Stockton, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and TRIPLE E PRODUCE CORP., a Delaware Corporation, Charging Party.	)	Case Nos. 94-CL-3-VI 94-CL-4-VI 94-CL-6-VI 94-CL-12-VI 94-CL-13-VI 94-CL-14-VI 94-CL-16-VI 23 ALRB No. 4 (March 13, 1997)

DECISION AND ORDER

On September 20, 1996, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above -referenced case, in which he recommended that the complaint filed by General Counsel alleging that Respondent United Farm Workers of America, AFL-CIO (UFW or Union) engaged in post-certification access violations which unlawfully restrained and coerced employees of charging party Triple E Produce Corp., a Delaware Corporation (Triple E or Employer), be dismissed in its entirety. General Counsel timely filed exceptions to the ALJ decision, along with a supporting brief. No reply briefs were filed by any party.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's decision in light of the exceptions and brief submitted by General Counsel and affirms the

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ALJ's findings of fact and conclusions of law, and adopts his recommendation to dismiss the complaint in its entirety.[1]

In *O.P. Murphy* Produce *Co., Inc., dba O.P. Murphy & Sons* (1978) 4 ALRB No. 106 (O.P. *Murphy),* the Board determined that a certified representative of agricultural employees has the right to enter the employer's premises to discuss contract negotiations and to investigate working conditions. *O.P. Murphy* held that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit.

Before commencing collective bargaining, the parties herein signed a post-certification access agreement on July 14, 1994. The agreement provided for access one hour before work and after work and at a designated lunch time. The agreement required the Union to notify Triple E which crews and fields it intended to access and the number of organizers taking access at each location. Each organizer was to have Union identification. According to the testimony of Nathan J. Esformes, the president of Triple E, the parties' intention was to follow the Board's regulations governing organizational access in terms of the number of organizers permitted in the field and the hours they were permitted to take access.

[1] In upholding the ALJ's decision, the Board does not rely on Ronald *L. Blanchard d/b/a Blanchard Construction Company* (1978) 234 NLRB 1035 [97 LRRM 1389], cited by the ALJ at page 21 of his decision, as that case was subsequently overruled by the 9th Circuit Court of Appeals on August 11, 1980 [108 LRRM 2104].

General Counsel's complaint alleged that on various occasions during 1994, while taking post-certification access, the UFW unlawfully restrained and coerced employees of Triple E in the exercise of their rights under section 1152 of the Agricultural Labor Relations Act (ALRA or Act), thereby engaging in independent violations of section 1154 (a) (1) of the Act. Specifically, General Counsel alleged that on certain occasions UFW representatives came into Triple E's fields and 1) yelled at supervisors in the presence of employees, calling them such things as "bandits" and "crooks;" 2) entered fields at times not authorized by the access agreement and in numbers exceeding the number permitted by the agreement; 3) entered fields with persons who were not UFW agents, in some cases giving them badges to wear which falsely identified them as Union agents; 4) engaged in videotaping of employees while they were working, without securing the permission of the employees or of Triple E personnel to do so; and 5) used bullhorns to address employees and refused to cease using bullhorns when Triple E supervisors objected.

Our evaluation of the alleged misconduct must be tested by an objective standard. Accordingly, for the reasons stated by the ALJ, we agree that none of the incidents in this case restrained or coerced employees within the meaning of sections 1152 and 1154 (a) (1) of the Act. Nevertheless, we are disturbed by some of the Union's actions which we believe exhibited disrespect to workers as well as to the Employer. Thus, although the Union's videotaping of employees at work was not sufficiently

coercive to constitute an unfair labor practice, we believe that videotaping the workers without their consent in circumstances where they were not free to leave the workplace was offensive and disrespectful of the employees. Moreover, the Union's acknowledgement that on one occasion it filmed the employees in order to prepare a documentary on working conditions indicates that its reasons for filming the employees were only tangentially related to the legitimate purpose of post-certification access--i.e., to communicate with unit employees about the progress of contract negotiations and to obtain current information about their working conditions, as well as their wishes with respect to contract terms and proposals. *(O.P. Murphy, supra,* 4 ALRB No. 106.) Further, while the UFW's invitation to non-Union personnel to take access with UFW representatives, and giving them badges to wear which falsely identified them as UFW agents, may have violated the parties' private access agreement (which provided for access by *Union organizers* with Union identification) , it did not constitute an unfair labor practice.

Nevertheless, the only charges made in this case were that the UFW, in taking post-certification access, engaged in conduct which unlawfully restrained and coerced employees in violation of Sections 1152 and 1154(a)(1) of the ALRA. Because we agree with the ALJ that those charges were not proven, we will dismiss the complaint in its entirety.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act (Labor Code section 1140 et seq.), the Agricultural Labor Relations Board finds that the complaint in Case No. 94-CL-3-VI, et al., should be, and it hereby is, dismissed in its entirety.

DATED: March 13, 1997

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

TRICE J. HARVEY, Member

CASE SUMMARY

UNITED FARM WORKERS OF AMERICA., AFL-CIO (Triple E Produce Corp.)

23 ALRB No. 4
Case No. 94-CL-3-VI, et al.

ALJ Decision

The complaint alleged that the UFW had engaged in post-certification access violations which unlawfully restrained and coerced employees of Triple E. The ALJ found that although UFW organizers had on certain occasions entered Triple E's fields in excessive numbers; entered fields with persons who were not Union representatives, in some cases giving them badges to wear which falsely identified them as Union representatives; engaged in videotaping employees while they were at work without securing the permission of the employees or of Triple E personnel; and used bullhorns to address employees and refused to cease using bullhorns when Triple E supervisors objected, none of the Union's conduct was sufficiently egregious to constitute an unfair labor practice. The ALJ therefore recommended that the complaint be dismissed.

