 U.S. 607, 616 [100 S.Ct. 2372]). California courts, as well, have long held that secondary boycott picketing is not protected by the free speech provisions of the California Constitution. (Voeltz v. Bakery and Confectionery Workers, Local 37 (1953) 40 Cal.2d 382 [254 P.2d 553].) We therefore affirm the ALJ's conclusion that the fourth proviso does not protect the UFW's secondary do-not-patronize picketing herein.

Having concluded that none of the four provisos protect the secondary picketing conduct herein, we affirm the ALJ's conclusion that the UFW violated section 1154(d) on the occasions

when it engaged in do-not-patronize picketing at Vons and Tianguis stores.

The Effect of Labor Code Section 1155

Labor Code section 1155 provides that the expression of any views, arguments or opinions shall not constitute evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. The language of the statute parallels that of section 8(c) of the NLRA. The UFW argued throughout these proceedings that section 1155 precluded the admission into evidence of every statement, both oral and written, attributed to the UFW, its agents and representatives, which would tend to establish the violations alleged.

The ALJ examined the legislative history of section 8(c) and found that the statute is best understood as protecting the expression of views, arguments and opinions which are part of the normal persuasive activities engaged in by employers and unions. However, as the U.S. Supreme Court has held, the function of section 8 (c) is to protect noncoercive speech by employers and labor organizations, and its protection should not be extended to speech and picketing in furtherance of unfair labor practices. (International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board (1951) 341 U.S. 694, 704.)

The ALJ found that by adopting the language of section 8(c) in Labor Code section 1155, and by requiring that the ALHB follow applicable precedents of the NLRA (Lab. Code § 1148), the

California Legislature accepted Congress' intent and the U.S. Supreme Court's interpretation of the language in question. We affirm his conclusion that the protection of section 1155 does not extend to speech or other expression of views in furtherance of unfair labor practices. Thus, the ALJ properly concluded that section 1155 did not operate to exclude the admission of statements made during pres.3 conferences, interviews or public appearances, publications or press releases, speeches, chants or comments, leaflets, placards, signs or banners distributed, worn or displayed at the site of picketing or handbilling occurring in conjunction with picketing.[12]

Recognitional Picketing

Under Labor Code section 1154(h), it is an unfair labor practice for a union to picket any employer where an object of the picketing is to force or require an employer to recognize or bargain with the union as representative of the employer's employees, unless the union is currently certified as the bargaining representative of those employees. Cases decided under identical language in section 8(b)(7) of the NLRA have held that recognition need not be the sole object of the union's picketing; it is enough if recognition is an object. (NLRB v. Suffolk County District Council of Carpenters (2d Cir. 1967) 387

[12] We also affirm the ALJ's conclusion that the UFW's picketing conduct is not protected by Article I, section 1 of the California Constitution, which provides that all people have inalienable rights, including the right to pursue and obtain safety. As the ALJ points out, Article I, section 1 should not be read to create a right of safety which goes beyond the free speech guarantees of the U.S. and California Constitutions.

?.2d 170, 173 [67 LRBM 2012]; General Service Employees Union. Local 73 v. NLKB (D.C. Cir. 1978) 573 F.2d 361,373 [97 LRRM 2906].) Nor need the union be seeking full-fledged recognition. To prove a violation, it need only be demonstrated that the union's picketing seeks to establish a continuing relationship with an employer regarding bargainable terms and conditions of employment. (NLRB v. Electrical Workers, Local 265 (8th Cir. 1979) 604 F.2d 1091, 1097 [102 LRRM 2001].)

However, as the ALJ herein notes, picketing in support of a demand which can be achieved without any need for bargaining is not a violation of law. (Fanelli Ford Sales, Inc. (1961) 133 NLRB 1463 [49 LRSM 1021].) The ALJ found that the UFW's demand that growers stop using pesticides could be achieved without bargaining. The Union never confronted any grower with a demand for bargaining over the issue of pesticides, and never informed Vons that the boycott would end if growers entered into bargaining over the issue. The ALJ did find circumstantial evidence that the UFW had a recognitional motive, for example in statements by Cesar Chavez that the boycott would force growers to "negotiate" and would "make . . . growers deal with us." But in order to prove a violation, he noted, the circumstantial evidence must point to recognition as an immediate, as distinguished from an ultimate, union goal. (Smitley v. NLRB (Crown Cafeteria) (9th Cir. 1964) 327 F.3d 361, enf'q (1962) 135 NLRB 1183 [55 LRRM 2302].) The ALJ concluded that General Counsel had not established by a preponderance of the evidence

that the UFW had an immediate recognitional object in conducting the picketing herein, and he therefore found no violation of section 1154(h).

NLRB cases finding violations for recognitional picketing have generally involved picketing of a primary employer with an avowed object of obtaining direct benefits for the primary employer's non-union employees. For example, in NLRB v. Suffolk County District Council of Carpenters, supra, 387 F.2d 170, the court affirmed the NLRB's finding of recognitional picketing where the union's picket signs declared that the employees of the picketed business were not protected by a collective bargaining agreement, and asked that the employees join with the union for better wages and working conditions. In General Service Employees Union, Local 73 v. NLRB, supra, 578 F.2d 361, the court affirmed the NLRB's finding of threatened recognitional picketing where the union sent a letter to a company threatening to engage in picketing to protest substandard working conditions and requesting certain information about those conditions. Similarly, in NLRB v. Electrical Workers, Local 265, supra, the reviewing court upheld the NLRB's finding of recognitional picketing of an electrical contractor where, prior to commencement of the picketing, the union had demanded that the contractor adopt terms of the union's collective bargaining agreement with other area employers.

On the other hand, the NLRB found no violation for recognitional picketing in Fanelli Ford Sales, Inc., supra, 133

NLRB 1468, where a union which had been seeking recognition from an employer started picketing to protest the discharge of an employee who had engaged in union activities. The national board found that the object of the union's picketing was to protest the employee's discharge and to have him returned to work. Since the record indicated that the union's picketing would have ceased if the employer, without recognizing or even speaking with the union, had reinstated the employee, the NLRB refused to infer a recognitional object for the picketing.

In Waiters & Bartenders Union, Local 500, Etc. (Mission Valley Inn) (1963) 140 NLRB 433 [52 LRSM 1023], the NLRB found that a union's picketing to protest an employer's refusal to reinstate unfair labor practice strikers did not have a recognitional object. Although the union continued to picket after the unfair labor practice charges were settled, the national board refused to infer a recognitional motive. The board emphasized that the existence of an unlawful goal of picketing remains an element of affirmative proof, and cannot be supplied by merely disproving the existence of a different, lawful object. (52 LRRM at 1025.)

In the instant case, the UFW did stop its picketing of Vons in April 1991 when Vons and the Union reached a "private party settlement" under which Vons agreed to cease promoting and advertising table grapes.[13] In mid-May, the CTGC notified Vons

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[13] Although the ALRB had previously obtained a Temporary Restraining Order (TRO) against the Union's secondary picketing

(continued...)

that it intended to bring an anti-trust action against it for the injury the ban on table grape promotion was causing CTGC members. As a result of the threatened lawsuit, Vons signed an agreement with CTGC, dated May 31, in which Vons consented to entry of a permanent injunction requiring it to promote and advertise table grapes and forbidding it from entering into contrary agreements with the UFW. The UFW, feeling angry and betrayed by Vons' agreement with CTGC, resumed its boycott on June 6.

David Martinez, Secretary-Treasurer of the UFW, testified that the goal of the UFW's boycott would be satisfied when Vons stopped promoting table grapes tainted with pesticides. He stated that if Vons agreed tomorrow that it would not put out any grapes, from whatever source, unless they were pesticide free, the Union boycott would end that day. The ALJ believed that Martinez' testimony made no sense, because the UFW's ultimate goal was to force growers to abandon the use of dangerous pesticides. Thus, he reasoned, the real purpose of the Vons boycott was to force growers to abandon the use of dangerous pesticides. Nevertheless, Martinez' testimony, as well as the UFW's cessation of picketing when Vons temporarily agreed to stop

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[13](...continued)
of Vons, Cesar Chavez and others who supported the UFW boycott had chosen to defy the order and were arrested. Thus, it cannot be said that the Union's picketing ceased because of the TRO rather than because of the settlement agreement.

promoting and advertising table grapes, indicates to us that although the UFW's ultimate goal may have been to obtain collective bargaining agreements with the growers, recognition was not the immediate goal of the picketing.

We therefore affirm the ALJ's conclusion that the UFW did not violate section 1154(h) in conducting its demonstrations at Vons and Tianguis markets.

Conduct of Other Persons/Groups in Support of the UFW

Because individuals and groups who were not directly affiliated with the UFW appeared at some of the demonstrations against Vons, the ALJ permitted some of them to intervene in the hearing and present testimony that they were acting independently of the Union while participating in the boycott. Since no persons or groups besides the UFW were named as respondents, the ALJ properly limited his recommended Order to the UFW, its officers, representatives and (unnamed) agents. The ALJ's recommended Order does not extend to persons or groups who conducted their own demonstrations against Vons' practices, including sale of table grapes treated with pesticides, even though those demonstrations, in some instances, coincided with UFW demonstrations. However, the ALJ ruled that groups or individuals who "consciously enmesh[ed]" themselves in UFW demonstrations, to the extent that they became agents of the Union, would be subject to his Order.

The ALJ reasoned that because First Amendment rights are involved in the boycott conduct herein, the rules of agency

should be strictly construed.[14] Further, he ruled that the doctrine of "apparent authority," under which a person may be considered an agent because of representations to a third person by the alleged principal, should not be applied herein.

We affirm the ALJ's ruling that because First Amendment rights of third parties are involved, the rules of agency should be strictly construed when applied to the conduct of any third parties herein. We also affirm his ruling that the doctrine of "apparent authority" should not be applied herein because to do so might result in an involuntary relinquishment of First Amendment rights.[15]

Damages

In Egg City, supra, 15 ALRB No. 10, we ruled that a compensatory damages remedy was available under the ALRA for illegal secondary boycott activity. We held that such a remedy should not be rejected simply because it is not explicitly mentioned in Labor Code section 1160.3, and noted that the California Supreme Court had already indicated that the Board may impose a remedy reasonably necessary to effectuate the policies

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[14] The ALJ noted that the wearing of UFW placards, handing out UFW leaflets, and taking directions from UFW coordinators would be strong evidence of agency. However, he observed, members of groups such as FOCUS appeared to be acting independently when they participated in the demonstrations at Vons/Tianguis.

[15] No party filed exceptions to the ALJ's rulings on agency.

of the Act, even in the absence, of-specific statutory authorization.[16]

We also rejected the notion that damages for illegal secondary conduct are not available under the ALRA because our Act does not contain a section that parallels section 303 of the NLRA.[17] Examining the legislative history of section 303, we found that the section was added to provide a damages remedy that federal legislators of the time did not believe the national board could administer. We found no such reluctance on the part of the California Legislature to allow this Board to administer a damages remedy under appropriate circumstances, since section 1160.3 of the Act specifically permits the Board to award damages in the form of makewhole relief for losses caused by an employer's refusal to bargain in good faith.

We also expressed a concern in Egg City that if we did not provide a damages remedy to persons injured by illegal secondary boycotts, no such recovery would be available in the civil courts of California. This was so, we found, because conduct protected or prohibited under the ALRA is within the exclusive jurisdiction of the Board. Thus, no California civil court would have jurisdiction to hear a damages claim for conduct

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[16] In Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209 [216 Cal.Rptr. 688], the court held that the absence of specific statutory authorization for issuing a bargaining order did not prevent the Board from imposing such an order in appropriate cases.

[17] NLRA section 303 provides, in part, that whoever is injured in his business or property by an unlawful secondary boycott may sue for damages in a U.S. district court.

violating section 1154(d) of our Act. Therefore, the Board decided that it had authority to award damages resulting from illegal secondary boycott activity to any person injured in his or her business or property by such conduct.

Clearly, Egg City, standing alone, would allow for the imposition of damages in the instant case. Since Egg City was decided, however, the California Supreme Court has issued its decision in Peralta Community College District v. Fair Employment and Housing Commission (1990) 52 Cal.3d 40 [276 Cal.Rptr. 114] [Peralta], which addresses the issue of administrative agencies' power to award compensatory damages.

In Peralta, a school district employee filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging sexual harassment by her immediate supervisor. Following a hearing before the Fair Employment and Housing Commission (Commission), the employee was awarded her out-of-pocket expenses plus $20,000 for damage to her dignity and esteem, humiliation, embarrassment, emotional pain and distress. A hearing conducted for the Commission is presided over by an ALJ who renders a proposed decision to the Commission, which either adopts it or issues its own decision. Either party can petition the superior court for a writ of administrative mandamus. At the time of the Peralta decision, if the Commission found unlawful discrimination, it was authorized under the Fair Employment and Housing Act (FEHA) to require the respondent to

> take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with

> or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of [the FEHA]. (Gov. Code § 12970(a).)[18]

The Peralta court found that the then-statutorily authorized remedies under FEHA were exclusively corrective and equitable in kind. In contrast, the court found, compensatory damages are designed to make a victim whole in the manner of traditional tort damages awarded by a jury in a private action in a court of law. Such a remedy, the court believed, was beyond the scope of the California Legislature's intended purpose in enacting the FEHA. (Peralta, 52 Cal.3d at 49.)[19] Moreover, the court noted, the administrative procedure under the FEHA does not preclude an employee from instituting a private lawsuit based on nonstatutory causes of action. Further, if DFEH fails to issue an accusation within 150 days of receiving a complaint, it must issue the complainant a "right to sue" letter, which authorizes the complainant to bring a civil suit in superior court seeking compensatory and punitive damages. (Peralta, 52

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[18] In 1992, the Legislature amended Government Code section 12970 to permit the award of actual damages, including damages for emotional pain and suffering, of up to $50,000 per aggrieved person per respondent. The revised statute applies only to complaints pending on or filed on or after January 1, 1993.

[19] The court noted that in housing discrimination cases, the FEHA authorized the Commission to order payment of actual and punitive damages. Similarly, the Civil Service Act authorized the Civil Service Personnel Board to award compensatory damages in discrimination cases. The court reasoned that if the nonexhaustive language in Government Code section 12970 were sufficient to include authority to award damages, then the specific references to damages in both the Civil Service Act and the housing section of the FEHA would be mere surplusage. (Peralta, supra, 52 Cal.3d at 50-51.)

Cal.3d at 54.) Thus, the court concluded that the Commission was not authorized to award compensatory damages in employment discrimination cases. (Id., at p. 60.)

Although the pre-1992 statutory language of Government Code, section 12970 contains some similarities to that of Labor Code section 1160.3, the language of section 1160.3 differs in that it does authorize damages in the form of bargaining makewhole. Further, the ALRA, unlike the FEHA, does not provide for an alternative private action under which a superior court could award compensatory or punitive damages. Conduct that is arguably either protected or prohibited under our Act is within the exclusive jurisdiction of the Board. (Lab. Code, § 1160.9; Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 67-68 [160 Cal.Rptr. 745].) Since coercive secondary boycotts are specifically prohibited by Labor Code, section 1154(d), no civil court would have jurisdiction to hear a damages claim for the boycott conduct alleged in this case. Moreover, one of the Peralta court's primary cautions—that compensatory damages for intangible injuries are traditional tort damages, which should appropriately be determined by a jury—is not applicable herein because of our decision in Egg City to limit secondary boycott damages to persons injured in their business or property.

We conclude that any person injured in his or her business or property[20] by reason of the conduct found herein to be in violation of Labor Code section 1154(d), may participate in the compliance proceedings which shall follow our liability determination herein in order to determine the extent of compensatory damages, if any, to which he or she may be entitled from the UFW.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, United Farm Workers of America, AFL-CIO (UFW), its officers, agents, successors, and assigns shall:

1. Cease and desist from threatening, coercing, or restraining Vons Companies, Inc., as found herein, or any other person with an object of forcing or requiring Vons Companies, Inc., or any other person to cease using, selling, transporting, or otherwise dealing in California table grapes produced by growers for whom the UFW is not the certified bargaining representative, or to cease doing business, directly or indirectly, with California table grape growers for whom the UFW is not the certified bargaining representative.

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[20] Unlike the ALJ, we find that Egg City unambiguously allows any person injured in his or her business or property to claim damages resulting from conduct in violation of section 1154(d). As explained above, we do not find that Peralta precludes such a damages award.