Board Decision

The Board found that much of the UFW's conduct was offensive and disrespectful to employees and to the Employer, and that the Union's videotaping of employees was only tangentially related to the legitimate purpose of post-certification access--i.e., to communicate with unit employees about the progress of contract negotiations and to obtain current information about the employees' working conditions, as well as their wishes with respect to contract terms and proposals. However, the Board affirmed the ALJ's ruling that the Union's conduct did not amount to unfair labor practices which unlawfully restrained or coerced employees in the exercise of their rights under the ALRA. Therefore, the Board affirmed the ALJ's dismissal of the complaint in its entirety.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case Nos. 94-CL-3-VI**
	)	**94-CL-4-VI**
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	**94-CL-6-VI**
	)	**94-CL-12-VI**
Respondent,	)	**94-CL-13-VI**
	)	**94-CL-14-VI**
and	)	**94-CL-16-VI**
	)	
TRIPLE E PRODUCE CORP., a Delaware Corporation,	)	
	)	
Charging Party.	)	

Appearances:

Thomas Patrick Lynch
Marcos Camacho, A Law Corporation
Keene, California
For Respondent

Stephanie Bullock
Visalia ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This case was heard by me on July 15, 16, 18 and 19, 1996, in Stockton, California. It is based on charges filed by Triple E Produce Corp., a Delaware Corporation (hereinafter referred to as Charging Party), alleging that United Farm Workers of America, AFL-CIO (hereinafter Respondent) violated section 1154(a)(1) of the Agricultural Labor Relations Act (Act). The General Counsel of the Agricultural Labor Relations Board (hereinafter Board or ALRB) issued a consolidated complaint, which has been twice amended (complaint) alleging that Respondent engaged in various acts and conduct which unlawfully restrained and coerced employees in the exercise of their rights under §1152 of the Act. Respondent filed an answer denying the commission of unfair labor practices, and asserting affirmative defenses. The Charging Party has not intervened in this proceeding, and did not appear at the hearing. General Counsel and Respondent filed post-hearing briefs, which have been duly considered. Based on the testimony of the witnesses, the documentary evidence received at the hearing, and the oral and written arguments made by the parties, the following findings of fact and conclusions of law are made:

FINDINGS OF FACT[1]

1. Jurisdiction

The Charging Party, which has an office and principal place of business in Stockton, California, is engaged in the business of agriculture, and is an agricultural employer within

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[1]These findings cover what the undersigned considers the pertinent facts related to the allegations in the complaint, and omit other testimony of, at best, peripheral relevance.

the meaning of section 1140.4(a) and (c) of the Act. Respondent is, and has at all material times herein been a labor organization within the meaning of section 1140.4(f). The 13 individuals listed in paragraph 12 of the complaint were at all material times agents of Respondent. Respondent admits that the Charging Party's employees, who allegedly were subjected to unlawful conduct, were at all material times agricultural employees under section 1140.4(b).

2. Background

The seven incidents giving rise to this case took place during the Charging Party's tomato harvest, which lasted from July to early November 1994. Up to six crews worked that harvest, with the Charging Party being the direct employer of one, and contractors being engaged for the others. Crew sizes varied, generally numbering from about 90 to 125. Sometimes, more than one crew would simultaneously work in the same area.

Respondent had initially filed a representation petition on October 17, 1975, in Case No. 75-RC-49-SAL, and won an election conducted on October 24, 1975. The Board overruled objections filed by the Charging Party and issued a certification on April 13, 1978. Triple E Produce Corp. (1978) 4 ALRB No. 20. The Charging Party refused to bargain with Respondent, and litigated its obligation to do so, resulting in the California Supreme Court's refusal to enforce the certification in 1985. Triple E Produce Corporation v. ALRB (1985) 35 Cal.3d 42 [196 Cal.Rptr. 518]. Respondent filed another petition for

certification in Case No. 89-RC-3-VI, and won an election conducted on July 31, 1989. After hearings on challenged ballots, and on objections filed by the Charging Party, and exceptions filed to the decision of an investigative hearing examiner, the Board overruled the objections and again certified Respondent on November 22, 1991. The Charging Party filed court appeals related to the second certification, which were ultimately rejected. In mid-July 1994, the parties commenced collective bargaining negotiations, which have yet to produce a contract.

3. The access agreement

Dolores Clara Huerta, Respondent's Secretary-Treasurer, and Rudolph Chavez Medina, formerly Respondent's Regional Manager, negotiated an access agreement with Nathan J. Esformes, the Charging Party's President and Spencer Hipp, one of the Charging Party's attorneys. The agreement was executed by Respondent and the Charging Party on July 14 and July 18, respectively. The parties' intent was to follow the Board's access Regulations, sections 90500 et. seq., to the extent possible.

Thus, the agreement provides for one hour of access before and after work, and one during a "designated" lunch time. The agreement does not specify who is responsible for designating the lunch time access, or whether it necessarily has to be taken at the same time each day. It is also silent as to the number of access takers Respondent is permitted to send, but the parties

agree this would be one representative for every 15 crew members.

Esformes asked Huerta and Medina to specify a time for lunch time access, but they declined to do so, citing the varying lengths of the workday and the difficulties Respondent was having in covering three employers in the area simultaneously involved in contract negotiations. According to Esformes, when Respondent was unable or unwilling to specify a lunch hour, he decided it would be from noon to 1:00 p.m. Esformes was vague as to when he did this, but eventually stated it was prior to the incident on July 21, 1994, described below. Esformes contends he informed Respondent's representatives of his decision, but was unable to identify any of those individuals. Respondent's agents who testified on the subject denied that Esformes so informed them. It is, however, undisputed that the decision was made known to the Charging Party's supervisors, and they confronted agents with this in the fields when they arrived outside the noon hour.

The access agreement specifically refers to "organizers" being permitted to enter the fields. It makes no reference to the use of bullhorns. The agreement also provides that if a party perceives a problem with the lunch time access, the issue will be "revisited." According to Esformes and Medina, as the events described below took place, one of the Charging Party's attorneys, during contract negotiations, requested the parties discuss the issue. Respondent refused, stating contract negotiations were a separate matter, and told the attorney to contact Gilberto F. Rodriguez, who had been assigned to be in

charge of the access taking.[2] The Charging Party never contacted Rodriguez to further negotiate the issue, although he was involved in incidents with supervisors regarding lunch time access. Respondent's agents testified they understood they could take access in the middle of the work day.

It should be noted that, due to the nature of the Charging Party's operations, some technical trespasses were almost inevitable. The starting and ending times for harvest work varied on a daily basis, and although the Charging Party sent Respondent facsimile memos stating where the crews would be working, these did not state the starting or ending times, or the number of crew members. Not only did the Charging Party not have a regular lunch period, but employees, if they ate lunch at all, could do so when they wished. Since at least some of the worksites were located a considerable distance from public roads, it is apparent that under these circumstances, Respondent's representatives would enter private property at times employees were working, simply to ascertain if this was the case and to determine how many were present.

With respect to the lunch time access, it was agreed that Respondent's representatives could approach employees as they

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[2]Their testimony is contradicted by William Franklin Boyer, the Charging Party's Financial Controller, who testified that the attorney, during negotiations, repeatedly informed the representatives that midday access was to be from noon to 1:00 p.m., and Huerta replied Respondent would take access whenever it wished. Medina and Esformes were more convincing concerning this issue, and their testimony is credited. It is also noted that Boyer, even if correct, at no time contended the parties reached agreement on this issue.

worked in the fields. Respondent took access almost every day during the harvest, at least until mid-October, and on many occasions more than once per day. Witnesses for both General Counsel and Respondent agree that on most occasions, no problems arose from the access taking.

4. The incident on July 21, 1994[3]

Isaac Villareal, Jr., a foreman for his father's crew, testified that on this date, Respondent's representatives took access to the Bozzano field on two occasions, once in the morning, and again at an unspecified time in the afternoon, while employees were still on working time. Prior to the afternoon entry, one of the tomato trucks had broken down and the employees were waiting to dump buckets of tomatoes, while others were still picking. According to Villareal, Jr., the female representative asked what was going on, and when told about the truck, loudly demanded that the employees, who were paid on a piecerate basis, be paid for their waiting time. The Villareals referred her to the Charging Party's foreman, Mariano Saavedra, but instead, she continued yelling at them, purportedly calling them "bandits," "rats" and "coyotes," in the presence of employees.

Thomas Joseph Guido, Jr., the Charging Party's Farm Manager, testified that he witnessed this incident, which he placed at between 1:00 and 1:30 p.m. He identified the female

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[3]All dates hereinafter refer to 1994 unless otherwise indicated. The witnesses were often unable to recall the exact dates of the incidents, but Respondent, at the prehearing conference, and in some instances at the hearing agreed to the dates set forth in the complaint.

representative as Zeferina Garcia Perez. Guido confirmed that Perez shouted at the Villareals, using the terms "bandits" and "coyotes," but did not mention the word, "rats" in his testimony. After this incident, Guido met with the representative, and resolved a separate issue regarding the suspension of two employees.

Saavedra testified that Perez questioned why he was in the fields, and demanded he leave, a demand he refused. Saavedra observed Perez yelling at the Villareals, and testified she accused Villareal, Sr. of being a crook, who was stealing money from the workers. He recalled that some employees were still picking tomatoes at the time. Supervisor Jose Luis Cardenas Estrada testified he was present, and heard Perez shouting at the Charging Party's supervisors, calling them "bandits." He did not mention any reference to "coyotes" or "rats" by Perez.

Perez, whose recall of the incident was poor, claimed she and organizer Jose Gonzalez entered the field at noon, or thereafter. Perez's pre-hearing declaration, taken by Respondent, states the incident took place at about 2:00 p.m. Perez testified that as she approached the field, she spoke with two employees, who told her they had been discharged for picking bad tomatoes. Perez initially testified she entered the field because none of the employees were working. Later, she testified that the two employees told her work was continuing, but she entered at their request. According to Perez, she discussed the incident with the Villareals and Guido, and during the course of

this, told them they were stealing from the workers by not paying them for buckets of tomatoes, because one or two were not ripe. Perez denied shouting at the Villareals, and claimed that when Guido told her it was not access time, she left. Perez's pre-hearing declaration, in addition to the timing of the incident, contains other significant differences in her account of the incident. When confronted with these, Perez's testimony changed, and it is apparent she was mixing two or more incidents.

Therefore, it is found that Perez and Gonzalez did enter the field after 1:00 p.m. and Perez did shout at the Villareals, in the presence of employees, calling them "bandits" and "coyotes."[4] Boyer testified that Respondent's entry into the fields at times other than the noon hour caused a "slight disruption" of the harvest, because the Charging Party wanted to schedule the harvesting to provide for access at a set time.

5. The incident on July 29

Respondent and the Charging Party became involved in a dispute, as to whether the Charging Party was refusing to pay workers for any tomatoes in a bucket, if a few of the tomatoes were unripe. Jesus Valencia Gonzalez (Valencia), one of the Charging Party's supervisors, testified that the Caffese field,

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[4]Villareal would have been the most likely of General Counsel's witnesses to recall what Perez said, and is corroborated by Guido on these phrases. It is also noted that in addition to the defects in Perez's testimony, Respondent, without explanation, failed to call Gonzalez as a witness to corroborate her. No other witness corroborated the reference to the Villareals being "rats," and this testimony is viewed as a gratuitous addition by Villareal, Jr.

he had disciplined employee Jesus Figueroa for picking unripe tomatoes, and was then approached by Organizer Luis Alberto Rivera. Contrary to allegations in the complaint, Valencia testified that Figueroa had dumped his partially filled bucket of tomatoes prior to the arrival of Respondent's agents, and not in response to comments made by them. At about 1:00 p.m., Rivera and another representative entered the field. Rivera purportedly began shouting at Valencia, in the presence of employees, that Valencia should "throw" the tomatoes if he did not like the quality (rather than, as alleged by Respondent, keeping the good ones, but not paying the worker who picked them.) Rivera then had a discussion with Guido, which Valencia did not hear, and left.