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

(a) Compensate any person injured in his or her business or property by reason of the conduct found herein to be in violation of section 1154(d) of the Act which occurred at the stores of Vans Companies, Inc. at the following times and places:

Place and Date

Montebello Tianguis - March 22, 1991
Huntington Park Tianguis - March 23, 1991
Cudahy Tianguis - March 23, 1991
Montebello Tianguis - June 6, 1991
Huntington Park Tianguis - June 9, 1991
Huntington Park Tianguis - June 15, 1991
Cudahy Tianguis - June 15, 1991
Montebello Tianguis - June 29, 1991
Huntington Park Tianguis - June 29, 1991
East Los Angeles Tianguis - June 30, 1991
Montebello Tianguis - July 6, 1991
Huntington Park Tianguis - August 11, 1991
East Los Angeles Tianguis - August 24, 1991
Montebello Tianguis - August 31, 1991
Fresno Vons - November 8, 1991
Montebello Tianguis - November 9, 1991
East Los Angeles Tianguis - November 9, 1991
Huntington Park Tianguis - November 9, 1991
Cudahy Tianguis - November 9, 1991
Montebello Tianguis - November 17, 1991
Huntington Park Tianguis - November 17, 1991
Montebello Tianguis - November 23, 1991
Montebello Tianguis - November 24, 1991
Huntington Park Tianguis - November 24, 1991
El Monte Tianguis - November 24, 1991
San Ysidro Vons - November 26, 1991
Montebello Tianguis - December 4, 1991
Cudahy Tianguis - December 7, 1991
East Los Angeles Tianguis - December 7, 1991
Huntington Park Tianguis - December 7, 1991
Huntington Park Tianguis - December 8, 1991

(b) Post copies of the attached Notice, in all appropriate languages, in conspicuous places at its offices and

meeting halls, for 60 days, the exact period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(c) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order, to Vons Companies, Inc., for posting, if it so desires, at any of the sites described in subparagraph (a), above.

(d) Within 30 days of notification from the California Table Grape Commission as to which table grape growers are affected by this Order, mail copies of the attached Notice to such growers.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order, to all agricultural employees of California table grape growers for whom Respondent is the certified bargaining representative.

(f) Notify the Regional Director, in writing, within 30 days of the issuance of this Order, of the steps it had taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: November 5, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

MEMBER FRICK, Concurring in Part and Dissenting in Part: Except as noted below, I concur with all of my colleagues' findings and conclusions. In particular, I agree that the record establishes that the UFW engaged in an unlawful secondary boycott by engaging in do not patronize picketing of markets owned by Vons at a time when the UFW was not the certified representative of the employees of the vast majority of the primary employers involved in this dispute. These facts eliminate the first two provisos to Labor Code section 1154, subdivision (d) as a basis for finding the secondary activity to be protected.[1] However, I do not agree that all of the secondary activity reflected in the record constituted picketing,

[1]Since the UFW is certified at only a small number of table grape growers, it is not necessary to decide if the second proviso would apply only if the UFW held certifications with all of all such growers. Therefore, I would not reach the issue.

so as to fall outside the third proviso[2], which allows do not patronize publicity other than picketing. I also would find the picketing that did take place was unlawful because it had a recognitional motive.

The Definition of Picketing

The record reflects that on some occasions the UFW and its supporters formed a picket line near the entrance to store parking lots. There is little doubt that this conduct constituted picketing. In addition, I agree that handbilling that occurred in conjunction with picketing, so that customers being handbilled were also aware of the picketing, may also be termed picketing. However, the record in the present case reflects that at many of the sites where UFW demonstrators appeared, the only conduct consisted of a small group of people roaming throughout the parking lot in no definite pattern who approached consumers to hand them leaflets, and ask them not to shop at Vons.[3] While recognizing that under DeBartolo Corporation v. Building & Construction Trades Council (1988) 485 U.S. 568 [108 S.Ct. 1392] (DeBartolo) pure handbilling may not be

[2]While the established nomenclature identifies four provisos, in reality the "second" and "third" provisos merely qualify the first proviso. This is essentially what the Board found in United Farm Workers of America, AFL-CIO (The Careau Group dba E<?<? City) (1989) 15 ALRB No. 10, albeit in a more complex fashion.

[3]This conclusion is based both on my own reading of the record and the ALJ's specific factual findings. To the extent that the record is unclear whether or not handbilling took place at various sites in conjunction with conduct that constituted picketing, such uncertainty is properly resolved against the party having the burden of proof, in this case, the General Counsel.

proscribed, the majority affirms the ALJ's conclusion that all of the conduct in this case constituted picketing because in every instance at least some of the leafleters were wearing placards.[4] The ALJ based this conclusion on precedent of the National Labor Relations Board (NLRB).[5] As explained below, such an expansive definition of picketing cannot be squared with principles enunciated by the U.S. Supreme Court.

It is well settled that picketing may be subject to some restriction because, unlike other forms of expression that are fully protected by free speech guarantees, it is a mixture of conduct and communication.[6] (See, e.g., NLRB v. Retail Store Employees Union (1980) 447 U.S. 607 [100 S.Ct. 2372].) While a clear definition of picketing is difficult to find in the case law, the most succinct is probably that articulated by Justice Black in his concurring opinion in National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen Local 760 (1964) 377 U.S. 58, 77 [84 S.Ct. 1063, 1073] (Tree Fruits);

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[4]The ALJ specifically found that there was no evidence that the leafleting included threats, blocking of ingress or egress, or any other intimidating behavior that could provide an independent basis for its proscription. (See ALJ decision, pp. 16-17.)

[5]See, e.g., Lawrence Typographical Union No. 570 (1968) 169 NLKB 279 [67 LKRM 1166].

[6]Though peaceful picketing may not enjoy the same level of protection as pure speech, it is expressive conduct which may be proscribed only where such a prohibition is necessary to prevent certain isolated evils. For example, while do not patronize secondary picketing may be proscribed, "struck product" secondary picketing may not. (Tree Fruits, supra, 377 U.S. 58 [84 S.Ct. 1063].)

> 'Picketing,' in common parlance and in section 8(b)(4)(ii)(B),[7] includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy.

In discussing the distinctions between pure speech, which may not be proscribed, and conduct, which is subject to some regulation, the concept of patrolling is the usual touchstone mentioned by the Court. As stated by Justice Douglas in his concurring opinion in Bakery & Pastry Drivers & Helpers v. Wohl (1942) 315 U.S. 769, 776-777 [62 S.Ct. 816, 819-820]:

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

Justice Stevens in his concurring opinion in Retail Store Employees Union, supra, 100 S.Ct. at page 2379, in conjunction with citing Justice Douglas's words above, stated:

> In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment.

As reflected in the quotations above, picketing is characterized by conduct which has a coercive effect that is

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[7]Section 8(b)(4)(ii)(B) refers to the National Labor Relations Act (NLRA). The pertinent provisions of section 1154(d) of the Agricultural Labor Relations Act (ALRA) are nearly identical.

separate from the persuasive force of the message being delivered. Where no such conduct is present, as with mere handbilling, the courts will not countenance proscription. (DeBartolo, supra, 485 U.S. 568 [108 S.Ct. 1392].) As the Court pointed out in DeBartolo, more than mere persuasion is necessary to prove a violation of section 8(b)(4)(ii), for that section requires a showing of threats, coercion, or restraints. (Id., at 108 S.Ct. 1399.)[8]

Logically, the potentially unlawful coercive aspect of peaceful picketing stems from its power, through the building of a perceived physical and/or psychological barrier to dissuade third parties from entering the premises or crossing the picket line. Indeed, it is this forced participation in the labor dispute that is the particular evil sought to be eliminated by restrictions on secondary activity by labor unions:

> Secondary boycotts and picketing by labor unions may be prohibited, as part of Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.

(NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886, 912 [102 S.Ct. 3409, 3425].) The coerced participation aspect of picketing is necessarily the aspect that may be proscribed, because all other aspects of peaceful picketing are purely expressive in nature and therefore protected. It follows that activity that does not have the effect of coercing participation in the labor dispute, but merely has a persuasive effect based

[8]Section 1154 (d) of the ALRA contains the same requirement.

upon the expression of the union's arguments in support of its position in the dispute, may not be proscribed and would not violate section 1154(d).

In sum, secondary picketing can be restricted because it has a element of coercive conduct, i.e., patrolling, that handbilling does not. Thus, picketing can have the effect of coercing consumers to become involved in the labor dispute. Peaceful, nonthreatening handbilling, on the other hand, relies solely on the persuasiveness of its message to have the desired effect.

Since a message written on a sign or placard is no less a form of expression than the same message on a leaflet, it is illogical to conclude that the wearing of a placard, unaccompanied by coercive conduct, transmutes what would otherwise be protected handbilling into picketing that may be proscribed. The math simply does not add up—speech plus speech does not equal conduct.[9]

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[9]Nor can the wearing of a placard while handbilling be considered picketing based on some perceived signalling effect. Case law references to signalling arise in the context of discussions of the effects of picketing which make the picketing proscribable, particularly its effect upon employees. However, those references do not stand for the proposition that any signalling of a dispute constitutes picketing, but instead that signalling is the result of a picket line. In other words, signalling enters the analysis only after the activity in question has already been found to constitute picketing due to some other characteristic, i.e., patrolling. For example, in his concurrence in Retail Store Employees Union, supra, 100 S.Ct. at page 2380, Justice Stevens refers to the signalling effect of picketing just after defining picketing as including patrolling. (See quotation at page 4, above.) Indeed, to find otherwise would create the untenable result that handbilling would be transformed into picketing if the recipients of the handbills received any indication of the nature of the dispute prior to

(continued...)

Thus, while the use of signs or placards is characteristic of picketing, the use of signs or placards alone does not constitute picketing.

Nor may the fact that the leaf letters were not stationed in a fixed location but instead approached consumers in the parking lot be the basis for concluding that the leafletters were patrolling. The dictionary definition of "patrolling" is "to make a regular and repeated circuit of (an area, town, camp, etc.) in guarding or inspecting." (Webster's New Twentieth Century Dictionary, Unabridged (2d ed. 1975) p. 1314.) This is consistent with the definition articulated by Justice Black, which is set out above. Thus, the essence of patrolling is the drawing of an imaginary line, which need not be static, fixed, or solid, but which forces those who approach, weighing factors beyond the mere content of the message conveyed, to consciously decide whether or not to cross the line.

Here, on the occasions where only leaf letting took place, the leafletters did not "patrol," but each merely approached consumers in a nonthreatening manner to convey their message through both literature and oral discourse.[10] When done in this manner, it is difficult to see how the leaf letting in the parking lot would require the crossing of a picket line

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[9](...continued)
reading the handbill, whether that information came from a placard or even a button or cap.

[10]It appears that there were usually several leafletters in the parking lot working alone, that is, they did not approach consumers in groups. Nor were they stationed or posted in a manner that would convey the image of a picket line.

any more than would the more typical leaf letting from fixed positions at the entrance to a business. Indeed, it has been found that handbilling of the nature present in this case does not constitute picketing.

In Storer Communications, Inc. v. National Assn. of Broadcast Employees and Technicians, AFL-CIO (6th Cir. 1988) 854 F.2d 144 [129 LRRM 2129], the court affirmed the granting of a summary judgment motion in favor of a union that had been engaging in "do not patronize" secondary activity against businesses that advertised on a television station with whom the union was engaged in a primary dispute. The pertinent alleged facts were as follows. On each occasion several union members distributed handbills, sometimes at the entrances to the businesses and sometimes "union members gave out handbills in the advertisers' parking lots in front of the buildings. The members either handed them out to people as they drove in the parking lots, or as they exited from their cars. They did not force the cars to stop, nor did they block their entry into the lot." (Id., at pp. 145-146.) The court also noted that the leaf letters did not walk or march in a definite pattern. The court concluded that, as a matter of law, these facts did not constitute picketing:

> The facts show that the union's handbilling activity involved walking around, approaching customers, and at times having brief conversations with them. These physical acts did not constitute a picket line, nor did they seek an automatic response.

(Id., at p. 146.) The court therefore held that under the just decided DeBartolo case the union's activity was not unlawful.[11]

In sum, to the extent that the activity in the present case consisted of peaceful, nonthreatening handbilling, whether or not conducted at a fixed location and whether or not the leaf letters were wearing placards, and was unaccompanied by a picket line at the same site, [12] such activity did not itself constitute picketing. Therefore, under the dictates of the DeBartolo decision, such activity was not unlawful.

Recognitional Picketing

My colleagues conclude that the UFW did not engage in unlawful recognitional picketing because (1) while the UFW's ultimate goal may have been negotiated agreements with the

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[11]My colleagues attempt to distinguish Storer by claiming that the leafleters in the present case "vigorously approached" and "confronted" customers as they exited their cars. The ALJ, at pages 15-16 of his decision, expressly discredited testimony that the leafleters were overly aggressive in their behavior toward customers and made the following finding:

> I am satisfied that, while UFW supporters evinced a strong commitment to their cause, they were not intimidating, overly aggressive, or confrontational in their approach to customers.

Nor did the ALJ anywhere conclude that the leafleters were patrolling. Indeed, there is no evidence that the leafleters walked or marched in a definite pattern. If my colleagues are overruling the ALJ on these findings, which are in my view firmly supported by the record, then they must of course provide an explanation for doing so.

[12]At pages 15-16, my colleagues appear to state that handbilling is to be considered picketing if picketing takes place at other times and places as part of the same overall campaign. This is an analytical leap for which my colleagues cite no authority. In order for picketing to have a coercive effect upon customers, they must, of course, be aware of the picketing.

growers, it had no immediate recognitional objective, and (2) the UFW' s demand that grape growers stop using pesticides could be met without bargaining. I believe the facts in this case present a close question. However, when the proper analysis is applied, I believe the record as a whole warrants concluding that unlawful recognitional picketing did take place, in violation of section 1154, subdivision (d)(2).[13]

To support the dichotomy between ultimate and immediate objects, my colleagues rely on Smitley (Crown Cafeteria) v. NLRB (9th Cir. 1964) 327 F.2d 361, enf'g (1962) 135 NLRB 1183 [55 LREM 2302]. The court in Smitley noted that normally the ultimate object of all union actions is to obtain contracts with employers and this simple reality is not sufficient to make picketing "recognitional." However, the court never stated that, in order to be unlawful, a recognitional object must be "immediate." Indeed, such a dichotomy ignores the possibility that picketing may be in furtherance of several goals, some more immediate than others but all sought to be accomplished through the present action.

Here, there is evidence that the UFW perceived that the boycott would aid its overall efforts to secure better working conditions, good faith bargaining on the part of growers, and more and better collective bargaining agreements. The UFW's speeches and literature often reflected these goals.[1]* These

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[13]As noted above, I agree with the majority to the extent that picketing took place which did not enjoy the protection of any of the provisos to section 1154, subdivision (d).

ALJ decision, page 62.

are the types of ultimate recognitional goals referred to in Smitley. However, in addition to the immediate ancillary goal of forcing Vons to stop promoting table grapes, the central focus of the boycott was the demand that table grape growers stop using dangerous pesticides. Consequently, this demand must be a part of the analysis of whether the boycott had a recognitional objective.

My colleagues, citing Fanelli Ford Sales, Inc. (1961) 133 NLRB 1468 [49 LRRM 1021], state that "picketing in support of a demand which can be achieved without any need for bargaining is not a violation of law." I do not believe that this is a fair reading of Fanelli and its progeny. In Fanelli, the NLRB overruled an earlier decision in which it had held that picketing to obtain reinstatement of an employee necessarily was designed to compel recognition or bargaining. Instead, the NLRB determined that, since the reinstatement demand could be met "without recognizing or, indeed, exchanging a word with the Respondent," some more affirmative showing that the union sought recognition or bargaining on the issue would be required before concluding that the demand was recognitional. (Id., 49 LRRM at 1022.) Thus, the fact that a demand theoretically can be met without bargaining does not mean that it is not recognitional, but only that such a demand is not per se recognitional.

In evaluating the totality of circumstances as reflected in the record, I would conclude that the demand to stop using pesticides on table grapes could not be met without resort to some degree of bargaining. In Fanelli and other cases where

no recognitional motive has been found despite a union demand touching upon terms and conditions of employment, the demand has been to reinstate an employee or to meet area standards. (See, e.g., Waiters & Bartenders Union, et al. (1963) 140 NLRB No. 38 [52 LRRM 1023]; Houston Building S Construction Trades Council (1962) 136 NLRB 321 [49 LRRM 1757].) In other words, the demands were clear and discreet and required no explanation.

In the present case, the UFW's demand suffered from a distinct lack of clarity. Though during an earlier period the UFW cited five pesticides that it demanded no longer be used, during the period at issue the demand was in the more general form of stopping dangerous pesticides.[15] Such a general demand, by its nature, cannot be met without the benefit of discussions, i.e., bargaining, to determine exactly what would satisfy the demand. To attempt to meet such a demand without such discussions would force an employer to guess at the desired action, at the peril of further damage to its business if the guess were incorrect. Among the issues that would have to be addressed would be the identification of the offending pesticides, whether an outright ban is sought, and whether changes in application procedures and safety practices would accomplish the desired result.

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[15]When the five pesticides were listed, the demands also included, inter alia, a joint testing program. Such a program, since it would require a continuing relationship between the UFW and the growers, would manifestly require bargaining. Though it appears that this demand was not regularly included during the period in question, I have found no evidence that it was expressly disavowed.

In sum, I believe the correct reading of applicable case law requires an examination of both the nature of the demand and all of the surrounding circumstances to determine if an object of the demand is recognition or bargaining. It is not enough to conclude that the demand theoretically could be met without bargaining. I would find that the demand in this case, given its highly general nature, coupled with other indications that the boycott was in part motivated by a desire for agreements with growers, was recognitional within the meaning of section 1154, subdivision (d).

DATED: November 5, 1993

LINDA A. FRICK, Member

CASE SUMMARY

UNITED FARM WORKERS OF AMERICA, AFL-CIO (CALIFORNIA TABLE GRAPE COMMISSION)

19 ALRB No. 15
Case Nos. 91-CL-5-EC(SD)
91-CL-5-l-EC(SD)
91-CL-l-VI

ALJ Decision

The ALJ found that on numerous occasions during 1991, the United Farm Workers of America, AFL-CIO (UFW) engaged in unlawful secondary boycott activities by picketing markets owned and operated by Vons Companies, Inc. (Vons), in violation of section 1154(d) of the Agricultural Labor Relations Act (ALRA). The ALJ found that the purpose of the boycott, which involved sidewalk picketing and leafletting of customers inside supermarket parking lots, was to get Vons to stop advertising and promoting California table grapes treated with pesticides which allegedly caused harm to farm workers and consumers. The ALJ concluded that the UFW's conduct constituted an illegal secondary boycott because the UFW's primary dispute was with California table grape growers, not with Vons; the UFW's picketing was aimed at inducing customers not to patronize the neutral employer, Vons, rather than not to buy the primary employer's product (grapes), and thus threatened, coerced or restrained Vons; and the UFW's conduct was not protected by any of the four "provisos" of section 1154(d) which permit picketing and other forms of publicity under certain circumstances not applicable herein.

The ALJ found that the UFW did not engage in recognitional picketing in violation of Labor Code section 1154(h) because, although the UFW may have had an ultimate goal of obtaining collective bargaining agreements with growers, it did not have an immediate recognitional object in conducting the demonstrations at Vons. The ALJ also concluded that the Order prohibiting secondary picketing should not extend to third parties who participated in demonstrations against Vons but acted independently rather than as agents of the UFW.

The ALJ held that, under the authority of United Farm Workers of America, AFL-CIO (The Careau Group dba Egg City) (1989) 15 ALRB No. 10, damages against the UFW could be sought only by any neutral party injured as a result of the illegal secondary boycott.

Board Decision

The Board affirmed the ALJ's conclusion that UFW supporters engaged in unlawful secondary picketing when they stood or walked back and forth along sidewalks in front of Vons stores, carried banners, flags and signs, and chanted slogans. The Board also affirmed the ALJ's finding that the parking lot conduct which involved the wearing of placards, speaking to store customers, distribution of leaflets, and patrolling by handbillers who

walked up and down the parking lot aisles and vigorously approached store customers with their leaflets constituted picketing. The Board concluded that the handbilling was so integral to the overall picketing activity that it could not be perceived or considered as a separate activity of peaceful handbilling within the meaning of DeBartolo Corp. v. Bldg. & Constr. Trades (1938) 485 U.S. 568 [128 LRRM 2001.]

The Board affirmed the ALJ's conclusion that the UFW did not engage in recognitional picketing in violation of section 1154(h). The Board also affirmed the ALJ's conclusion that groups or individuals who demonstrated against Vons' practices without becoming agents of the UFW should not be subject to the Board's Order.

The Board affirmed the ALJ's conclusion that damages are awardable against parties found to be in violation of section 1154(d). However, the Board concluded that any person (not just neutral employers) injured in his or her business or property by reason of the unlawful conduct could seek compensatory damages.

Concurrence and Dissent

Member Frick concurred with the majority on all findings and conclusions, with two exceptions. One, Member Frick would find that at many of the sites where UFW demonstrators appeared, the only activity consisted of a small group of people roaming throughout the parking lot in no definite pattern who approached customers to hand them leaflets and ask them not to shop at Vons. In her view, this activity may be characterized only as handbilling and do not include conduct, such as patrolling, that would allow the activity to be considered picketing, and thus subject to regulation. Two, Member Frick would find that the UFW's picketing had an unlawful recognitional objective because the demand to stop using pesticides on table grapes was of a highly general nature that would be difficult to meet without bargaining and there were other indications in the record that the UFW sought to obtain agreements with grape growers as a result of the boycott.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent. and CALIFORNIA TABLE GRAPE COMMISSION , Charging Party/Intervenor, and MYTYL GLOMBOSKE, RUDOLPH RICO, FATHER JOSEPH TOBIN, Intervenors.	Case Nos. 91-CL-5-EC(SD) 91-CL-5-l-EC(SD) 91-CL-l-VI

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October 14, 1992

RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge:

This matter was heard by me in San Diego and in Los Angeles, California, over a. period of eight hearing days, beginning on April 1 and concluding on April 10, 1992.

It arose out of charges filed against the United Farm Workers of America, AFL-CIO ("UFW") by the California Table Grape Commission ("CTGC"). In those charges, the CTGC alleged that the UFW violated the secondary boycott provisions of the Agricultural Labor Relations Act ("ALRA") on numerous occasions in 1991, by picketing markets owned and operated by Vons Companies, Inc. ("Vons").

After investigating the CTGC's charges, the General Counsel issued a complaint alleging 39 instances in which the UFW's picketing violated section 1154(d)(ii) (2) of the California Labor Code by exerting improper secondary pressure on Von's so that it, in turn, would exert pressure on California grape growers, all of whom are members of the CTGC, to stop using certain pesticides on the table grapes they produced. The complaint was subsequently amended by adding 33 additional incidents and by alleging that the UFW's conduct also violated the prohibition against recognitional picketing found in section 1154 (h) of the Act.

The Respondent answered, denying that it had violated the Act and raising numerous defenses—jurisdictional, procedural, substantive, and constitutional. Several of those defenses were disposed of prior to hearing:

(1) The Standing of CTGC to File Charges. Respondent asserted that CTGC, as a governmental agency, could not file charges as an aggrieved party under ALRA. I ruled the defense invalid because CTGC is a quasi-public corporation which, by statute, has all of the powers granted to private corporations, including the right to sue and be sued (Food & Agr. Code, §6551), and I pointed out that, in NLRB v. Indiana & Michigan Electric Co. (1943) 313 U.S. 9, 17, the U.S. Supreme Court, interpreting parallel language in the National Labor Relations Act, had refused to limit the classes of persons who could file charges. (See Ruling on Motion to Dismiss or Bifurcate, dated February 20, 1992.) Respondent also claimed that the Board could not act on the charges because CTGC had engaged in various sorts of misconduct directed at the UFW. I rejected this "unclean hands" defense based on the Supreme Court's holding that, "Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry." (318 U.S. at 18; see also: Teamsters Local 294 (Island Dock Lumber, Inc.) (1963) 145 NLRB 484, 492 fn. 9; Plumbers Local 457 (Bomat Plumbing S Heating) (1961) 131 NLRB 1243, enf'd. 299 'F.2d 497 (2nd Cir. 1962); Sheet Metal Workers Local 20 (1961) 132 NLRB 73.) In Administrative Order 92-4, the Board denied Respondent's interim appeal of my ruling and reserved the issue for exceptions. However, when the Respondent subsequently moved to stay further proceedings, the Board addressed and rejected the Respondent's arguments, citing Indiana and Michigan Electric and

two National Labor Relations Board decisions involving charges filed by public entities (ILWU, Local 16 (City of Juneau) (1969) 176 NLRB 389 and ILA, Local 1414 (Occidental Chemical Company) (1982) 261 NLRB I.).[1] (See Administrative Order 92-5, pp. 1-3.) Finally, when Respondent sought to enjoin the ALRB from proceeding in this matter, the Superior Court for County of Los Angeles likewise ruled that CTGC had the standing necessary to institute proceedings before the ALRB. (See Ruling on Order to Show Cause Re Preliminary Injunction, UFW v. Foote, Case BC 052037, ¶ 17, issued April 26, 1992.)[2]

(2) Dismissal of Previous Secondary Boycott Charges as a Bar to this Proceeding. Because the previous secondary boycott charges which were dismissed all involved incidents other than those alleged in the pending proceeding and because there was nothing in the dismissals to indicate that they were intended to cover conduct other than that alleged, I ruled that the ALRB was not barred from proceeding. (See Ruling on Motion to Dismiss or Bifurcate, dated February 20, 1992.) In Administrative Order 92-4, the Board denied Respondent's interim appeal of my ruling and

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[1]During the course of the hearing, Respondent attempted on a number of occasions to offer evidence of the Charging Party's "governmental" status and "unclean hands". On each occasion, I rejected the evidence.

[2]In an attachment to its post hearing brief, Respondent raises for the first time the defense that the charges were invalid because the members of CTGC had a personal financial interest in the outcome of the proceeding, therby violating the California Political Reform Act, Gov. Code §37100. That is a issue reserved for the Superior Court (Gov. Code §91003(b)), and should have been raised in the injunction proceedings brought there.

reserved the issue for exceptions. However, when the Respondent subsequently moved to stay further proceedings, the Board addressed the issue and ruled that the settlement of the earlier charges did not bar these proceedings (See Administrative Order 92-5, p. 3.), and in the subsequent injunction proceeding the Superior Court agreed. (See Ruling on Order to Show Cause Re Preliminary Injunction, UFW v. Foote, Case BC 052037, ¶ 18, issued April 26, 1992.)

(3) Estoppel Based on Representation by the General Counsel to Respondent's Counsel. In its interim appeal of my ruling denying its motion to dismiss, Respondent argued for the first time that a remark made by the General counsel to the Respondent's counsel in June 1991, to the effect that "the union finally got [the language in its leaflet] right" operated to estop the Board from subsequently claiming the leaflet was untruthful. In Administrative Order 92-4, the Board reserved the issue for exceptions. However, when the Respondent subsequently moved to stay further proceedings, the Board addressed and rejected the argument:

> "Even assuming the remark were made as asserted, the Board fails to see how it is material to the dispute herein, nor how a party could reasonably rely on such a remark." (See Administrative Order 92-5, p. 4.)

When the Respondent sought to introduce the remark at hearing, I ruled that the effect of the Board's ruling was to foreclose further litigation of the issue. (VIII:l.)

Prior to the hearing, CTGC intervened as the charging party and fully participated in the proceedings. During the hearing,

three individuals: Mytyl Glomboske, Rudolph Rico, and Father Joseph Tobin—each of whom asserted that the proceeding would impact upon their constitutional right to protest Van's sale of table grapes treated with certain pesticides—were also allowed to intervene and participate on a limited basis. (See Ruling on Motion to Intervene, issued April 8, 1992.)

During the hearing, the General Counsel amended the complaint by eliminating the "aiding and abetting" clause from the prayer by striking the words "...persons and labor organizations acting in concert or participation with it...." and by eliminating allegations that UFW picketing at the Pasadena Courthouse on August 17 and November 1, 1991, violated the Act (Complaint, page 7 and ¶7, page 5.)

At the conclusion of the General Counsel's case, I granted a motion to dismiss those incidents of alleged violations for which no proof had been offered.[3]

After the close of the hearing, Respondent and Intervenors Glomboske, Rico and Tobin filed a motion to disqualify me; that

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[3]The following incidents, alleged in Paragraph 7 of the Complaint were stricken: Von's Store #265, Los Angeles, March 2 & 9, 1991; Tianguis Store #461, East Los Angeles, March 2, 9, 17, 22, 23 & 30, 1991; Tianguis Store #454, Huntington Park, March 2, 1991 and November 10, 1991; Tianguis Store #460, Los Angeles, March 3 & 9, 1991; Tianguis Store #453, El Monte, March 9, 16, 17, 22, & 23, 1991; Vons' Companies, Inc. Store #250, San Fernando, March 10, 16, 24 & 30, 1991; Tianguis Store #451, Montebello, March 9, 16, 17 & 23, August 17, and November 10, 1991; Tianguis Store #452, Cudahy, June 29, August 12 & 17, and November 10, 1991; Vons[1] Store #161, Mission Hills, March 16, 1991; Tianguis Store, Brooklyn Ave., Los Angeles, August 18 and November 10, 1991; Von's Store, Pasadena, November 1, 1991; and Vons Stores, Santa Monica, November 2, 1991.

motion was denied by ruling submitted herewith. I have also submitted to the Board my recommendation pursuant to Title 8, California Code of Regulations, section 20800, concerning the conduct of counsel for the Respondent.

All parties filed post hearing briefs.[4]

Upon the entire record, including the documentary evidence introduced and my observation of the demeanor of witnesses, and after consideration of the arguments and briefs submitted, I hereby make the following findings of fact and reach the following conclusions of law.

I. FINDINGS OF FACT

A. The Effect of Labor Code, Section 1155

Both in its Answer and throughout the hearing, Respondent, citing section 1155 of the Labor Code, objected to the admission of every statement, both oral and written, attributed to the UFW, its agents and representatives, which would tend to establish the violations alleged. I overruled all such objections, but reserved the issue for final determination in this Decision.

Because the UFW's interpretation of §1155 would, if accepted, impose drastic limits on the evidence to be considered, it needs to be resolved before moving on to consider the facts.

Section 1155 provides:

> "The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute

[4]The Respondent and Intervenors Glomboske, Rico and Tobin filed a single, consolidated post hearing brief.

> evidence of an unfair labor practice under any of the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit."

The language is drawn, almost verbatim, from section 3(c) of the National Labor Relations Act, where it had its origin in the extensive revisions in the original Wagner Act by the Taft-Hartley Amendments of 1947. At that time, Congress was concerned by the NLRB's use, frequently in the context of organizational campaigns, of anti-union comments by employers to their employees as proof that their subsequent conduct violated the Act. (See, for example, Remarks of Sen. Ellender, 93 Cong. Rec. 4261 (daily ed. April 28, 1947).) The situation was exacerbated by the fact that unions were without similar constraints because they, were not subject to the unfair labor practice provisions of the Wagner Act. (See, for example, Remarks of Sen. Taft, 93 Cong. Rec. 4142 (daily ed. April 25, 1947.) The House and the Senate both sought to rectify the situation by making union restraint and coercion illegal and by including free speech guarantees, applicable both to unions and to employers; section 8(c) emerged out of the reconciliation of those guarantees in the House and Senate bills. (House Conf. Rept. No. 510 on H.R. 3020. 80th Cong., 1st Sess., p. 45 (1947).) During the final debate on the Conference Report, Senators Morse, Pepper, and Murray opposed the provision, arguing that "under this amendment. . .the Board and the courts must close their eyes to the plain implications of speech; and they must disregard clear and probative evidence of motive, or prejudice, or bias." (Remarks of Sen. Morse, 93 Cong. Rec. 6610 (daily ed.

June 5, 1947); see alsc remarks of Sen. Murray, 93 Cong. Rec. 6656 Si 6662 (daily ed. June 6, 1947).) in response to these criticisms, Senator Taft, the principal proponent of the legislation, provided his fellow Senators with an interpretation and clarification of this and other disputed amendments. The crucial portion reads:

> "There has...been some question raised with respect to the phrase 'constitute or be evidence of an unfair labor practice. ' The purpose of this language is to make it clear that the Board is not to use any utterances containing threats or promises of benefit: as either an unfair labor practice standing alone or as making some act which would otherwise not be an unfair labor practice, an unfair labor practice. It should be noted that this subsection is limited to 'views, argument, or opinions' and does not cover instructions, directions or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law." (93 Cong. Rec. 6601 (daily ed. June 5, 1947); see also 93 Cong. Rec. 7002 (daily ed. June 12, 1947).)

The following day, the Senate passed the legislation which eventually became the Labor Management Relations Act of 1947. (93 Cong Rec. 6695 (daily ed. June 6, 1947.)

Senator Taft's distinction between views, arguments and opinions, on the one hand, and admissions, on the other, is—in the context of the complaints which led to the enactment of section 8 (c)--best understood as protecting the expression of views, arguments, and opinions in so far as they are part of the normal persuasive activities engaged in by employers and unions, but as inapplicable to incriminating statements or conduct not directed at persuading or convincing employees, members or other

possible constituents.

Under such an analysis, section 1155 would not preclude the admission of statements made during press conferences, interviews or public appearances, or contained in internal documents or press releases [since all of these are simply explanations of union conduct or behavior], but it would preclude the use of speeches, leaflets or other persuasive conduct made, distributed or engaged in at the situs of picketing or handbilling—at least in so far as the leaflet, speech or conduct served to induce or encourage, but did not threaten, coerce or restrain.

Notice, however, that importing that distinction into section 1154(d) would render subsection (i) meaningless, since there would then be no way to establish "inducement and encouragement" which is the gravamen of the conduct prohibited in that subsection. Early on, the National Labor Relations Board and the Supreme Court recognized this and refused—for that reason and for other policy considerations—to construe section S(c) as qualifying section S(b)(4). (Brotherhood of Carpenters (1949) 81 NLRB 802, 807-16; International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board (1951) 341 U.S. 694.) As the Court said:

> "The remedial function of § 8(c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech and picketing in furtherance of unfair labor practices such as are defined in § 8(b)(4). The general terms of § 8(c) appropriately give way to the specific provision of § 8(b)(4). (Id. at 704.)