Guido testified he observed Rivera and the other individual take access between 1:00 and 1:30 and, contradicting Valencia, claimed that Figueroa dumped the tomatoes at Rivera's urging, while Rivera was shouting at Valencia. Guido also testified that he had observed Figueroa drinking beer, and was intoxicated, contentions not corroborated by Valencia. Guido asked Rivera to leave, as it was not access time.

Rivera testified as an adverse witness called by General Counsel, but was not questioned on this incident. Respondent intended to recall him as its witness, but Rivera did not appear, reportedly because he was ill. Former organizer Reynaldo Ponce testified that he arrived with Rivera at about noon. It should be noted that Ponce's recall was admittedly very poor, and he

appeared annoyed at being taken from work to testify. His account was so vague that it is not certain he was referring to the same incident as Valencia and Guido. Ponce remembered a shouting match between Rivera and supervisor Ernesto Sanchez, and possibly that Sanchez was also shouting at Figueroa. He testified that Figueroa claimed his tokens (used to signify buckets of tomatoes picked) had been stolen, and was shouting pro-union phrases, purportedly prompting Sanchez to say he would fire Figueroa. Ponce recalled that Guido arrived a few minutes later, but did not remember if he spoke with anyone about the incident. He contended Figueroa was not drunk, and that he did not see him drinking any beer.

It is found that on this date, Respondent's representatives entered the fields after the noon hour, and during the course of an argument concerning discipline to Figueroa, in the presence of employees, Rivera shouted at Valencia that he should dump the tomatoes if he did not like them. The conflicting evidence fails to establish that Rivera encouraged Figueroa to dump his bucket.

6. The incident on August 17

On this date, 13 representatives of Respondent, along with an employee and four cameramen from CBS television entered the Kimoto field and photographed employees as they entered the field to enter work and perhaps, as they began working.[5]

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[5]General Counsel contends that an additional three representatives were on the property, but out of the fields. Said contention is apparently based on testimony which confused

Respondent brought in the cameramen without prior notice to, or consent by the Charging Party. The Charging Party's payroll records show that about 223 employees, including foremen (probably three), were working at this location on that date, meaning a total of 15 access takers was permissible, rather than 18. Huerta denied she ever received any complaints regarding the number of access takers, and no evidence was presented showing that such protests were made to her or any other agent of Respondent.

Huerta, corroborated by other witnesses, credibly testified that she invited the cameramen to the fields because they wished to film a documentary on working conditions. Huerta admitted that she had previously brought alleged labor law violations to the attention of the Charging Party, and one of its attorneys had offered to permit Respondent to enter the fields to investigate. Huerta refused the offer, because the Charging Party wanted to have one of its representatives present. On this date, prior to entering the fields, she counted the number of employees, and believed there were an appropriate number of access takers present. According to a statement in Rivera's pre-hearing declaration, which was admitted because Rivera had no present recall while testifying, Respondent counted about 360 employees in the field, which would have permitted 24 access takers.

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this incident from that which took place on September 9, discussed below. However, even if General Counsel's contention is correct, the outcome herein would be unaffected.

Guido credibly testified he initially told Huerta no cameras were permitted in the field, and Huerta said they were just filming a documentary, and to let them remain. When Huerta failed to remove the camera crew, he approached them and asked that they leave, which they did. Respondent's representatives remained in the fields for 15-20 minutes after the camera crew left. Guido testified that employees were upset at being photographed, and turned away from the cameras. Respondent's witnesses who testified on the subject stated that employees were happy to be photographed and shouted pro-union slogans. Most probably, some employees disliked the photography, some welcomed it, and it caused some disruption of the harvest.

It is found that Respondent's representatives did take access as work began on this date and did bring non-organizers with them. To the extent that the number of access takers exceeded the agreed number, this was minor and unintentional.

7. The incident on September 9

On this date, Respondent sent ten organizers and four cameramen from SEIU Local 1199 to the Armanino field. Again, the camera crew was brought in without prior notice to, or consent by the Charging Party. They arrived at about 11:15 a.m., while employees were working. Huerta testified that the Local 1199 agents were invited because they also wanted to film a documentary concerning the working conditions, and she wanted to show that the Charging Party was not paying employees for buckets containing a few bad tomatoes, even though it kept the rest.

Huerta and former Regional Manager Rudolph Chavez Medina counted the number of employees present, Huerta estimating the number to be 150. Since Respondent had brought too many access takers, three organizers and one cameraman were sent out of the fields and waited by the vehicles in which they had arrived, but apparently they were still on private property. Employee Jesus Salcedo Ceja estimated there were 90 to a few over 100 employees present which, if correct, would permit seven or eight access takers, rather than the ten present (or 14, as General Counsel would have it, four of whom were not actively meeting with employees.)[6]

During this period, Rodriguez, as he had on many prior occasions, addressed the employees through a bullhorn. Rodriguez would address work-related issues, sometimes shouting slogans, or permitted workers to do this. On this occasion, he urged employees to report to Respondent if the Charging Party was refusing to pay for their buckets of tomatoes.