By adopting the language of § 3(c) and by requiring that "the Board follow applicable precedents of the National Labor Relations Act, as amended" (Lab. Code § 1148), our Legislature accepted Congress' intent and the Supreme Court's interpretation of the language in question. Furthermore, the same may be said with respect to the allegations of illegal recognitional picketing: § 1155 serves its purpose without extending its protection to speech and picketing in furtherance of unfair labor practices such as these defined in § 8(b)(7) of the NLRA and carried over into § 1154(h) of the ALRA.

I therefore conclude that § 1155 does not operate to exclude the admission of statements made during press conferences, interviews or public appearances, or contained in publications or press releases; nor does it exclude speeches, chants, or comments made, or leaflets, placards, signs, or banners distributed, worn, or displayed at the situs of picketing or handbilling.

B. The Conduct Complained Of

All of the conduct complained of relates to activities carried on by the UFW at the stores and headquarters of Vons Companies, Inc. Vons, the largest food retailer in Southern California, operates three subsidiary chains: Vons, Tianguis, and Pavilions. Tianguis markets cater to the Hispanic community and, as such, were the focus of the UFW's activities. In addition, there was some activity at stores of the Vons subsidiary; and, while there was no leaf letting or picketing at Pavilions, customers at stores where activity did take place were encouraged

to boycott its snores as well.

The General Counsel and the Charging Party introduced evidence of 32 incidents, spanning the period from March 22 to December 3, 1991; 29 occurred at 5 different stores in the Tianguis chain, 2 at Vons Stores, and 1 at Vons headquarters. The chronology is as follows:

1. Montebello Tianguis - March 22, 1991[5]
2. Huntington Park Tianguis - March 23, 1991
3. Cudahy Tianguis - March 23, 1991
4. Montebello Tianguis - June 6, 1991
5. Huntington Park Tianguis - June 9, 1991
6. Hunting-en Park Tianguis - June 15, 1991
7. Cudahy Tianguis - June 15, 1991
8. Montebello Tianguis - June 29, 1991
9. Huntington Park Tianguis - June 29, 1991
10. East Los Angeles Tianguis - June 30, 1991
11. Montebello Tianguis - July 6, 1991
12. Huntington Park Tianguis - August 11, 1991
13. East Los Angeles Tianguis - August 24, 1991
14. Montebello Tianguis - August 31, 1991
15. Fresno Vons - November 8, 1991
16. Montebello Tianguis - November 9, 1991
17. East Los Angeles - November 9, 1991
18. Huntington Park Tianguis - November 9, 1991
19. Cudahy Tianguis - November 9, 1991
20. Montebello Tianguis - November 17, 1991
21. Huntington Park Tianguis - November 17, 1991
22. Vons Corporate Headquarters, Arcadia - November 20, 1991
23. Montebello Tianguis - November 23, 1991
24. Montebello Tianguis - November 24, 1991
25. Huntington Park Tianguis - November 24, 1991
26. El Monte Tianguis - November 24, 1991
27. San Ysidro Vons - November 26, 1991
28. Montebello Tianguis - December 4, 1991
29. Cudahy Tianguis - December 7, 1991
30. East Los Angeles Tianguis - December 7, 1991
31. Huntington Park Tianguis - December 7, 1991

[5]Witness Ortega was uncertain of whether this incident occurred on the 21st, 22nd, or possibly the 23rd (which was a Saturday). (See II:113; IV:155.)

32. Hunting-con Park Tianguis - December 8, 1991[6] Those stares are, like most supermarkets, separated from public sidewalks and streets by large parking areas, which they have to themselves or share with other stores in the shopping center in which they are located.

Most of the incidents occurred on weekends when the stores were busiest and involved anywhere from 6 to 12 UFW supporters, and occasionally more. While activities varied with the size of the group, all of the incidents had one essential component: As customers parked and exited their automobiles, and occasionally as they were leaving, a UFW supporter wearing some kind of identification--usually a placard—would approach, speak briefly with the customer, ask that he or she boycott Vons, and hand the

[6]The General Counsel relied on the testimony of Adan Ortega and Carlos Arambula and on photographs and videos taken by them and by television news crews to prove all of the above incidents except #15 (Vons Store, Fresno, November 8, 1991) and #27 (Vons Store, San Ysidro, November 26, 1991). The Fresno incident was testified to by Kathleen Nave, and corroborated by a video tape from a local television station (II:27-39; Intervenor's Ex. 4), and the San Ysidro incident is depicted in a videotape which Union witness Arturo Rodriquez testifed accurately depicted the events. (General Counsel's Ex. 23; VI: 112-113.) For its part, the Union did not deny that the incidents took place; it did, however, attack the manner in which Ortega and Arambula characterized the behavior of the participants and their ability 'to recollect the details of each incident. (See pp. 15-16, infra.)

customer a leaflet explaining the Union's position. (VI:208-209.) While the words spoken and the leaflets distributed varied, the basic message was the same: Do not shop at Vons/Tiangius because it sells table grapes treated with pesticides harmful to farmworkers, their families, and consumers in general.[7] Some UFW supporters could be identified by the T-shirts or caps they wore, or by insignia on their shirts, but most supporters—at least one in each of the incidents complained of--wore small placards (11" x 17") hung around their necks. (VI:207.) The placard had two sides, either of which might be displayed; one side read, "DON'T SHOP HERE Fast for Life! BOYCOTT GRAPES" with a black UFW eagle symbol in the background; the other side read, "NO GRAPES" followed by the UFW logo, a black eagle encircled by the legend "United Farmworkers of America, AFL-CIO.[8] At some of the locations, leafletters also offered customers "No Uvas [Grapes]" bumper stickers for which they requested a small contribution.

The number of leafletters varied from incident to incident, sometimes only a few were stationed in the parking aisles, other times there were more. At times, leaf letters were stationed just

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[7]Eight different leaflets were introduced as having been distributed by the UFW at Vons. (Intervenor' s Exs. 3, 9, 10, 11, 12 Si 13; General Counsel's Ex. 46; Respondent's Ex. H.) While all carried much the same basic message, several contain language which is helpful in ascertaining the UFW's objectives in boycotting Vons and. They, along with the other evidence of "objective", are considered in detail below (infra, pp. 25-27).

[8]General Counsel's Ex. 3. On several occasions, UFW supporters wore other placards reading, "No compre en Tianguis" (Do not shop at Tianguis).

outside stare entrances as well as in the parking lot, and sometimes they also stood near the driveway entrances from the street to offer leaflets—and comments—to customers driving in or out. Some leafletters would shout slogans or chants, such as, "Boycott Tianguis", "Boycott Vons", "Don't Shop Here", "No Uvas".

In the larger demonstrations, UFW supporters wearing placards, T-shirts, hats, and/or insignia also stationed themselves along the public sidewalk or at the edge of the streets where they displayed large signs, placards, banners, and/or UFW flags, reading "No Grapes", "Boycott Vons", or the like. Usually, they would chant or call out to passing motorists, asking them to "Boycott Tianguis", "Don't Shop at Vons", "Don't Shop Here", "No Grapes", or the like. On occasion, they paraded back and forth along the sidewalk with signs. Their signs and banners and their comments, chants and shouts conveyed the same basic message as that of the leafletters in the parking lots: Don't shop at Vons/Tiangius because it sells table grapes treated with pesticides harmful to farmworkers, their families, and consumers in general.

While there was some testimony that UFW supporters were overly aggressive in their behavior toward customers, that testimony came exclusively from two witnesses: Adan Ortega and Carlos Arambula.[9] Both were employed by an organization which actively opposed the UFW's grape boycott and both evinced a

[9]The General Counsel used Ortega and Arambula to establish 30 of the 32 incidents.

hostile attitude toward the UFW and its supporters.[10] Because of this, I do not accept: their testimony that Union supporters acted improperly. The photographs and video tapes which they took do not corroborate such claims; nor does the testimony of the Union witnesses who were present. In this regard, I was particularly impressed with the testimony of the Irving Hershenbaum, a member of the Union's Executive Board, who acted as a "Store Coordinator" in the East Los Angeles area and was present for a number of the incidents. He answered the questions put to him in an hones- and forthright manner, and did not, as did some of the other union and employer witnesses, attempt to argue the case in his testimony. I believe him when he said:

> "Well, we have basic rules that we used for -- since I joined the staff, we ask people to respect the customers. If the customers didn't want to talk with them, don't talk to them. Be nonviolent at all times and [explain] what the issues were." (VI:205.)

I am satisfied that, while UFW supporters evinced a strong commitment to their cause, they were not intimidating, overly aggressive, or confrontational in their approach to customers.[11] (See, generally: VI: 207-212.) Nor did they unduly

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[10]Arambula, in particular, displayed considerable hostility toward the Union, and that led him repeatedly to overstate his .testimony and to interject adverse characterizations which went beyond the questions he was asked. Ortega was a sophisticated witness; he was much more subdued and less overtly hostile, but he repeatedly put "a favorable spin" on his testimony and missed few opportunities to repeat and reiterate points which he believed harmful to the UFW's position.

[11]They were hostile toward Arambula and Ortega, but this is understandable in view of their opposing views. And even in those confontations, union supporters did not exceed the bounds of picket line propriety.

impede the flow of traffic into and out of the parking lots or disrupt the flow of customers into and out of the stores.

Four of the incidents--Montebello on June Sch, Fresno on November 3th, Vcns Headquarters on November 20th, and San Ysidro on November 25th--differed from the others. Montebello included all of the elements described above, but it was much larger. Approximately 100 people attended; the press was invited; and, on the sidewalk area just outside of the parking lot, an area was set aside where Cesar Chavez and others spoke to these assembled.[12] The demonstration at Von's in Fresnc was similar to other incidents, but mere UFW supporters--approximately 60 -- were present, and UFW Executive Board member Arturo Rodriguez stood in the sidewalk area and spoke to those assembled, including representatives of the press. The demonstration at Vons Corporate Headquarters in Arcadia was also large. Between 150 and 200 UFW supporters stood on the sidewalk in front of the parking lot, many wearing placards, some waving UFW flags or carrying signs reading, "Boycott Von's", "No Uvas", "Boycott Tianguis", and the like. A person with a bull horn led the crowd in chanting "Tell Vons No", "Boycott Vons", "No Uvas", and the like. Unlike the other incidents, no evidence was introduced to establish that any customers were present that day. The incident which occurred at San Ysidro was larger than usual and included, in addition to normal boycott activities, a demonstration,

[12]Because of the size of the crowd, there appears to have been some incidental spillover into the parking lot.

conducted by UFW Executive Board member David Martinez, of tile dangers of pesticides.

The content of the speeches given at Montebello and. Fresno is relevant in establishing the purpose and abject of the UFW boycott; as such it will be considered later in these findings of fact. (See pp. 24-25, infra.)

It was net uncommon, especially at the larger demonstrations, for persons to be present who, while supportive of the boycott, were not directly affiliated with the Union. Some carried UFW signs, some participated in leaf letting, and some spoke at the larger assemblies. Their roles and status will be discussed later when the issues of agency and responsibility are considered. (See pp. 63-55, infra.)

C. The History of the Boycott at Vons

The legality of the UFW's conduct turns, to a great extent, on its purposes and objectives. The best place to begin the inquiry into what those purposes and objectives were is to examine the events which led up the Von's boycott.

Cesar Chavez and his Union were deeply concerned' over the the effects of certain pesticides used in the production of grapes on the health of farmworkers and their families. The 'Union became convinced that the best way to address those concerns was to call for a consumer boycott of table grapes which focused on the supermarkets where they were sold.[13] Because

[13]The considerations which led to this decision were explained by Union President Cesar Chavez in his address to the 20th Anniversary Conference of the Public Citizen. (See pp. 6-13

mast farmworkers are Hispanic, because Southern California is the home of one of the largest Hispanic communities in the United States, and because Vans, as the largest supermarket chain in Southern California, had specifically established a subsidiary chain [Tianguis] to cater to the Hispanic community, Vans was selected as a prime target for the UFW's anti-pesticide campaign. As Chaves said in his address to the Public Citizen Conference:

> "Vons wants the profits it makes from consumers, including many Hispanics, but Vons also wants to appease grape growers at the expense of Hispanic farm workers and their children who are poisoned by pesticides and at the expense of all consumers who are threatened by toxic chemicals." (Intervener' s Ex. 6(b), p.13.)

Sometime in 1939, union supporters began collecting signatures from customers in Vons' parking lots on petitions which stated, "We support the United Farm Workers' efforts to eliminate pesticides from the food we and our families eat" and specifically mentioned, "Pesticides on grapes" and "Alar in Apples". (Respondent's Ex. L.) At a meeting held that Summer, UFW leaders presented management with petitions signed by 40,000 consumers and requested that the company stop promoting and advertising table grapes. (VI: 171.) Vons asked for time to study the issue. (Respondent's Ex. M.)

Later that Summer, a second meeting was held. "At that meeting Vons representatives stated that Vons would be

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of the Transcript of Intervenor's Ex. 6.) [That transcript was submitted to me, pursuant to the agreement of the parties, after the close of hearing. Having received no objection to its accuracy, it is hereby admitted into evidence as as Intervenor's Exhibit 6(b) .]

implementing certain changes in its marketing policies in the exercise of its business judgment and discretion based in part on Vans' perception of public concern. Following that meeting for a period of approximately seven to eight weeks, Vans stepped selling table grapes in its Tianguis store and in stares located in grape growing areas and did not advertise or promote grapes." (Respondent's Ex. M.)

At that point, Vons again began selling and advertising table grapes. The Union contacted the company, urging it to reconsider its position. Receiving no' response, the UFW conducted a demonstration just prior to Christmas 1939, in which several hundred suppcrters marched from a local church to a nearby Vons store. Further attempts to contact Vans were unsuccessful, as was a UFW sponsored letter writing campaign in which groups and organizations sympathetic to the Union's cause wrote Vans asking that it meet with the UFW over the pesticide issue. (VI:174-175.)

Fustrated with Vans failure to respond, the UFW decided that more forceful measures were called for. In June or July 1990, it began sending supporters to individual stores to persuade customers to boycott Vans and shop elsewhere. They conducted themselves in much the same manner as described above in Section B--wearing placards, they would approach customers in the parking lot, asking them to boycott Vons and offering leaflets explaining the dispute. At times, union supporters would also station themselves along the sidewalks in front of the stares, carrying

larger signs, banners or flags and chanting boycott slogans.

This activity continued for approximately 8 months. During that time, unfair labor practice charges were filed by Vans alleging that the UFW conduct violated the secondary boycott provisions of the ALRA, a complaint issued, and the ALR3 obtained a Temporary Restraining Order against secondary picketing.[14] On September 11, 1990, Union President Cesar Chaves and others who supported the UFW boycott chose to defy the order and were arrested. (See General Counsel Ex. 57.) in late 1990, the hearing on the unfair labor practices was held, but in March or April 1991, before a decision issued, Vons and the UFW reached a "private party settlement" under which Vons agreed to cease promoting and advertising table grapes. On April 24, 1991—while the Board was considering whether to adopt the settlement—Vons stopped advertising grapes and the UFW called off its boycott.

Shortly thereafter, in mid-May, the California Table Grape Commission stepped in and notified Vons of its intention to bring an anti-trust action against it for the injury which the ban on table grape promotion was causing CTGC members. This resulted in a "Settlement Agreement", dated May 31, 1991, in which Vons consented to the entry of a permanent injunction requiring it to promote and advertise table grapes and forbidding it from entering into contrary agreements with the UFW. The Anti-Trust

[14]The Superior Court later declined to issue a Preliminary Injunction, and an appeal was taken. That appeal was pending when the action was dismissed as a part of the settlement of the underlying unfair labor practice charges.

Complaint and die Stipulation for Judgment were filed on June 5, 1991, and a Stipulated Judgment was entered by the Superior Court that same day.[15] The UFW was not made party to those proceedings and did not learn of them until after the fact.[16]

While all this was going on, the private party settlement between Vans and the UFW was accepted by the ALSB: On May 21st the Agency stipulated to the dismissal with prejudice of the injunction proceedings it had brought against the UFW, and on June 6th the ALJ who had heard the matter approved a joint request to withdrawn the charges and ordered that the complaint be dismissed with prejudice.

The UFW felt angry and betrayed by what had occurred, and announced that it would resume its boycott against Vons with a mass demonstration at the Tianguis store in Montebello on June 6th. (General Counsel's Ex. 4.) That demonstration and the

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[15]This stipulated injunction was later used by Tianguis Stares to explain to its customers why it could not yield to the UFW:

> "What you should know is that a judge in the Superior Court of Los Angeles has ordered us to advertise and promote grapes. Because of this order, if we do not advertise and promote grapes, we would be breaking the law." (Respondent's Ex. I.)

That is true as far as it goes, but it fails to mention that the judge had merely done what Vons itself had asked him to do.

[16]Thereafter, the Union filed a petition for Mandate with the Superior Court asking that the Stipulated Judgment be set aside. That matter was still pending at the time of the hearing.

ensuing boycott activities are described Section B, aiove.[17]

D. Tne Purpose of the UFW's Boycott of Vona

The answer to the Question, "Why did the UFW urge consumers not to shop at Vons stores?" is not as simple and direct as either side would have it. Rather, the evidence discloses a "cluster" of interrelated motives and purposes, some of which were constant, while others varied over time, disappearing altogether or becoming more or less important as circumstances changed.

The critical period for determining the Union's purposes and motives is the period which began on June 6, 1991, just after Vons had settled its anti-trust dispute with the Table Grape Commission by agreeing to resume advertising and promoting California Table grapes, because that is the period during which almost all of the incidents charged in the Complaint took place.

[17]Note that three of the incidents alleged in this Complaint precede the resumption of the boycott on June 6th and thus belong to the earlier portion of the Vons boycott. (See Incidents 1-3, page 12, supra.) For that reason, Respondent argues that they have no place in this proceeding. The argument would be well taken, if the agreement which led to the dismissal of the earlier charges, complaint and injunction proceeedings included conduct beyond the incidents actually charged and litigated in the 'previous proceeding, but there is nothing in the terms of the dismissal documents to indicate any intent to go beyond those incidents. (See discussion at pp. 4-5, supra.)

Once that period has been dealt with, it is appropriate to look to earlier periods of the Vons boycott, and, indeed, to the history of the Grape boycott in general to determine what purposes and motives from those earlier periods may have carried over to the critical period which began in June and continued on into December of 1991.

Evidence of purpose and motive comes from a variety of sources. The contents of leaflets circulated the signs and banners displayed the chants, the comments made to customers, the speeches given by union officials at demonstrations, and the testimony of those officials at the hearing are, of course, helpful. So, toe, are the explanations to be found in speeches given by Union officials to other audiences, Union fundraising letters, solicitations and other publications, and the video tapes used in presenting the Union's position to the general public.

1. The Period frcm June 6 to December 8, 1991.

On June 6th, when Cesar Chavez spoke to the press, public and union supporters assembled outside the Montebello Tianguis, he touched on three major themes: (1) the UFW's displeasure with Vons for reneging on its agreement not to promote California 'Table Grapes; (2) the injuries which California Grape growers were perpetrating on farm workers and their families by using dangerous pesticides; and (3) the dangers which those toxic chemicals present to consumers. He explained that the UFW would address those grievances by urging consumers not to shop at Vans

and its subsidiaries and not to purchase California table grapes.

The chants, signs, banners, and comments at the demonstrations which followed reflect Chavez' message of June 6th and emphasize his injunction to boycott Vons and stop buying California table grapes.

More revealing are the leaflets circulated after June 6th. Most begin by emphasizing the harm which pesticides have inflicted upon farmworkers and their families, especially children. They go on to criticize grape growers for using dangerous chemicals en their grapes and Vons for supporting those growers by advertising and promoting their grapes, and conclude by asking consumers not to shop at Vons/Tianguis/Pavilians (Intervenor Exs. 3 & 9; Respondent Ex. H; General Counsel Ex. 46.). Several of the leaflets also allude to the deleterious effect of pesticide residues on consumers. (Intervenor Exs. 9 & 10; General Counsel Ex. 45.);" and several take Vons to task for reneging on its agreement to stop promoting table grapes. (Intervenor's Exs. 3, 10 & 11.) All but two of the leaflets, contain the following legend at the bottom in small print [and sometimes in very small print]:

> "Our dispute is with the table grape industry's abusive use of pesticides. The boycott of Vons Co. is in response to their continued advertising of contaminated grapes." (Intervenor Exs. 3, 9, 10 & 11; Respondent Ex. H; General Counsel Ex. 46.).

At the hearing, several union witnesses testified that the term "Table Grape Industry" included not only growers, but distributors, pesticide manufacturers, and supermarkets as well.

But that is nor what the leaflets say; all speak of "the table grape industry's abusive use of pesticides", and two of them criticize "the Table Grape Industry [for] continue[ing] to spray grapes with the [cancer causing] pesticides (Interveaor Exs. 9; General Counsel Ex. 46). (Emphasis supplied.) This indicates that, by "Table Grape Industry", the Union is referring to growers since they—unlike manufacturers, distributors and supermarkets--are the ones who "spray" and "use" pesticides.

Two of the leaflets differ significantly from the rest. Intervencr's Ex. 12 makes no mention of the Von's boycott; rather it speaks of the dangers of certain pesticides, the need for a joint UFW/Grower testing program, and the importance of free and fair elections and good faith collective bargaining. However, since there is no evidence indicating when it was distributed, it cannot be given controlling weight in determining the UFW's purpose and objectives at the time of the alleged violations.

The leaflet which is Intervenor's Ex. 13 is another matter. A careful examination of the videotapes disclose that it was used on at least two occasions—June 29 at the Huntington Park Tianguis and June 30 at the East Los Angeles Tianguis. (General Counsel's Ex. 5.)[18] While it speaks to the use of pesticides, it treats that issue as one among many farm worker grievances. Of equal importance are inadequate bathroom facilities,

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[18]At East Los Angeles, it was being distributed by Union Executive Board Member Irv Hirshenbaum. At Huntingdon Park, it was held over the lens of Adan Ortega's camera to prevent him from videotaping what was going on.

subminimum wages, speed-ups, and sexual harassment en tie job. Although the leaflet concludes by asking consumers to stop shopping at Vans because it supports "the Republican policies that allow these abuses to continue," I do not believe that the UFW's purpose was to pressure Vons to lobby the Republican administration to prevent the alleged abuses. Its aim was to get Vons to use its considerable economic leverage with the growers, whose grapes it was selling, to change their ways. This is borne out by Cesar Chaves' remarks at the Public Citizen conference, where he made it clear that Vons' was being picketed for its potential power to inflict serious economic damage on growers but said nothing about enlisting its support as a surrogate lobbyist. (See Intervenor's Ex. 6(b), p. 14 & p. 21 ["The only thing that the growers fear is the supermarket."].)

It was at this Conference, held in October 1991—midway through the critical June-December period—that Chavez issued what is, far and away, the fullest and most revealing statement of the UFW's purpose and strategy in pursuing the Vans boycott.

He began by describing the frustrations which his Union had experienced over the years in attempting to achieve its goals through traditional electoral politics. It simply could not afford to compete with wealthy and powerful business interests. He went on to say that, because "the process has failed us":

> "There is no progress on issues that affect ordinary people, health care, education, unemployment, insurance. There are solutions but they are not to be had through public policy which requires that you place your faith in the hands of politicians. Solutions can be achieved through public action, taking matters in

your own hands by taking your case directly to the American people." (Intervenor's Ex. 6(b), pp. 10-11.)

For the Farm Workers, "public action" found its expression in the consumer boycott—a tactic which, as Chavez explained, is not subject to the inhibitions of traditional political action (Id. pp. 11, 14-15) and was responsible for two of the union's most significant victories: The 1970 boycott forced growers to sign the first union contracts in the history of agriculture in the United States, and the 1975 boycott forced them to support the enactment of the Agricultural Labor Relations Act. (Id. pp. 11-12.)

In 1975, according to Chavez, the Union made a serious mistake: It abandoned the boycott and placed its faith in the new law, only to find, "After nine years under two Republican governors and millions of dollars of growers' campaign contributions, agribusiness controls the state agency that was created to enforce the law." As a result, "[w]e [re]turned to our court of last resort. Farm workers are again asking the American people to boycott California table grapes."[19] (Id. p. 12.)

He then explained how the purpose of the current boycott--the elimination of the use of dangerous pesticides—was to be achieved:

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[19]At the hearing, there was conflicting testimony over whether the boycott was aimed at all table grapes or just those grown in California. I accept Chavez' statement of the scope of his union's boycott. It fully comparts with his "manageable chunks" theory of boycotting. (See Id. p. 30.)

"Most high, volume supermarket chains operate on profit margins of 1 to 2 percent. When grape boycott volunteers turn, away thousands of customers, it costs supermarkets millions of dollars.... (Id. p. 12.)

"Now Vons is losing millions of dollars. Vons will break, we're sure. When enough supermarkets like Vons under the boycott [sic] -- Grape growers will be forced once more to negotiate with the farm workers and then the pesticides issue will be addressed." (Id. p. 14.)[20]

This will happen because "[t]he only thing the growers fear is the supermarket. "(Id. p. 21.)

In the course of his remarks, Chavez also explained that support for the current boycott came from many of the same constituencies who had supported the earlier boycotts:

"Our basis of support is among Hispanic, Afro-Americans and other minorities plus allies in labor and the church, also members of close-knit organizations such as PIRG and Public Citizen. Also, an entire generation of Americans who matured politically and socially in the 6O's and 70's." (Id., pp. 12-13.)[21]

One other document of interest was circulated during this period. Intervenor's Exhibit 7 is a flyer, in Spanish, prepared

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[20]In responding to a question from the audience, he cited as historical precedent the first table grape boycott from 1965 to 1970 in which:

"[T]he growers came, they wanted to -- They couldn't sell their grapes and wanted to deal with us. One of the demands we had was we wanted them to stop DDT on all the grapes harvested in California and Arizona.

"We sat there and they signed a contract and they stopped using DDT and three or four other pesticides...." (Id. p. 22.)

[21]One gets some sense of those constituencies by examining the list of supporting organizations in concluding credits to "The Wrath of Grates" video produced by the UFW. (intervenor' s EX. 8.)

by the UFW office in parlier and distributed sometime in August 1991. It appeals for farmworkers to participate in the grape boycott. The basis for the appeal is revealing:

> "If you are looking for job opportunities, help us win the table grape boycott so that the union wins great contracts. " (Emphasis supplied.)

Boycott Director Arturo Rodriquez testified that, when it came to his attention, he immediately directed that the flyer be withdrawn because "it wasn't communicating the message that we wanted to communicate to the workers."[22] (VI:136.)

2. The Period of the Earlier Vons' Boycott.

The CTGC introduced two video tapes containing comments made by UFW officials during the course of the initial Vons boycott, which began in June 1990 and extended into March 1991. The first -- Intervenor's Ex. 26 (a)--was a television interview given by Executive Board Member David Martinez on August 27, 1990; the second—Intervenor's Ex. 27(a)--was a television news story, broadcast September 9, 1990, which recorded remarks by Cesar Chavez at a Vons demonstration.[23]

Both are relevant not only because they serve to corroborate Chavez' admission, a year later at the Public Citizen Conference,

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[22]When Adan Ortega called the number on the flyer, he was told that active farmworkers who were covered by the UFW pension plan would receive credit toward their pensions for participating in the Vons boycott. (IV:52.) However, in view of Mr. Rodriquez' testimony, it is not clear whether that offer was implemented.

[23]Translations of those two exhibits 'were identified as Intervenor's Exs. 26(b) and 27(b); no objection having been made as to their accuracy»• they stand admitted into evidence.

that the object of the Vons boycott was to exert economic pressure on California table grape growers to come to an agreement with the UFW to halt the use of dangerous pesticides, but also because their remarks serve to establish the continuity of that objective throughout the period in question. In his interview, Mar tine 2 explained:

> "[W]e know that when they [Tianguis, Vons and Pavilions] don't promote them or put them on special, the sale of grapes gees down, the produce moves only at 50%, and this is a pressure on the employers of the _San Joacuin Valley." (Intervenor's Ex. 26(b), p.5.) (Emphasis supplied.).

Chavez took matters a step further, saying that if Vons would stop promoting grapes, consumers would stop buying them, "and then it makes it so the growers deal with us." Intervenor' s Ex. 27(b), p.2.) (Emphasis supplied.)

3. The Grape Boycott in General.

The Intervenor introduced a number of exhibits which, though not concerned specifically with Vons, do reveal the UFW's overall purposes in conducting the table grape boycott. Since the activity at Vons was one facet of the Union's overall activities, its purposes are relevant here. Although most of the documents pre-date the incidents charged in the complaint, they--like the remarks of Chavez and Martinez in the Fall of 1990--establish continuity with and corroboration for evidence of purpose appearing in later leaflets and statements.

First of all, there are three fundraising letters — Intervenor's Ex. 15, dated October 9, 1989; Intervenor's Ex. 14,

dated Winter 19 90, and Intervenor's Ex. 16, undated.[24] All address the pesticide issue. The first two include three demands: that growers guarantee free and fair elections, and that they negotiate decant, fair contracts with the UFW (which, according to Ex. 15, will ensure safe working conditions); the third letter invites readers to order copies of the Union's "The Wrath of Grapes" video (Intervenor's Ex. S.), which includes those same demands.[25]

In January 1390, the UFW devoted a special issue of its magazine "Food and Justice" to the problems of grape workers. (Intervenor' s Ex.17.) The articles make the same points which Chavez was later to make in his Public Citizen speech: Because the law has failed, California grape growers have been able to oppress and harass their workers with unreasonable quotas and harsh working conditions and to ignore their health and their safety by depriving them of basic sanitary facilities and exposing them to the dangerous pesticides. The UFW's response has been to press for an international boycott of California grapes. In that connection, it has targeted Vans stares, focusing on the harm which pesticides pose to farm workers and their families and to consumers.

Intervenor's Ex. 28 is a UFW press release, dated

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[24]Although undated, this letter appears to be most recent because it specifically mentions the Von's boycott.

[25]Both Intervenor's Ex. 14 and the video mentioned in Ex. 16 also include a demand for the establishment of a joint UFW-Grower testing program for substances used on grapes; that demand does not appear in Intervenor's Ex. 15.

September 2, 1990, describing Chavez' comments to delegates attending the UFW Convention. In those comments, Chavez linked the losses suffered by growers--as indicated by a nationwide downturn in wholesale prices and "grape terminal unloads"--to the UFW's boycott efforts, and specifically mentioned' the success of its demonstrations at Vans, thus making it clear that the purpose of those demonstrations was to inflict economic damage on growers by hurting the supermarket chain which distributes their grapes.

The UFW produced two videos publicizing the grape boycott. The first, bearing a copyright of 1986, is entitled "The Wrath of Grapes" (Intervenor's Ex. 8); it makes the same points that Chavez would later make in his Public Citizen speech: The Republican administration in California destroyed the Agricultural Labor Relations Act, leaving farm workers with low wages, poor working conditions, and no protection from deadly pesticides. The only way to correct those abuses--especially the dangers pesticides pose for farm workers, their families and consumers--is once again to boycott California table grapes because, according to Chavez, "Without the law, we cannot organize unless we boycott, and that is why we are boycotting." 'The video concludes with him saying, "If enough people join us and don't buy grapes the growers will have to do something about pesticides." (Transcript of Intervenor's Ex. 8, pp. 3 & 12.)[26]

[26]The transcript of "The Wrath of Grapes" was submitted to me, pursuant to the agreement of the parties, after the close of hearing. Having received no objection to its accuracy, it is hereby admitted into evidence as Intervenor's Ex. 8(b).

The second video is an updated version of "The Wrath of Grapes", entitled "No Grapes". (Respondent's Ex. K.) It focuses entirely on the potential injuries which growers are inflicting upon farm workers, their families and consumers by the continued use of dangerous and untested pesticides, and it concludes with Cesar Chavez saying, "The only way to get through to them [the growers] is by not buying grapes." Unlike the earlier video, there is nothing about organizing or about contracts or working conditions. "No Grapes" bears a copyright of 1992, and there is nothing to indicate that it was being circulated during 1991 when the incidents in question all occurred; on the other hand, there is some evidence that "The Wrath of Grapes" was in circulation at that time. (VI:140.)

E. The UFW's Boycott of Vons; Factual Conclusions

1. The UFW's overriding concern during the period in which all of the incidents here charged took place (March through December 1991) was the actual and potential harm which certain pesticides used on table grapes posed for farm workers and the families of farm workers, especially their children. That concern was constant and pervasive, manifesting itself again and again in leaflets, comments to customers, speeches by union officials, and in almost every other vehicle of communication utilized by the Union. I am satisfied that it was the primary factor motivating the UFW actions at Vons/Tianguis/Pavilions.

2. The UFW's actions were also motivated by a desire to protect prospective customers of Vons/Tianguis/Pavilions from

the potential hazards which certain pesticides used en table grapes posed far consumers. However, as one would expect of an organization whose primary constituency is farm workers, that concern—though regularly mentioned in Union communications to the public—was always subordinated to its concern for the welfare of farm workers and their families. Indeed, the UFW used the one to feed, the ether: Appealing to the self-interest of Vons' customers in avoiding harm to their own families was a good way of securing their allegiance to the Union's primary goal of protecting farm workers and their families. As Chavez explained, "If you get a real issue that is close [to those you want to organize], they will organize." (Intervenor' s Ex. 6(b), p. 26. Emphasis supplied.)

3. Early in the boycott, the Union made a variety of public statements indicating that its purpose in calling for a boycott of California table grapes was to obtain decent and fair collective bargaining agreements and to prevent growers from oppressing and harassing their workers by imposing unreasonable quotas and harsh working conditions and by failing to provide basic sanitary facilities. As the boycott progressed and as the Union began to focus its energies on Vons, those demands, though never repudiated, received less and less emphasis. But they never entirely disappeared: Intervenor's Ex. 13, a leaflet criticizing table grape growers for inadequate bathroom facilities, sub-minimum wages, speed-ups, and sexual harassment on the job, was circulated at two of the demonstrations here at

issue, and Intervenor's Ex. 7, asking far help so the union would win "great contracts", was circulated--albeit briefly--a month, later. I therefore find that these traditional collective bargaining demands, though relegated to a minor role, were still "in the wind" during the critical period between March and December 1991.