Rodriguez initially denied that anyone ever complained to his about the use of the bullhorn, but after being shown his prehearing declaration, contradicting this testimony, admitted Guido loudly complained about this on September 9. Other witnesses testified that Guido complained about the use of the bullhorn on many occasions. Guido testified that on September 9,

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[6]See Pinkham Properties (1977) 3 ALRB No. 15. General Counsel contends that the Charging Party's records show that no more than 140 employees, including foremen, could have worked this field on September 9.

he specifically asked Rodriguez to put down the bullhorn, in the presence of employees, and Rodriguez ignored him. In their declarations, Rodriguez and Medina stated that Guido only told them the use of the bullhorn was an improper way to organize employees, but Medina, in his testimony, admitted that Guido told him, on several occasions, that such use was illegal. Based on the foregoing, it is found that at least commencing on September 9, Guido requested that Respondent's agents not use the bullhorn, but they refused to cease using it.

Guido also demanded that the cameras be removed from the field. His demand was not met, so he contacted the San Joaquin County Sheriff's Department, which sent officers to evict the organizers. The total incident lasted over one hour, but Respondent's witnesses testified that any excess time was caused by the arrival of the deputies, and the ensuing investigation by them. Guido, on the other hand, testified that the access takers were present for "a good hour, hour and a half, somewhere around there," prior to the arrival of law enforcement personnel. Guido's testimony on this point was vague, and it is found that the time in excess of one hour was largely, if not totally caused by the arrival of Sheriff's deputies.[7] It is undisputed that Respondent took access outside the noon hour, during working time on this date, and brought non-organizers to take access. It is

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[7]The Sheriff's Department report of the incident (which is hearsay) does not establish that the excess time spent at the premises was not caused by the presence of law enforcement personnel.

also found that Respondent unintentionally permitted too many access takers to enter the fields.

8. The incident on September 24

Dolores Huerta invited Mercedes Rea Silveira, an educator who is active in children's rights issues, Carmen Fernandez and volunteer worker, Luis Martinez, to take access with her at fields being harvested by the Charging Party's employees. Huerta wanted Silveira and Fernandez to witness and photograph the alleged use of child labor. Silveira, who was given one of Respondent's access identification tags, has never been employed by Respondent, and no prior notice of their visit was given to the Charging Party.

Huerta and Silveira testified that as they drove to the fields, Guido initially prevented them from entering, but then relented. While Silveira was in the process of videotaping purported child labor violations, Guido approached and angrily demanded that the photography cease. According to Guido, Huerta, in the presence of employees, told Guido he could not tell her what to do, an allegation not directly denied by Huerta. Guido physically prevented Silveira from continuing the photography, although there is a conflict in testimony as to whether he did this by waiving his hands in front of the camera, or by physically attempting to wrest it from her, and then stalking Silveira, Fernandez, Martinez and Huerta through the field.[8]

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[8]For the purposes of this Decision, it is unnecessary to resolve the conflict in testimony.

Guido contacted the Sheriff's department, but by the time law enforcement personnel arrived, Respondent's contingent had left.

9. The incident on October 3

Huerta testified she informed a reporter from the Modesto Bee that Respondent suspected the Charging Party was selling alcoholic beverages to employees at work. The reporter said he would send someone to cover the story. As the result, photographer Adrian Mendoza was sent to Respondent's office, and took lunch time access with Respondent's representatives, including Rodriguez and Medina, at the Gogna field.

Mendoza, who has never been employed by Respondent, was given Respondent's access identification tag, and entered the fields without notice to, or consent by the Charging Party. When Mendoza began photographing the employees at work, Guido demanded he stop. Mendoza, who had believed he was there with consent, left when told to do so. During this access period, Rodriguez again addressed the workers over a bullhorn. Guido credibly testified he asked Rodriguez to stop using the bullhorn, and Rodriguez again ignored him.

10. The incident on October 13

Guido testified that Perez and Organizer Jose Gonzalez drove onto the access road leading to the Thompson Ranch field at about 1:30 p.m. The entrance to the access road is about one-half mile from the field. Perez parked the vehicle on the access road, blocking tomato trucks from entering or leaving. Guido testified that a State inspector had just arrived to investigate

alleged wage and hour violations, based on the Charging Party's purported failure to pay for its workers' tomato buckets. Huerta admitted that Respondent had contacted various authorities to investigate working conditions.

According to Guido,[9] he approached Gonzalez and Perez, and told them to leave, because it was not access time. Gonzalez replied they were not there to take access, and he and Perez left to observe the investigator. Guido followed them and demanded the vehicle be moved, threatening to tow it and to call the Sheriff's department. At this point they moved the vehicle, but instead of leaving, entered a farmworker's home, which had a telephone. Guido called the Sheriff's department, and when deputies arrived, several vehicles containing other agents of Respondent were close behind. After an investigation by the Sheriff's department, the incident ended.

Perez testified that she arrived at the fields between 1:00 and 1:30 p.m. Perez contends she entered when she did because she believed work was over, since she observed two employee vehicles leave the fields. Said testimony is suspect, since it appears she and Gonzalez were present to meet with the State investigator, and they probably did not care whether work was over or not. Perez further testified that when Guido told her it was not access time, she explained to him she thought the

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[9]Valencia testified he first approached Gonzalez and Perez, and asked them to move the vehicle. When they refused, he contacted Guido. Guido did not mention Valencia in his testimony concerning this incident.

workday was over.

Rather than refusing to leave, according to Perez, Guido prevented their exit by blocking their vehicle with his. Perez is circumstantially corroborated on this issue with respect to a telephone call she made to Respondent's office, purportedly reporting said conduct by Guido. On the other hand, as noted above, Respondent without explanation did not call Gonzalez as a witness at the hearing, and it seems implausible that Guido, who wanted Respondent's representatives off the property, would have prevented them from leaving. It is also noted that Guido's alleged conduct does not appear in the Sheriff's department report, and no unfair labor practice charge was filed in response by Respondent. It is unnecessary to resolve this conflict in testimony, since the undisputed facts show that Gonzalez and Perez entered the property after the noon hour, while employees were still working. It has not, however, been clearly established that employees were close enough to observe the incident, and in particular, the conversations between Guido and Respondent's representatives.[10]

ANALYSIS AND CONCLUSIONS OF LAW

The ALRB established post-certification access rights in O.P. Murphy Produce Co., Inc., dba O.P. Murphy & Sons (1978) 4 ALRB No. 106. A certified representative of agricultural employees has the right to enter the employer's premises to

[10]Assuming employees did observe the incident, and it took place in the more aggravated circumstances as told by Guido, the outcome herein would be unaffected.

discuss contract negotiations, and to investigate working conditions. These rights, however, are not unqualified or free of procedural requirements.

The Board's access regulations are found commencing at Regulations §20900, and provide for one hour of access before and after work, and one hour during the employees' lunch period. If there is no established lunch period, the Board has interpreted this section to mean the time the employees are actually eating their lunch. K. K. Ito & Sons (1976) 2 ALRB No. 51. The access regulations encourage parties to enter into voluntary access agreements, and specify that they may contain terms different than those set forth in the regulations.

Violations of private party access agreements or the Board's access regulations may establish grounds for motions to deny access, objections to the conduct of election or violations of Labor Code Section 1154(a). The Board, in Ranch No. 1 (1979) 5 ALRB No. 36, found that different standards apply when considering whether a particular remedy is appropriate:

> Under 8 Cal. Admin. Code 20900(e)(5)(B), violation of the access rule by a labor organization may constitute an unfair labor practice under Labor Code Section 1154(a)(1) if it independently constitutes restraint or coercion of employees in the exercise of their rights guaranteed by Labor Code Section 1152, and such conduct may constitute grounds for setting aside an election where the Board determines that such conduct has affected the results of the election. Standards different from those set forth in the above regulation section apply to motions to deny access based on violation of the rule. A party submitting a motion to deny access is not required to show that violation of the access rule resulted in the infringement of employees' statutory rights or affected the results of an election. A motion to

> deny access will be granted where the moving party demonstrates violation of our access rule involving either (1) significant disruption of agricultural operations, (2) intentional harassment of an employer or employees, or (3) intentional or reckless disregard of the rule.

A fair reading of the above passage is that the standards for establishing a violation of §1154(a)(1) are more similar to those which establish objectionable conduct than grounds for an order denying access, and that those standards require more egregious misconduct. The decision also shows that the factors listed as grounds for an order denying access, in themselves, do not necessarily establish an unfair labor practice.

General Counsel contends that the photographing and videotaping of employees on August 17, September 9 and September 24 constituted unlawful restraint and coercion. Case law on this issue is not in accord. It is well established that the photographic surveillance of employees, while they are engaged in protected concerted activity, may constitute an unfair labor practice. United States Steel Corporation (1981) 255 NLRB 1338 [107 LRRM 1097], enf. den. United States Steel v. NLRB (CA 3, 1982) 682 F.2d 98; Intermedics, Inc. (1982) 262 NLRB 1407, at page 1415 [110 LRRM 1441]; Ronald L. Blanchard d/b/a Blanchard Construction Company (1978) 234 NLRB 1035 [97 LRRM 1389].[11]

Unions have been found to be unlawfully engaged in

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[11]The Third Circuit, in United States Steel Corporation, supra, disagreed with the NLRB's finding that photographic surveillance of protected activity is per se coercive, and required a showing that under the factual circumstances, the photography reasonably tended to restrain or coerce employees in the exercise of their statutory rights.

photographic surveillance when filming non-striking employees crossing picket lines, meeting with rival union leaders or engaging in dissident union activities. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 695, AFL-CIO (T. B. Wood's Sons Company) (1993) 311 NLRB 1328 [145 LRRM 1157]; Construction, Production & Maintenance Laborers' Local Union 383, Laborers' International Union of North America, AFL-CIO (Carter-Glogau Laboratories, Inc.) (1982) 260 NLRB 1340, at page 1343 [109 LRRM 1383]; Local 3, International Brotherhood of Electrical Workers, AFL-CIO (Cablevision of New York City) (1993) 312 NLRB 487, at page 492 [145 LRRM 1180]; North American Meat Packers Union (Geo. A. Hormel & Company) (1987) 287 NLRB 720, at pages 732-733 [128 LRRM 1137]. In the absence of evidence that employees were photographed while participating in protected activities, the NLRB and ALRB have repeatedly refused to find that the photography, in itself, tended to restrain or coerce employees in exercising their statutory rights. Thus, the NLRB ruled that taking photographs of employees at work, absent a showing that this somehow related to protected activities, did not constitute an unfair labor practice. Bardcor Corp. (1984) 270 NLRB 1083 [116 LRRM 1231].[12] The ALRB, in similar fashion, held that by,

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[12]Union misconduct must be at least as serious as an employer's to establish an unfair labor practice. The NLRB has held that, based on the omission of the term, "interfere with," from §8(b)(1)(A) of the National Labor Relations Act, greater misconduct is required before unions may be held to have committed unfair labor practices under that section, than are employers under parallel §8(a)(1). Said interpretation was

inter alia, bringing an outside television news unit onto an employer's premises outside the times permitted by Regulation §20900(5), Respondent did not engage in objectionable conduct sufficient to warrant overturning an election. K. K. Ito Farms (1976) 2 ALRB No. 51.

Thus, General Counsel's additional contention, that the invitation of non-organizers to take access, in violation of the access agreement, further establishes an unfair labor practice, is not supported by case law.[13] In this case, the employees were photographed at work, but not while engaged in protected activity. Although Respondent invited outsiders in for this purpose on three occasions, as opposed to the one incident in K. K. Ito Farms, and some disruption of work probably took place, this in itself does not establish that said conduct unlawfully tended to coerce employees in their §1152 rights.

General Counsel contends that the abusive conduct by Perez on July 21 and by Rivera on July 29, toward the Charging Party's supervisors tended to coerce employees into supporting

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rejected by the District of Columbia Court of Appeals, which found that employers and unions are held to the same level of conduct in determining whether unfair labor practices have taken place. Helton v. NLRB (CADC, 1981) 656 F.2d 883.