4. In its literature, in the speeches and comments of its officers, and in its other communications to the public, the UFW made it clear that it held the growers responsible for the problems which motivated its call for a boycott of table grapes.[27] It was their spraying and use of pesticides which had harmed and was continuing to harm farm workers and their families; it was their spraying and use of pesticides which endangered consumers; and it was they who oppressed and harassed their workers with low pay, speed-ups, sexual harassment, and unsanitary conditions. The purpose of the UFW boycott, therefore, was to force table grape growers to change their ways.

5. The Union's public pronouncements make it clear that its boycott is aimed at California table grapes and the

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[27]I do not accept the testimony of David Martinez and Auturo Rodriquez that the boycott was directed at pesticide manufacturers, grape distributors and supermarkets. Not only is it at variance with Union literature, Cesar Chavez' public citizen speech, and other communications to the public, but it is inconsisent with the comments Martinez made in his television interview the previous year (See Intervenor's Ex. 26(b), p. 5.) My impression was that Martinez and Rodriquez, like Ortega, were advocates inclined "to put a favorable spin" on their testimony; Martinez, especially, missed few opportunities to repeat and reiterate points which he believed helpful to Respondent's theory of the case.

California growers who produce them. (See Intervenor's Exs. 4; 6(b), p. 12; 3(b), p.l; 12; IS, p. 2; 17, p. 3; 27(b) p. I; & 28; General Counsel's Ex. 4.) Even where California is not mentioned by name, the examples given all involve California grapes and California growers. (See Intervenor's Exs. 3, 9, 10; Respondent Ex. H; General Counsel Ex. 46.)[26] When the Union used the term "table grape industry" in its leaflets and elsewhere, it was refering to California table grape growers, not to the chemical companies who manufacture pesticides, the distributors who ship table grapes, or the markets which sell them. (See discussion at pp. 25-26, supra.)

6. The public pronouncements described above also make it clear that the boycott extended to all California table grapes, which means that it was directed at all California table grape growers and not confined to any specific subgroup.

7. The UFW is certified as the collective bargaining representative of employees at approximately 12 of the 830 table grape growers in California. (Compare Intervenor's Ex. 1 with General Counsel's Exs. 56(a), 56(b) & 56(c); see also General Counsel's Ex. 2.) Vons purchases table grapes from a large number of growers, only a small number of whom' are covered by UFW certifications. (Intervenors Exs. 18 through 24 & 25 (a).)

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[26]I do not accept David Martinez' testimony that the boycott extended to all grapes, not just to those grown in California. The'Union's public prouncements belie that assertion and fellow Executive Board member, Arturo Rodriguez, twice testified to the contrary. (VT:115, 157.) Intervenor's Ex. 12 mentions Chilean grapes, but only as an afterthought.

8. The UTW chose Vons for its demonstrations because, "The only thing the growers fear is the supermarket," and, among supermarkets chains, Vans' size, the locations of its stores, and its efforts to appeal to Hispanic customers made it an attractive target. By conducting demonstrations at its stores, the Union sought to exert sufficient pressure on the narrow profit margins on which supermarkets depend to force Vons to stop advertising and promoting California table grapes, thereby reducing table grape sales and causing growers to lose substantial revenues. The Union believed that, in order to regain those lost revenues, California table grape growers would be willing to mend their ways and halt the use of dangerous pesticides. Thus, boycotting Vons was never an end in itself; it was the means chosen by the UFW to get California table grape growers to stop using dangerous pesticides[29] [and, to a much lesser extent, force the growers to improve wages and other working conditions].

9. In each and every instance here litigated as a possible violation, the UFW sought--through leaflets; through placards, banners and signs; and through speeches, chants and comments—to induce customers not to shop at Vons/Tianguis/Pavilions, as distinguished from only inducing them to refrain from purchasing table grapes at Vans. (See pp. 13-15, supra.)

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[29]David Martinez' testimony that the goal of the boycott would be satisfied when Vans stopped promoting table grapes makes no sense. The purpose of the Von's boycott was to force growers to abandon the use of dangerous pesticides. That the UFW sought to attain that end by forcing Vons to stop advertising and promoting table grapes in no way alters that purpose.

II. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Tae Alleged Violation of Section 1154 (d)

In United Farm Workers of America (The Careau Group dba Eqa City) (1939) 15 ALRB No. 10, the Board analyzed the structure of §1154(d) and compared it with analogous provisions found in the National Labor Relations Act, as amended. (Id. pp. 3-13.) Using that analysis, it is possible to delineate the basic requirements for an illegal secondary boycott: First of all, an object of the activity engaged in by the charged union must be to force an employer other than the one with whom the union has its primary dispute (the so-called "secondary employer") to cease selling or otherwise dealing in. the products of the producer with whom the union has a primary dispute (the "primary employer"). Secondly, in carrying out that object, the charged union must resort to tactics which "threaten, coerce or restrain" the secondary employer. Finally, the two requirements just described must not be interpreted or construed in such a way as to forbid any primary strike or picketing[30] or any conduct described as protected in the four paragraphs which follow subsection (4).

In the context of this case, the requirements for a violation may therefore be re-stated as follows:

1. The UFW's primary dispute must have been with California table grape growers, and not with Vans.
2. An object of the activity engaged in by the UFW must

[30]See the concluding sentence of subparagraph (2) of §1154 (d) for this rule of construction.

have been, to force Vons to cease selling or otherwise dealing in table grapes produced by California growers.

3. In carrying out that object, the UFW must have engaged in conduct which threatened, coerced or restrained Vons.

4. The requirement that there be a prohibited object, as described, in 2, above, and the requirement that Vons be threatened, restrained or coerced as described in 3, above, must, be construed in a manner which will not infringe en conduct protected by any of the four "provisos" which follow subsection (4).

The question of whether the Union has violated §1154(d) is best resolved by taking the four requirements, one by one, and considering the facts and the law relevant to each. In doing so, it should be kept in mind that the fourth requirement, dealing with the "provisos" to §1154(d), does not stand separate and apart from the other three. It is best understood as a series of rules to be applied in "construing" and "interpreting" the first three requirements. (See Edward J. DeBartolo Cora, v. Florida Gulf Coast Bldg. & Const. Trades Council (DeBartolo II) (1988) 485 U.S. 568, 582-583.)

1. The UFW's Primary Dispute Was with the California Table Grape Growers and not with Vons.

The overwhelming weight of the evidence establishes the Vons' boycott was the means chosen by the UFW to force California table grape growers to stop using pesticides dangerous to farm

workers, their families and consumers in general.[31] (Factual Conclusions #4 & #5, pp. 36-37, supra.) Vons became a target only because it could be used by UFW as leverage against the growers. (Factual Conclusion #3, pp. 37-33, supra) The Union sought to exploit this leverage by engaging in conduct which would induce Vons to stop promoting and advertising California table grapes, thereby diminishing sales and causing enough economic harm to growers to make them amenable to the UFW's demand that they refrain from using dangerous pesticides. (Id., pp. 37-38.) As such, this case presents a classic example of an attempt to involve a neutral employer in a dispute not of its own making. (The Careau Group dba Ecc City, supra, 15 ALRB No. 10,pp. 6-7.)

One argument made by the UFW is that Vons' repudiation of its earlier agreement to refrain from advertising and promoting California table grapes created a primary dispute between the Union and the Company. This overlooks the nature of the agreement which was repudiated. The fact that a secondary employer first yields and then changes its mind and refuses to go along with a union's demand that it curtail its business with a primary employer does not alter the nature of the underlying dispute. It still involves an attempt by a Union to play the one off against the other. Indeed, an interpretation which turned a secondary dispute into a primary dispute every time a secondary

[31]And, to a much lesser extent, to force those growers to improve wages and other working conditions. (Factual Conclusions #3 and |3, pp. 25 & 37-33, supra.)

employer refused to go along with, a union's demand that it stop doing business with a primary employer would completely legalize the secondary boycott. That the refusal to go along may have been preceded by an initial agreement to yield to union pressure changes nothing; the union is still attempting to embroil a neutral employer in a dispute not of its own making.

Nor is there any factual basis for arguing that, insofar as the demonstrations were aimed at protesting the danger which pesticides posed for consumers [as distinguished from workers and their families], they were primary in nature. The UFW's public pronouncements make it clear that it held the growers responsible for the potential danger to consumers, as well actual harm inflicted on farm workers. (Factual Conclusion $4, p. 36, supra.) Moreover, the potential danger of pesticides to consumers was used by the UFW to bring home to customers the dangers faced by farm workers and their families. (Factual Conclusion #2, pp. 34-35, supra.)

I therefore conclude that the UFW was not involved in a primary dispute with Vons.

2. An Object of the UFW's Demonstrations Was to Force Vons to Refrain From Selling or Otherwise Dealing in California Table Grapes.

In conducting the demonstrations here litigated as violations, the UFW was—in each and every instance—seeking to force Vons to stop promoting and advertising California table grapes; its object in so doing was to curtail the sale of grapes produced by California growers, thereby diminishing the volume of

business between Vans and these growers. (Factual Conclusions #4, #5, #S, #3 pp. 36-38, supra.) That, in and of itself, is enough to satisfy the "prohibited object" requirement found in subparagraph (2) of §1154(d) because, so long as "an object" of the Union was to get Vans to curtail[32] its business dealings with California table grape growers, it makes no difference that it may have had other or further "objects", such as halting the use of pesticides dangerous to farm workers, their families, and consumers (Factual Conclusions #1 & #2, pp. 34-35, supra) or improving working conditions in the fields (Factual Conclusion #3, pp. 35-36, supra). NLRB v. Denver Building Council (1951) 341 U.S. 675, 689.)

In International Longshoremen's Association (ILA) v. Allied International, Inc. (1932) 456 U.S. 212, the ILA had directed its members to refuse to unload Soviet goods as a way of protesting the invasion of Afghanistan. The Supreme Court held that the pressure exerted by the Union on the shipping and stevedoring companies, being a natural and foreseeable consequence of its actions, must be viewed as at least one object of the boycott:

> As understandable and even commendable as the ILA's ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers [the shipping and stevedoring companies]. And it is just such a burden. . .that the secondary boycott provisions were designed to prevent. (Id. at 223.)

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[32]While the elimination of all advertising and promotion would not, of course, result in a total cessation of its dealings with California table growers, the effect on Vons would be substantial (V: 24-26.) And that is enough to establish a violation. (See International Longshoremen's Association v. Allied International, Inc. (19-82) 456 U.S. 212, 224.)

The requirement that there be a prohibited object has, therefore, been met.

3. In Carrying cut Its Prohibited Object, the UFW Engaged ia Conduct which. Threatened, Coerced or Restrained Vans.

The determination of how far a union can go in publicizing its grievances is net just a question of statutory interpretation or legislative intent. There is always the further question of whether Congress or a Legislature has gone beyond its constitutional power and infringed upon a union's right of free speech. In enacting §1154 (d), the California Legislature expressed its sensitivity to that problem by providing that:

> Nothing in this subdivision (d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution.

And the U.S. Supreme Court has repeatedly been called upon to distinguish union conduct which is constitutionally protected from that which is not.

In interpreting the secondary boycott provisions of the National Labor Relations Act, the Supreme Court has extended the full measure of constitutional protection to handbilling and, it would appear, to other forms of publicity that do not involve picketing. (DeBartolo II, supra, 485 U.S. at 575-577.) However, picketing is another matter; as the Court explained in DeBartolo:

> "Picketing is qualitatively 'different from other modes of communication, "Babbitt v. Farm Workers, 442 U.S. 289, 311, n.17 (quoting Hughes v. Superior Court (1950) 339 U.S. 460, 465), and Safeco [NLRB v. Retail Store Employees (1980) 447 U.S. 607] noted that the picketing there actually threatened the neutral with ruin or substantial loss. As Justice Stevens painted out in his concurrence in Safeco, 447 U.S. at 619,

picketing is "a mixture of conduct and communication" and the conduct element "often provides the most persuasive deterrent to third parties about to enter a business establishment". Handbills containing the same message, he observed, are "much less effective than labor picketing" because they "depend entirely on the persuasive force of the idea." Ibid. Similarly, the Court stated in Hughes v. Superior Court, supra, 339 U.S. at 465:

> "Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences different from other modes of communication."

(Ibid., 433 U.S. at 530.)

The leading case on the issue of whether peaceful picketing directed at its customers serves to threaten coerce or restrain a neutral employer is NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits) 377 U.S. 58 (1964). There, several unions picketed Safeway stores asking its customers to refuse to buy Washington State apples because one of unions was involved in a labor dispute with the distributors who supplied those apples to Safeway. The Supreme Court held that picketing Safeway stores in order to induce its customers not to buy Washington, apples, did not threaten, coerce or restrain Safeway.[33] In so finding, the Court distinguished "product picketing" from "do net patronize" picketing:

> "When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds.

[33]The "First Proviso" to §1154(d) was written in such a way as to incorporate into our Act the construction placed on the words "threaten, coerce or restrain" by the Court in Tree Fruits.

> the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." (Id. at 72.) (Emphasis supplied.)[34]

The determination of whether a union engaged in activity which threatened, coerced or restrained a neutral employer thus turns on two questions:

> 1. Did the union picket the neutral [rather than simply engaging in non-picketing activities such as hand-billing]?
>
> 2. If it did, was its picketing aimed at inducing customers not to patronize the neutral [as distinguished from simply urging them not to buy the product of the primary employer]?

If the answer to both questions is "yes", then the neutral has been threatened, coerced and restrained. (Honolulu Typographical Union No. 37 v. NLRB (D.C. Cir. 1968) 401 F.2d 952, enf'g 167 NLRB 1030 (1967).)

Picketing occurs when persons with placards or picket signs post themselves at or near an employer's place of business to give notice of the existence of a dispute. (18F Kneel, Business

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[34]Later, in NLRB v. Retail Store Employees (Safeco), supra, the Court went a step further and found that even "product picketing" can threaten, coerce and restrain a neutral employer in situations where the neutral's business consists almost entirely in marketing the product or services of an employer with whom the union has a primary dispute.

Organizations: Labor Law, §31.01[1].) The fact that the placard is worn rather than carried makes no difference. (See Lawrence Typographical Union No. 570 (1968) 169 NLRB 279, 282.) Indeed, the NLRB has found picketing in cases where signs were placed on a trailer, or in a nearby snow bank, while persons without signs [but identifiable as union supporters] approached visitors or strangers as they exited their parked cars and handed them leaflets. (Id. at 282-283; NLRB v. Local 182, IBT [Woodward Motors] (2nd Cir. 1963) 314 F.2d 53; and see Lumber and Sawmill Workers Local Union No. 2797 [stoltze Land S Lumber Co.] (1965) 156 NLRB 383, 394.) Only where signs were displayed without the presence of any union supporters has the NLRB declined to find picketing. (NLRB v. United Furniture Workers [Jamestown Sterling Corp.] (1964) 337 F.2d 936.).

In all but two of the demonstrations here litigated[36], UFW supporters wearing placards reading "Don't Shop Here" or "No Grapes" stationed themselves in parking lots adjacent to Vons or Tianguis markets and approached customers as they parked and exited their vehicles, and asked that they support the Union boycott and refrain from shopping at Vons. (Supra, pp. 13-14.)"Under the authorities cited above, that constitutes picketing. In a number of cases, demonstrators also stood on the sidewalk adjacent to the parking lots and displayed signs and banners urging a boycott of Vons and of grapes. Such conduct, occurring

[36]The demonstration at V.on's headquarters on November 20, 1991, and the demonstration at the Van's store in San Ysidro on November 26, 1991, are the exceptions.

either by itself, as it did at Van's San Ysidro stare an November 26, 1991[37], cr In conjunction with other activities such as chanting and approaching customers in parking lots (supra, pp.14-16.), also constitutes picketing.

The demonstration which occurred at Von's headquarters on November 20, 1991 is another matter. There is no proof that customers were present. (V:188.) in those circumstances, it is difficult to see how the activity served to "threaten, coerce or restrain" Vons in the manner contemplated by Tree Fruits. (See Chicago Typographical Union (1965) 151 NLH3 1665, 1553-1669) [carrying signs at a location away from the boycotted site is not a violation].) I therefore recommend that that allegation be dismissed.

It is likely that during the course of the picketing described above there were instances in which handbills were distributed by union supporters who were not wearing placards. It therefore could be argued that that particular conduct is non-coercive and protected. However, when faced with that contention, the NLR3 has repeatedly ruled that handbilling conducted in conjunction with picketing is to be deemed part of the picketing. Local 732, Teamsters (1979) 229 NLRB 392, 400 ("Handbilling ... conducted at the same time of or in the same area as the picketing is the equivalent of picketing itself and

[37]That is the only activity depicted in the videotape which was the sole evidence introduced as to what occurred at San Ysidro. (General Counsel Ex. 23; VI: 112-113.)

is unprotected, by the [NU33]"); San Diego Typographical Union No. 221 (1932) 264 NILX3 374; Los Angles Typographical Union 174 (1970) 131 NLH3 334, 333; National Association of Broadcasting Employees & Technicians (1978) 237 NLRB 1370, enf'd, 631 F.2d 944 (B.C. Cir. 1980), overruled on other grounds, 267 NLHS 853 (1983); San Franclscc Building and Construction Trades Council (1990) 297 NL33 177.