[13]This does not mean that Respondent's conduct, in bringing non-organizers onto the Charging Party's premises, did not constitute access violations, as opposed to unfair labor practices. Both the access agreement and the access regulations refer to organizers being permitted to enter the fields, not individuals from other organizations. Since this case does not involve a motion to deny access, no final conclusions are reached as to whether any of Respondent's conduct violated the access agreement or Regulations.

Respondent. Violence, or threats of violence by union agents, directed against employees, or supervisors in the presence of employees, may be held to be unlawfully coercive, if the conduct reasonably tends to convey the message that employees will suffer violent consequences if they do not accede to the union's demands. Bertuccio v. Superior Court (1981) 118 Cal.App.3d 363; Western Conference of Teamsters, Agricultural Division, I.B.T., and its Affiliated Locals 1173 and 946 (V. B. Zananovich & Sons, Inc.) (1977) 3 ALRB No. 57. On the other hand, the Board has held that vulgar, offensive remarks made by management representatives to or concerning union officials, in the presence of employees, or made to the employees, must contain threats of force or reprisal before they can be considered unlawful under section 1153(a). Gourmet Harvesting and Packing, Inc. and Gourmet Farms (1988) 14 ALRB No. 9. See also Gargiulo, Inc. (1996) 22 ALRB No. 9, at pages 8-9. While the Board found a violation where a union agent actually assaulted and battered a rival organizer,[14] obscene, abusive language and a challenge to fight by a union agent to a rival union organizer, in the presence of employees, was held not coercive to employee rights. Salinas Lettuce Farmers Cooperative (1979) 5 ALRB No. 21. Presumably, remarks by a union official to employer representatives would be subject to the same test.

As the Board pointed out in Gourmet Harvesting, the NLRB has not always imposed such a prerequisite to find that

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[14]Teamsters Union Local 865 (1977) 3 ALRB No. 60.

impermissible denigration of such officials or union supporters constitutes unlawful coercion or restraint of employee free choice. Even in the absence of violence or threats, the NLRB cases have recognized that union-related issues are likely to stir heated emotions, and latitude must be given for rough verbal give and take in labor relations matters. Thus, foul language directed against strikebreakers by a union agent was held not to violate the National Labor Relations Act. International Association of Machinists and Aerospace Workers, AFL-CIO, Aerospace Lodge No. 1233, et al. (General Dynamics Corporation, Pomona Division) (1987) 284 NLRB 1101 [126 LRRM 1008]. In similar fashion, the NLRB held it was not unlawful for a management official to call a union representative a "liar," or to refer to pro-union employees and a union representative as "trash." Precision Castings Company (1977) 233 NLRB 183, at page 196 [96 LRRM 1540]; Serve-U Stores, Inc. (1976) 225 NLRB 37, at footnote 7 [93 LRRM 1033]. The ALRB, in Gourmet Harvesting, supra, found no violation where a supervisor used foul language to union supporters, and called them "chavistas bastards."

Viewing the evidence in the most favorable light to General Counsel's case, it is undisputed that neither Perez, on July 21, nor Rivera, on July 29 engaged in violent conduct or uttered any threats. Under Gourmet Harvesting, supra, their conduct cannot be viewed as unlawful. Even under the general "restraint and coercion" standard, the evidence also fails to show that the conduct of Perez or Rivera would tend to coerce

employees in the exercise of their statutory rights. Neither used foul language, although Perez did use the terms, "bandit" and "coyote." The evidence fails to show that Rivera's conduct caused an employee to dump his bucket of tomatoes, but even if Rivera had encouraged this, there is no evidence he coerced the employee to do anything. A shouting match between union representatives and management representatives hardly leads employees to believe they are required to support the union. Accordingly, it is found that this allegation has no merit.

General Counsel alleges that by taking midday access at improper times on four occasions, with excessive numbers of representatives on two occasions and for an excessive length of time on one occasion, Respondent further violated §1154(a)(1). Said conduct was purportedly exacerbated by the refusal of Respondent's representatives to leave when requested to do so, and by the use of a bullhorn, which the agents also refused to cease using upon demand. Such conduct is generally referred to as "excess access," and in Ranch No. 1 (1979) 5 ALRB No. 36, resulted in sanctions being imposed against an organizer through a motion to deny access.

On several occasions, the Board has overruled election objections based on similar conduct. See Ranch No. 1 (1979) 5 ALRB No. 1; K. K. Ito & Sons, supra; Triple E Produce Corp., supra, enforcement denied on other grounds, Triple E Produce Corporation v. ALRB (1985) 35 Cal.3d 42 [196 Cal.Rptr. 518]; George Arakelian Farms, Inc. (1978) 4 ALRB No. 6. In the latter

two cases, there were several instances in which union officials took excess access and, as noted above, a film crew accompanied the union representatives in K. K. Ito & Sons.

As an initial observation, it is questionable whether there was even an access violation with respect to the entries outside the noon hour. The access agreement does not specify the time for midday access, and the record fails to show the parties reached agreement on the issue. While the access agreement provides for a designated lunch time access, it does not state that the Charging Party has the authority to unilaterally set the time, or that it has to be at the same time each day. Assuming the access agreement, under these circumstances, did not govern when Respondent could take midday access, the Regulations do not contemplate a situation where not only is there no designated lunch period, but employees take their lunch breaks at different times, if at all. It appears, however, that the Board, under such circumstances, permits midday access to be taken at any time, so long as it does not exceed one hour. Ranch No. 1 (1979) 5 ALRB No. 1. On the other hand, Respondent's argument, that it was entitled to take access when it did to investigate working conditions fails, even assuming the access agreement did not cover this type of access, because the Board requires prior notice and consent by the employer, absent unusual circumstances, which have not been shown. O.P. Murphy Produce Co., Inc., dba O.P. Murphy & Sons, supra, at pages 9-11; J.R. Norton Company v. ALRB (1987) 192 Cal.App.3d 874, at pages 906-907 [238 Cal.Rptr.

87].[15]

With respect to the excess number of access-takers and the instance in which the representatives stayed for a period in excess of one hour, the former incidents were isolated and the result of unintentional miscounting by Respondent's agents. Lack of intent to violate access rules is a factor to consider in determining the seriousness of the violation. L & C Harvesting, Inc. (1993) 19 ALRB No. 19. The one occasion where midday access was overstayed has been found to have been largely, if not entirely, the result of the Sheriff's deputies arriving at the scene.

The use of a bullhorn is not mentioned in the access agreement, or the Regulations. Presumably, if the use of a bullhorn seriously disrupted operations, it would constitute an access violation, but not necessarily an unfair labor practice under Ranch No. 1 (1979) 5 ALRB No. 36. Certainly, Respondent's agents were acting at their own peril in simply ignoring demands that they cease using the bullhorn, as well as other protests by the Charging Party's representatives. It is precisely this sort

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[15]Respondent's concern, that the Charging Party would cover up its alleged labor violations, does not authorize a trespass. The record fails to establish that the grievance-related matters were so urgent that the agents could not have waited until the appropriate access time to enter. Respondent also argues that the refusal to permit photographing of working conditions constitutes an unconstitutional limitation on its free speech rights. This argument is not persuasive, since many issues pertaining to union organizing involve free speech considerations, and labor relations agencies often grant or limit the scope of union activity, with obvious free speech implications. Reasonable limitations on access rights, which have free speech implications, are clearly permissible.

of conduct which leads to violence in the fields.

Nevertheless, even assuming the access taking outside the noon hour, excess number of access takers and use of the bullhorn all violated the access agreement, or the Regulations, the evidence still fails to show how this would reasonably tend to restrain or coerce employees into supporting Respondent. Mere disruption of operations does not establish an unfair labor practice. The violation of an agreement, in itself, does not tend to restrain or coerce employees. Affording oneself to more time with employees than permitted, and with more representatives, in itself, does not reasonably tend to restrain or coerce employees in their rights under the Act.

Finally, General Counsel argues that the cumulative effect of Respondent's conduct tended to coerce employees into believing they had to support Respondent, because it could defy the Charging Party at will. General Counsel cites no authority which applies to the facts of this case. Certainly, conduct which causes employees to believe in the power of their representative, in itself, is not unlawful, and many employees would not support a representative they felt was powerless. The case authority is clear that a union engages in violative conduct only when it exercises its power in a manner which is reasonably coercive to employees, and that this generally requires violence or threats of reprisal.

United Farmworkers of America, AFL-CIO (Marcel Jojola) (1980) 6 ALRB No. 58, cited by General Counsel, involved repeated

acts of residential picketing at employees' homes by Respondent, accompanied by foul language directed toward the employees, in an effort to force them to stop crossing its picket line. That case required a balancing of Respondent's free speech rights and the employees' right to privacy in their homes, not at issue here. While unwanted photography also involves an invasion of privacy, the Board and NLRB cases indicate that such invasion, absent a link to protected activities, does not establish restraint or coercion. Communications Workers of America, AFL-CIO (Ohio Consolidated Telephone Company) (1958) 120 NLRB 684, also cited by General Counsel, was a case involving threats, violence and the blocking of ingress and egress by a union during the course of an economic strike, a much different situation than presented herein.

Finally, in District 65, Retail, Wholesale & Department Store Union, AFL-CIO (B. Brown Associates, Inc., et al.) (1965) 157 NLRB 615 [61 LRRM 1382], the NLRB found violations where a union, which had no access rights conducted "swarm-ins" of four employers' premises with numerous unauthorized access takers, shut down production and refused to leave. Although two of the "swarm-ins" involved threats, violations were found in the two where none were made, because they created an atmosphere of fear and confusion, and the direct purpose of the conduct was to solicit employees to join the union.

The instant case does not involve an organizational campaign or a strike. At the time of the access-taking, the

employees had already voted to be represented by Respondent. Under these circumstances, it is clear that the standards set forth in Ranch No. 1 (1979) 5 ALRB No. 36, and those related to the conduct herein discussed above are more pertinent than those cited by General Counsel. In addition, under a totality of circumstances standard, the evidence fails to establish that Respondent's conduct was so grossly inappropriate so as to imply coercion.

It is undisputed that on many occasions, Respondent took access without incident. The Charging Party's employees were accustomed to seeing Respondent's agents at their workplace, and the excesses established by the evidence could not reasonably have had the impact of those in District 65, supra. Even assuming that defiant violations of the access agreement, in themselves, could impermissibly lead employees to believe that Respondent, and not the Charging Party, controlled their employment, the facts herein hardly support such a theory. While in some cases not admirable, the evidence fails to show that Respondent's conduct was highly abusive or constituted a mass invasion of the workplace, beyond what is permitted by the access Regulations.

It should be remembered that the Charging Party, over a period of many years, prevented Respondent from representing the unit employees through various Board appeals and court challenges. Employees could not reasonably believe that Respondent controls their terms and conditions of employment,

since the parties have not even reached a collective bargaining agreement. The Charging Party has exercised its property rights, when it felt they were violated, by invoking State trespass laws, in the presence of employees. Furthermore, the evidence has shown that the Charging Party's representative has also become belligerent, in the presence of employees, when asserting the Charging Party's perceived rights.

In conclusion, while some of Respondent's conduct may have violated the access agreement or Regulations (See Navarro Farms (1996) 22 ALRB No. 10), said conduct did not rise to the level of restraint and coercion under section 1154(a)(1) of the Act. Based on the foregoing, it will be recommended that the complaint be dismissed.

ORDER

The complaint is dismissed in its entirety.

Dated: September 20, 1996

Douglas Gallop
Administrative Law Judge