The UFW also contends that the activities it engaged in at the stores were constitutionally protected under the Supreme Court's holding in DeBartolo II, supra. That contention ignores the distinction--drawn again and again in that case—between permissible handiilling and prohibited consumer picketing. (Id. 485 U.S. at 571, 574, 579-230, 582-583, 585.)

Having determined that picketing occurred, the next question is whether it was aimed at inducing customers not to patronize the neutral employer, as distinguished from simply urging them not to buy the product of the primary employer. Here, the answer is clear: In conducting its boycott activities at Vons, the UFW sought—through leaflets; through placards, banners and signs; and through speeches, chants and comments—to induce customers not to shop at Vons/Tianguis/Savilions, as distinguished from simply inducing them to refrain from purchasing California table grapes. (Factual Conclusion #9, p. 38, supra.)

I therefore conclude that in all but one of the demonstrations here litigated as violations, the UFW engaged in conduct which--had it arisen under the secondary boycott

provisions of the National Labor Relations Act--would have been found to have threatened, coerced, and restrained a neutral employer. Therefore, unless the "provisos" which appear in §1154(d) and which are unique to our Act, serve to protect the conduct here at issue, the UFW will be found to have violated the Act.

4. Neither the Object Described in Section 2, above, Nor the Conduct Described in Section 3, above, Are Protected, by Any of the Pour Provisos to $1154(d) of the ALRA.

In view of the conclusions reached above, two of the four provisos are inapplicable to this case. The First Proviso, requiring that §1154 (d) be interpreted in accordance with the Supreme Court's decision in Tree Fruits[38], is confined to "publicity [including picketing] [which] does not have the effect of requesting the public to cease patronizing [the neutral employer]." Here, there is no question that the picketing engaged in by the UTW requested consumers to cease patronizing Vans/Tianguis/Pavilions. (Factual Conclusion #9, p. 33, supra.) The Third Proviso, dealing with publicity other than picketing, is likewise inapplicable because all of the demonstrations here litigated as violations involve picketing. (Supra, p. 48.)

That leaves the Second and Fourth Provisos. The Second proviso goes beyond the provisions of the National Labor

[38]Actually, the proviso goes slightly beyond Tree Fruits and permits product picketing in furtherance of a union's dispute with a primary employer who produces only an "ingredient" of the product. But that extension of Tree Fruits makes no difference in this case.

Relations Act and permits "do not patronize" picketing of a neutral employer where the union "is currently certified as the representative of the primary employer's employees"; while the Fourth Proviso requires that §1154(d) be interpreted to permit publicity, including picketing, which is protected either by the U.S. Constitution or by the California Constitution.

a. The Second Proviso. The UFW's primary dispute is not with any single employer, but with the entire "California table grape industry" (Factual Conclusions #4 & #3, pp.35-37, supra.) The California table grape Industry, as that term was used by the Union in its leaflets and other public pronouncements, consists of all California table grape growers. (Factual Conclusion #6, p. 37, supra.) Therefore, in the context of this case, the term "primary employer", as used in §1154(d), is "all California table grape growers". Since Vons is the "employer" or "person" who "distributed" the products of the primary employer and the UFW is the "labor organization" involved, the Second Proviso can be paraphrased as follows:

> Picketing [which] has the effect of requesting the public to cease patronizing Vons, shall be permitted only if the UFW is currently certified as the representative of the employees of all California table grape growers.

Because the "object" of the UFW's picketing was to curtail Vons' business dealings with a group of employers broader that those for whom it held certifications (Factual Conclusions #7 & &8, pp. 37-38, supra), the Union cannot avail itself of the protection

afforded by Second Proviso.[39]

Under the sea-cut cry framework created by the California Legislature in §1154(d), the UFW had two choices: It could have picketed Vons asking customers not to buy California table grapes-sold there because they are treated with pesticides dangerous to farm workers, their families and consumers, in which case its picketing would have been protected by the First Proviso. Or it could have picketed Vans asking customers not to patronize its stores because they sold grapes produced by growers for whom the UFW was certified, but who refused to stop using pesticides dangerous to their workers, the families of their workers and consumers, in which case its picketing would have been protected by the Second Proviso.[40] Instead, the UFW sought to have the best of both worlds by engaging in "do not patronize" picketing aimed at all California table grape growers. This, the statute does not permit.

b. The Fourth Proviso. This proviso incorporates into our

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[39]Under this analysis, the requirement of truthfulness which the Board read into the proviso in its Egg City decision does not come into play because the proviso, by its own terms, does not apply to picketing aimed at primary employers for whom the union has no certification.

[40]The practical difficulties in identifying those grapes sold by Vons which originated with UFW certified growers does not dictate a different reading. (See distributor testimony in volumes VII & VIII of the transcript.) Had the union picketed, advising customers that Vons sold grapes produced by Union certified growers, its picketing would have been permissible so long as the Union did not act "in reckless disregard of [the truth]" and took steps to see that there was a "reasonable basis for its belief". (The Careau Group dba Egg City, supra, 15 ALR3 10, at p. 13.)

Act the well established rule that statutes are to be interpreted so as to avoid serious constitutional problems. (2A Sutherland, Statutory Construction (5th ed. 1992) §45.11 pp. 48-49.) Indeed, in DeBartolo II, 435 U.S. at 575,the Supreme Court, citing NLRB v. Catholic Bishop of Chicago (1979) 440 U.S. 490, 499-501, 504, relied en that very rule in upholding a union's right to engage in peaceful handbilling, even though the handbilling involved in that case did fall within the protective language of the publicity proviso to §8(b)(4) of the NLRA. That rule of interpretation is to be distinguished from the prohibition, found in Article III, section 3.5 of the California Constitution, forbidding an administrative agency from declaring a statute unconstitutional. (The Careau Group dba Egc City, supra. 15 ALR3 No. 10, p. 24, fn. 16 & ALJD pp. 25-26.) In other words, while the Board may interpret §1154(d) to avoid serious constitutional problems, it has no power to strike any of its provisions as unconstitutional.

The Respondent argues that in order to avoid a conflict with the U.S. Supreme Court decision in NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886, which upheld the constitutional right of citizens to engage in boycott picketing activities, the Board should follow the path taken by the Supreme Court in DeBartolo II and construe §1154(d) to permit the UFW to engage in peaceful picketing at Vons, even though its picketing was outside the protective language of the provisos to §1154(d).

Claiborne Hardware involved peaceful picketing conducted by

the NAACP of white merchants in Port Gibson, Mississippi, aimed at exerting pressure on them to "secure compliance by both civic and business leaders with, a lengthily list of demands for equality and racial justice." (Id. at 907.) In upholding the protestors right to engage in such picketing, the Court distinguished it from situations in which there is a strong governmental interest in economic regulation, saying:

> The right of business entities to "associate" to suppress competition may be curtailed. National Society of Professional Engineers v. United States, 435 U.S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress" striking the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." NLRB v. Retail Store Employees, supra, at 617-613 (Blackmun, J. concurring in part). See Inter national Longshoremen's Association (ILA) v. Allied International, Inc., supra, 456 U.S. at 222-223, and n. 20. (Id. at 912.)

Since the Court made it clear that its decision did net affect the prohibition against secondary boycotts and picketing by labor unions, the Respondent's argument that §1154 (d) must be reinterpreted because Claiborne poses a serious constitutional problem for such boycotts makes no sense. Moreover, the Respondent's argument overlooks the distinction, already described (supra, pp. 45 & 49), between handbilling and picketing which the Court in DeBartplo II carefully explained (435 U.S. at 580) and repeatedly drew (Id. at 571, 574, 532-533, 535).

Taking a slightly different approach, the Respondent argues that its picketing did not occur in the context of a "labor dispute" and is therefore outside the ambit of §1154(d); as such,

it is entitled to the same constitutional protection afforded tie NAACP picketing in Claiborne Hardware.

In determining the reach of §3(b)(4), the Federal Courts and the NLB3 have never relied on the rather nebulous concept of "labor dispute"; instead, they have asked if a labor organization has threatened, restrained or coerced a neutral employer with an object of forcing that employer to cease doing business with another employer. Once those conditions are met, §3(b)(4) applies, and there is, in Respondent's terminology, "a labor dispute." The limits of §8(b)(4) were tested in International Longshoremen's Association (ILA) v. Allied International. Inc., supra, involving the refusal of ILA members to unload Soviet goods in response to the invasion of Afghanistan. (See discussion at p. 43, supra.) If the conduct of the union in ILA was within the scope of §8(b)(4)-- and the Supreme Court held that it was -- then this case, a fortiori, is within the scope of §1154(d): The UFW is a labor organization. It sought to gain its ends by resorting to picketing, an economic weapon traditionally used by organized labor. It enlisted the support of other labor organizations in doing so. (Supra, p. 29; see, in particular, the credits to Intervenor's Ex. 8.) Its basic aim was to protect the farm workers and families who make up its primary constituency as a labor organization.[41] Its activities were ultimately

[41]See Federal Trade Commission v. Superior Court Trial Lawyers Assn. 11990) 493 U.S. 411 [Ultimate goal of ensuring constitutional right to counsel not protected under Claiborne Hardware where immediate goal was to secure an economic benefit for the protesting group.]

directed an the employers of its constituents. Its primary demand—the elimination, of the use of dangerous pesticides—is a matter of safety and, as such, something over which unions and employers have traditionally bargained[42]. Finally, its secondary demands—better wages and other working conditions—are also traditional union demands.[43]

Turning to the California Constitution, the Respondent invokes the doctrine of "independent state grounds" to argue for a broader interpretation of the right of free speech, one which would protect the demonstrations here litigated as violations of §1154(d). (See Robins v. Pruneyard Shopping Center (1979) 23 Ca.3d 399, 908, affd. 447 U.S. 74 (1980).)

California courts have long held that secondary boycotts are not protected free speech. Voeltz v. Bakery and Confectionery Workers, Local 37 (1953) 40 Cal.2d 332; see Seven Up Bottling

[42]In AS-H-NE Farms (1980) 6 ALRB No. 9 the Board held that, in the context of agricultural employment, where pesticides are so often used and may affect the health and safety of employees working near and with them, pesticides and chemicals constitute a mandatory subject of bargaining. On the general duty to bargain over safety issues see: Minnesota Mining and Manufacturing (1932) 261 NLRB 27, 29, enf'd 711 F.2d 343 (D.C. Cir 1933); NLRB v. Gulf Power Co. (5th Cir. 1957) 334 F.2d 822, 825; NLRB v. Miller Brewing Co., (9th Cir. 1969) 408 F.2d 12, 14; Solano County Employees Association (1932) 136 Cal.App.3d 256, 260.

[43]These same factors serve to distinguish the UFW from other organizations, including unions such as the Carpenters, who may have conducted demonstrations at Vons protesting its sale of grapes or other products believed to pose environmental or safety hazards. It was on that basis that I excluded evidence of other demonstrations by other organizations. Furthermore, those differences preclude any contention that the UFW's right of equal protection under the Fourteenth Amendment has been violated.

Company of Los Angeles v. Grocery Drivers Union Local 343 (1953) 40 Cal.2d 363.) In UFW v. Superior Court of Monterey County (1971) 4 Cal.3d 556, the Court struck down an overly broad injunction against picketing and recognized as legitimate the kind of consumer picketing carried on in Tree Fruits (4 Cal.3d at 568-570); but, in so doing, the Court made it clear that "to the extent that petitioners' activity involves a secondary boycott, we believe it to be properly enjoinable" (Id. at 569, fn. 25), and went on to caution, "Nor should [this] opinion be read to sanction a secondary, as opposed to a consumer boycott." (Id. at 572. fn. 30.)

In Environmental Planning and Information Council v. Superior Court (1934) 35 Cal.3d 138, the Court applied the U.S. Supreme Court's decision in Claiborne Hardware to an environmental newsletter criticizing a newspaper for its editorial policies on environmental matters and calling upon readers, of the newsletter not to patronize businesses which advertise in the paper. Writing for the Court, Justice Grodin relied both on the First Amendment and on Article I, section 2 of the California Constitution (now art. I, §9), citing Robins v. Pruneyard Shopping Center, supra, and included the following footnote:

> Certain of the distinctions made by the United States Supreme Court in Claiborne, between "political" boycotts on the one hand and "economic" or "labor" boycotts on the other, have been criticized by some commentators as artificial (e.g., Harper, The Consumer's Emerging Right to boycott: NAACP v. Claiborne Hardware and its implications for American Labor Law (1984) 93 Yale L.J. 409,440-442). For the

> purposes of this opinion, it is unnecessary for us to decide, and. we do not decide, whether or to what extent such distinctions are appropriate under the California Constitution. (Id. at 193, fn. 9.) (Emphasis supplied.)

To date, the California Supreme has not had occasion to reach the issue it "did not decide" in Environmental Planing and Information Council v. Superior Court. California law thus remains as enunciated in Voeltz v. Bakery and Confectionery Workers, Local 37, supra, Seven Up Bottling Company of Los Angeles v. Grocery Drivers Union Local 848, supra, and UFW v. Superior Court of Monterey County, supra. Secondary boycotts are therefore not protected by the Article I, section 9 of the California Constitution.

Finally, Respondent argues that Article I, section 1 of the California Constitution, declaring that "All people...have inalienable rights....Among [which is the right of] pursuing and obtaining safety," requires that §1154(d) be interpreted to protect the conduct here litigated.

As important as that right may be, it is difficult to "see why it should have a greater claim than the equally fundamental right to free speech. If the delicate balance struck by the Legislature between union freedom of expression and the ability of neutral employers to remain free from coerced participation in industrial strife allows the prohibition of secondary boycotts, why should the right to pursue and obtain safety alter that balance and permit unions to coerce neutral employers into participating in disputes not of their own making?

Neither the Respondent nor the California Labor Federation, on whose amicus curiae brief to the Superior Court the Respondent relies, answers that question, and I see no basis for creating a right of safety which, goes beyond the Free Speech guarantees of the First Amendment to the U.S. Constitution and Article I, section 9 of the California Constitution.

I conclude that neither the second nor the fourth provisos to §1154(d) can be construed to protect the conduct here litigated. Having already determined that the UFW threatened, coerced and restrained Vans with an object of forcing it to curtail its business dealings with the California table grape growers, I therefore conclude that the UFW violated §1154(d) in 31 of the 32 incidents enumerated on page 12, above. (Incidents #1 through §21 and §23 through §32.) For the reasons already stated (supra, pp. 43-49),I recommend that the Complaint be dismissed as to incident $22, involving picketing at Vons' corporate headquarters on November 20, 1991.

B. The Alleged Violation of Section 1154(n)

Section 1154(h) makes it an unfair labor practice for an labor organization to:

> [P]icket...any employer where an object thereof is either forcing or requiring an employer to recognize or bargain with the labor organization as the representative of his employees unless such labor organization is currently certified as the collective bargaining representative of such employees.

This wording follows, verbatim, the opening paragraph of §3(b)(7)

of the National Later Relations Act.[44]

The fact that here the picketing was directed against Vons rather than the growers from whom recognition was allegedly sought does net render the section inapplicable since, by its own terms, it applies to the picketing of "any employer" to force "an employer" to bargain.

The issue, therefore, is whether the UFW's demand that the growers stop using dangerous pesticides constitutes a demand "to recognize and bargain".

To begin with, recognition need not be the sole object of the picketing, it is enough if it is "an object". (NLRB v. Suffolk County District of Carpenters (2nd Cir. 1967) 387 F.2d 170, 173.); General Service Employees, Local 73 v. NLRB (D.C.Cir. 1978) 578 F.2d 361, 373. Nor need the union be seeking full-fledged recognition; in NLRB v. Electrical Workers, Local 265 (3th Cir. 1979) 604 F.2d 1091, 1097, the Court held:

> To establish that an object of picketing is recognitional, it need not be established that the union is seeking to gain recognition qua recognition. Rather, Congress proscribed as recognitional picketing any picketing that seeks to establish a union in a continuing relationship with an employer with regard to matters which could substantially affect terms or conditions of employment of his employees and which are

[44]However, §1154(h) does not include the three subsections which follow §3(b)(7). Oddly enough, language identical to $1154(h) is to be found in the opening paragraph of the preceding section, $1154(g); only there it is followed by the first two subsections of §3(b)(7) of the NLRA and the "informational picketing" proviso of the third; i.e. §8(b)(7)(A) & (3) and the second proviso to §3(b)(7)(C). The only way to make sense of the obvious legislative oversight is to construe both sections together, making the provisos of §1154(g) equally applicable to §1154(h).

> or may be subjects of collective bargaining by a Lawfully recognized, exclusive representative.

See also: Dallas Building S Construction. Trades Council v. NLRB (D.C. Cir. 1963) 396 F.2d 677, 630-631; Building & Construction Trades Council (Samuel 5. Long, Inc.) 201 NLRB 321, enf'd, 435 F.2d 630 (3rd. Cir. 1973).

However, the Board and the Courts have indicated that picketing in support of a demand which can be achieved without any need for bargaining is not a violation. The leading case is Fanelli Ford Sales, Inc. (1961) 133 NLR3 1463. There the Board held that picketing for the reinstatement of a discharged employee is not per se picketing for a recognitional object because:

> So far as this record indicates, Respondent's picketing would have ceased if the Employer, without recognizing or, indeed, exchanging a word with the Respondent, had reinstated [the discharged employee]. (Id. at 1469.)

See also: Teamsters Local Union No. 676 (1972) 199 NLR3 445, 446, aff'd, 495 F.2d 1116, 1124 (5th Cir. 1974); Waiters & Bartenders Local 500. etc. (Mission Valley Inn) (1963) 140 NLRB 433, 441.[45]

On the face of it, the UFW demand that California growers cease using dangerous pesticides would appear to fall within the Fanelli Ford rationale since it could be achieved, without bargaining "...or, indeed, exchanging a word with..." the

[45]The rationale on which the Fanelli Ford case is based does not require that the union be protesting a discharge which arguably violate the Act; any kind of discharge is will do. Teamsters Local Union No. 676, supra; and see Waiters & Bartenders Local 500, etc. (Mission Valley Inn), supra at 441.

growers. All they had to do was to stop using the five pesticides specified, by the Union. (See Intervenor's Ex. 12.) At no point did the Union, confront any grower with a demand for bargaining over the issue; at no point did the Union inform Vons that it would cease its boycott if California growers would enter into bargaining over the issue; and at no point did the Union inform Vons customers that the purpose of the boycott was to bargain with growers ever the use of dangerous pesticides.

There is, however, circumstantial evidence that the union harbored a recognitional motive. In his Public Citizen speech, Chavez said the boycott would force growers to "negotiate" (Intervenor's Ex. 6(b)); earlier, he had said the boycotting would "make...growers deal with us" (Intervenor's Ex. 27(b)); in the Wrath of Grapes video, he says it would help the UFW "organize" farm workers (Intervenor' s Ex. 8(b)); finally, more traditional collective bargaining demands, though relegated to a minor role, were still "in the air". (Factual Conclusion #3, pp. 35-36, supra.)[46]

In order to find a violation, the circumstantial evidence must point to recognition as an immediate, as distinguished from an ultimate, union goal; for, as the Court explained the leading -.case involving the information picketing proviso to §3(b)(7)(C):

> The hard realities of union-employer relations are such that it is difficult, indeed almost impossible, for us to conceive of picketing falling within the terms of

[46]There is also the flyer which speaks of winning contracts. (Intervenor' s Ex. 7.) However, its prompt withdrawal makes is significance questionable. (See pp. 29-30, supra.)

> the [informational picketing] proviso that did not also have as "an object" obtaining a contract with the employer. This is normally the ultimate objective of any union in relation to an employer who has employees whose jobs fall within the categories of employment that are within the jurisdiction of the union. (Smitley v. NLRB (Crown Cafeteria) (9th Cir. 1964) 327 F.2d 361, enf'g 135 1TLS3 1133 11962); see also NLRB v. Local 3, IBEW (2nd Cir. 1963) 317 F.2d 193, 193.)[47]

The same is true here; any union engaging in the kind of picketing permitted in Fanelli Ford Sales probably has recognition as an ultimate goal. The question is whether, considering the union's behavior in its overall context, it can be said that the general counsel has proven recognition to be an immediate goal.

Admittedly, the question is a close one; but, given the fact that no recognitional object was manifested, directly or indirectly, to the growers, to Vons, or to its customers, I am persuaded that, in the overall context of what occurred, it has not been established by a preponderance of the evidence that the UFW had an immediate recognitional object in conducting the demonstrations here litigated as violations of §1154 (h).

I therefore conclude that the UFW did not violate §1154(h) in conducting the demonstrations here litigated.

C. Agency and Responsibility

Because persons and groups who are not directly affiliated with the UFW have supported its boycott against Van's by appearing at Union demonstrations, it is important that any

[47]It should be noted that under our Act the "informational picketing" proviso modifies all of §1154(g) [and (h)]; not simply one subsection as is the case under the NLSA (See S3(b) (4)(C).)

relief granted in tills proceeding be structured so as to avoid interference with their legitimate First Amendment rights. It is for this reason that I permitted the intervention of Mytyl Glomboske, Rudolph Rico and Father Joseph Tobin, and it is for this reason that the General accepted my recommendation that the "aiding and abetting" clause be stricken from the prayer to its complaint.

My Recommended Order does not extend to persons and/or groups conducting their own demonstrations against Vans' practices or policies, including its sale of table grapes treated with pesticides, even though those demonstrations may coincide with UFW demonstrations. However, individuals and groups will be subject to this Order if they "consciously enmesh" themselves in UFW demonstrations by becoming agents of the Union.[48] Because First Amendment rights are involved, the rules of agency are to be strictly construed. The relaxed standards applied to employers in Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 320-321, have no place. Furthermore, the doctrine of "apparent authority", under which a person will be considered an agent because of representations to a third person by the alleged principal, is not to be applied.[49] To do so would allow persons who had not "consciously enmeshed" themselves in an activity nonetheless to be considered agents. In the context of this case, that might well result in an involuntary relinquish-

[48]See Charging Party's Post Hearing Brief, p. 45.

[49]See section 8 of the Restatement Second of Agency (1957).

ment of First Amendment rights.[50]

Having stated the legal principles involved, it must be remembered that the existence of an actual agency relationship is question of fact which cannot be resolved in the abstract. However, it is fair to say that wearing UFW placards, handing out UFW leaflets, and talking direction from UFW officials or coordinators would be strong evidence of agency. (See Local 248, Meat S Allied Food Workers (1977) 230 NLRB 139, 194.) By that standard, Mr. Rico appears to have been acting as an agent of the UFW when he participated in its demonstrations (VIII: 153-159, 161-164); while Annie Waterman and her organization FOCUS do not appear to have been UFW agents. (VIII: 89-90, 97-98, 106-107.)

D. Damages

In The Careau Grout dba Egg City, supra, 15 ALRB No. 10, at pp. 29-33, the Board held that "in order to effectuate the policies underlying the proscript-ions of illegal secondary boycott activity in Cur Act", compens-atory damages may be assessed against a labor organization which violates that $1154(d).

The policy underlying §1154(d) is the same policy which, underlies the proscription against illegal secondary boycotts found in the National Labor Relations Act; namely, the protection of "neutral employers...not directly involved in a labor dispute,

[50]By eliminating resort to the doctrine of apparent authority, I do not mean to prevent the introduction of evidence which goes to establish actual authority simply because that evidence might have been used in proving the rejected theory of apparent authority.

from direct union sanctions." (Frito-Lay, Inc. v. Retail Clerks Union Local No. 7 (10th Cir. 1980) 629 F.2d 652, 653; The Careau Group dba Esc City, supra, 15 ALRB No. 10, at p. 32; see also: International Longshoremen's Association (ILA) v. Allied International. Inc., supra, 455 U.S. at 223-224; DiGiorcio Fruit Corp. v. NLRB (D.C. Cir. 1951) 191 F.2d 642, 644, cert. denied, 342 U.S. 369 (1951). In Jaden Electric v. IBEW, Local 212 (D.N.J. 1931) 508 F.Supp. 983, 985, the Court recounted the legislative history - reflecting that policy:

> With respect to the early legislative history of §S(b)(4)~, the defendants cite two statements by Senator Taft as summarizing the congressional position as to whom this section was designed to protect. "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." 93 Cong.Rec. 4198 (1947). At a later date Senator Taft indicated that, "[t]he secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike...." 95 Cong.Rec. 8709 (1949). The defendants also point out that at the time of the debates over the passage of these sections, much discussion centered around the damages to farmers from secondary boycotts by truckers. As Senator Ball explained, "[F]arm producers and small businesses and their employees are the main victims of secondary boycotts, jurisdictional strikes, and organizational boycotts....It is such persons and their rights that we are trying to protect." [93 Cong.Rec 4838 (1947)][51]

Given that legislative history, it was--early on--argued: that since the protection of neutral parties who are unconnected with the primary dispute but are caught in the crossfire is the

[51]There is nothing in the sketchy legislative history of our Act to indicate that different policy considerations obtained. (See Labor Relations Committee Hearing, May 12, 1975, p. 50, cited in The Careau Group dba Egg City, supra, 15 ALRB No. 10, ALJD at p. 55.)

basis far banning secondary boycotts, only those neutral parties and not primary employers should be entitled to damages. (United Brick & Clav Workers v. Deena Artware (6th Cir. 1952) 138 F.2d 637, 644-543, cert. den. 345 U.S. 906 (1953).)

The argument was rejected, not because the Federal Courts disagreed that the policy underlying §8(b)(4) was to protect neutral employers, but because Congress did not confine itself to §3(b)(4), but went on to enact a another provision—Section 303 of the Labor Management Relations Act—which provided that damages are to be awarded to "Whoever shall be injured" by an illegal secondary boycott. The legislative history of that section (93 Ccng.Rec. 4343-46, 4853, 4872-73 (1947)) and the rule that the word. "whoever" has a "plain, unambiguous meaning which we are not authorized, to disregard", required a holding that both primary and secondary employers were entitled to damages under Section 303(b). (United Brick & Clay Workers v. Deena Artware, supra. 198 F.2d at 644-S45; Jaden Electric v. IBEW, Local 212, supra. 508 F.Supp at 935-936; Wells v Operating Engineers, Local 181 (6th Cir. 1962) 303 F.2d 73, 75-76; see Mead v. Retail Clerks International Assn., Local Union No. 839 (9th Cir. 1975) 523 F.2d 1371.)

Our Act has no section equivalent to §303 of the NLRA. Such relief as is available has its genesis in §1154(d), a section whose origin is §3(b)(4) of the NLRA. Thus, the constraints which led the Federal Courts to uphold the right of primary employers to recover damages under the NLRA do not

operate under the ALRA. It would appear, therefore, that the policy considerations underlying §1154(d) require that damages be limited to "neutral parties who are unconnected with the primary dispute but are caught in the crossfire." (Jaden Electric v. IBEW, Local 212, supra.) Indeed, that is what the reasoning of the Board in the Ecc City decision suggests both in its stress on the need to protect "secondary employers enmeshed in a labor dispute not of their own making" (Id. at 32) and in its emphasis notion that the damage remedy is to be confined to "egregious violations". (Id. 29-30, 32, citing Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209, 223-224.)[52] Unfortunately, however, the concluding paragraph of its discussion (Id. at 32) and the language used in its Order (Id. at 34) go beyond the rationale which preceded them and speak of "any person who has been injured".

I am convinced that the best way to resolve that ambiguity is to confine the damages here awarded to neutral parties who are injured as a result of the illegal secondary boycott. To do otherwise would go beyond the legislative policy underlying 51154(d) and the rationale offered by the Board in reaching its

[52]The two notions coalesce on page 32 where the Beard explains: "To deprive secondary employers of a purely compensatory damages remedy in either civil courts or before this Board would, however, create precisely the situation condemned by the Harry Carian Sales court, viz., it would leave potential egregious violations of our statue without significant sanction." (Emphasis supplied) In other words, the "egregiousness" which justifies the remedy arises out of the harm inflicted on neutral secondary employers.

Conclusion, and would be at odds with the holding of the California Supreme Court in Peralta Community College District v. Fair Employment and Housing Commission (1990) 52 Cal.3d 40, that administrative agencies have no power to award compensatory damages "beyond the scope of the Legislature's intended purpose in enacting [the statute]. (Id. at 49.)[53]

Finally, it must be borne in mind that, separate and apart from the 31 demonstrations here found to have violated the Act, the UFW was engaged in other, lawful and constitutionally protected activities aimed at convincing the public not to buy California table grapes and not to patronize Vans. In United Mine Workers of America v. Gibbs,(1964) 383 U.S. 715 arid Local 20, Teamsters, etc, v. Morton (1964) 377 U.S. 252, the Supreme Court held that where a union has engaged in both lawful and unlawful conduct, and the consequences of those activities are separable, the Union is liable only for injuries proximately caused by the illegal activities.

III. REMEDY

Having found that the Respondent has engaged in unfair labor practices prosecribed in §1154(d) of the Act, I shall recommend tht it cease and desist therefrom and that it take certain

[53]Indeed, the Peralta decision may well call into question the right of the Board to award any compensatory damages beyond those specifically set forth in the Act. That, however, is for the Board and the Courts to decide. I am bound the Board's determination in Ecc City that compensatory damages are appropriate in secondary boycott cases; the only question before me is whether the Board intended that decision to include primary employers among the beneficiaries of such damages.

afirmative action designed to remedy its unfiar labor practices and to effectuate the policies of the Act.

Upon the basis of the entire record, the findings of fact, and the conclusion of law, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent, United Farm Workers of America, AFL-CIO, its officers, representatives and agents [as defined in Section II.c., above], shall:

1. Cease and desist from threatening, coercing, or restraining Vons Companies, Inc., as found herein, or any other person with an object of forcing or requiring Vons Companies, Inc., or any other person to cease using, selling, transporting, or otherwise dealing in California table grapes produced by growers for whom the United Farm Workers is not the certified bargaining representative, or to cease doing business, directly or indirectly, with California table grape growers for whom the United Farm Workers is not the certified bargaining representative.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Compensate Vons Companies, Inc. and any other neutral employer or person protected by section 1154(d) of the Act who has been injured in his or her business or property by reason of conduct found to be in violation of section 1154(d) of the Act herein which occurred at the stores of Vons Companies,

Inc at the following times and places:

Place and Date
Montebello Tianguis - March 22, 1991
Huntington Park Tianguis - March 23, 1991
Cudahy Tianguis - March 23, 1991
Montebello Tianguis - June 6, 1991
Huntington Park Tianguis - June 9, 1991
Huntington Park Tianguis - June 15, 1991
Cudahy Tianguis - June 15, 1991
Montebello Tianguis - June 29, 1991
Huntington Park Tianguis - June 29, 1991
East Los Angeles Tianguis - June 30, 1991
Montebello Tianguis - July 6, 1991
Huntington Park Tianguis - August 11, 1991
East Los Angeles Tianguis - August 24, 1991
Montabello Tianguis - August 31, 1991
Fresno Vons - November 8, 1991
Montebello Tianguis - November 9, 1991
East Los Angeles - November 9, 1991
Huntington Park Tianguis - November 9, 1991
Cudahy Tianguis - November 9, 1991
Montebello Tianguis - November 17, 1991
Huntington Park Tianguis - November 17, 1991
Montebello Tianguis - November 23, 1991
Montebello Tianguis - November 24, 1991
Huntington Park Tianguis - November 24, 1991
El Monte Tianguis - November 24, 1991
San Ysidrc Vons - November 26, 1991
Montebello Tianguis - December 4, 1991
Cudahy Tianguis - December 7, 1991
East Los Angeles Tianguis - December 7, 1991
Huntington Park Tianguis - December 7, 1991
Huntington Park Tianguis - December 8, 1991

(b) Post at its offices and meeting halls copies of the attached notice. Copies of said notice, on forms provided by the El Centra Regional Director, after being duly signed by Respondent Union's representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 days thereafter, in conspicuous places, including all places where notices to members are customarily pasted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other

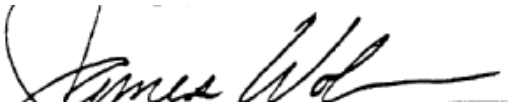
material.

(c) Mail copies of the attached notice, in, all appropriate languages, within 30 days of this Order, to Van Companies, Inc. for posting, if it desires to do so, at any of the sites described in subparagraph (a), above.

(d) Notify the El Centro Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

The Complaint is dismissed as to those portions in which Respondent has not been found to have violated the Act.

Dated: October 14, 1992



JAMES WOLPMAN
Chief Administrative Law

NOTICE TO ALL MEMBERS

Pursuant to the Order of the Agricultural Labor Relations Board, and in order to effectuate the policies of the Agricultural Labor Relations Act, we hereby inform you that:

WE WILL NOT threaten, coerce, or restrain Vons Companies, Inc. or their Vons/Tianguis/Pavilions stores, or any other person, with an object of forcing or requiring that they cease using, selling, transporting, or otherwise dealing in California table grapes produced by growers for whom the United Farm Workers is not the certified bargaining representative, or cease doing business with California table grape growers for whom the United Farm Workers is not the certified bargaining representative. .

WE WILL COMPENSATE Vons Companies, Inc and any other neutral employer who has been injured in his or her business or property by reason of conduct which has been found by the Agricultural Labor Relations Board to be in violation of section 1154(d) of the Act which occurred between March 22, 1991 and December 8, 1991.

UNITED FARM WORKERS OF AMERICA, AFL-CIO

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 319 South Waterman Ave., El Centro, Salinas, California. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE.