

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

GARGIULO , INC . ,)	
)	
Employer,)	Case No. 96 -PM- 2 -SAL
)	(22 ALRB No. 9)
and)	
)	
UNITED FARM WORKERS OF AMERICA,)	23 ALRB No. 5
AFL-CIO,)	(April 25, 1997)
)	
Labor Organization,)	
)	
and)	
)	
EFREN BARAJAS; LAURO BARAJAS ;)	
XAVIER ORTEGA; BALTAZAR AGUIRRE;)	
JOSE MOJICA,)	
)	
UFW Organizers.)	

DECISION AND ORDER

On January 24, 1997, Investigative Hearing Examiner (IHE) Thomas Sobel issued the attached decision, in which he found that Efren Barajas, an organizer¹ for the United Farm Workers of America, AFL-CIO (UFW), led a group of UFW supporters onto the property of Gargiulo, Inc. (Employer) in numbers in excess of those authorized by regulation governing organizational

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¹Mr. Barajas formally holds the position of Third Vice President in the organization. The other organizers listed above were originally named in the motion to deny access, but no allegations specifically involving these organizers were set for hearing.

access,² thus showing an intentional or reckless disregard for the rules set forth in the regulation. All other allegations of conduct in violation of the regulation were dismissed by the IHE. As a remedy for the violation, the IHE ordered that Efren Barajas be barred from exercising the right of access provided by the regulation anywhere in the area covered by the Board's Salinas Regional Office for a period of 60 days, commencing when the UFW next files a Notice of Intent to Take Access to the property of any agricultural employer located in that region.

Both parties timely filed exceptions to the decision of the IHE, the UFW arguing that no violation should have been found and the Employer arguing that the evidence warranted the finding of additional violations. The Board has reviewed the decision of the IHE in light of the record and the exceptions and briefs of the parties and affirms the findings of fact and conclusions of law of the IHE and adopts his proposed remedy, as modified herein.³ As discussed below, in some instances we believe it

²The regulations of the Agricultural Labor Relations Board (ALRB or Board) grant union representatives a qualified right of preelection organizational access to an employer's property in order to meet with agricultural employees at their work site under strict procedural, time and manner limitations. (Title 8, California Code of Regulations, section 20900 et seq. ; *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392.)

³The Employer's request for oral argument is denied. The additional request that the Board re-examine the entire process leading to this decision, including reconsideration of the Board's decision setting the matter for hearing (22 ALRB No. 9) and its order denying enforcement of the Employer's subpoena (Admin. Order No. 96-12) is also denied, as the particular facts and circumstances of this case do not warrant a formal re-
(continued...)

helpful to explain our agreement with the conclusions of the IHE.⁴

DISCUSSION

The Violation Found By The IHE

The UFW asserts that the Board, in denying enforcement of the Employer's subpoena in Administrative Order No. 96-12, predetermined that there was no numbers violation of the access rule on June 14, 1996. This is not correct. In the administrative order, the Board stated that it was irrelevant whether the group allegedly led onto the property by Efren Barajas were official UFW organizers or merely supporters. The intent of this statement was that the UFW was responsible for whomever it took in with it during access, i.e., anyone the union organizers bring in along with them during access are agents of the union for that purpose.

In a related argument, the UFW asserts that there could be no access violation because the group led in by Barajas

(. . .continued)

examination of the entire process. Nor is this the proper forum for such an undertaking. However, the Board does share the frustration with the efficacy and the length of the present process for enforcing the access regulation and will continue to seek to improve the process.

⁴The IHE's findings with regard to the time the group entered the Employer's property and with regard to the alleged statements by Barajas on June 14, 1996 at Jensen Ranch are by necessity heavily dependent upon credibility determinations. The Board will overrule credibility determinations only where a clear preponderance of relevant evidence demonstrates that they are incorrect. (*Standard Drywall Products* (1950) 91 NLRB 544; *David Freedman & Co.* (1989) 15 ALRB No. 9.) The record here provides no such indication.

consisted of off-duty Gargiulo employees who had an independent right to be on the property. While it is true that off-duty employees normally may solicit union support from fellow employees in non-working areas, as found by the IHE, this is not determinative. The access regulation gives a union a limited right to solicit support from employees on the employer's property and it may only bring a limited number of people onto the property to carry out this mission. It is therefore reasonable to hold a union responsible for whomever it invites in with it during access and to prohibit the use of access time for other purposes, such as union-led or sponsored demonstrations, even if some or all of the participants had a right to enter the property if not acting as agents of the union.

The Allegations Found Unproven

a. The Shouting of Obscenities on June 14, 1996 at Jensen Ranch

The IHE and the parties appear to have interpreted the questions set for hearing by the Board in *Gargiulo, Inc.* (1996) 22 ALRB No. 9 as implying that the shouting of obscenities by access takers or organizers could constitute an independent access violation. This was not the Board's intent. The access regulation itself, at section 20900 (e) (4) (C), states that speech alone shall not constitute disruptive conduct. Further, in the Board's decision (at pp. 8-9), the Board explained that the access rule does not regulate the content of the union's message and that the exchange of insults does not violate the regulation.

While no doubt the Board could have been more clear in

its earlier decision, the reference to the shouting of obscenities was added to the questions set for hearing because the Board understood the allegation to be that the group entered the property early and shouted obscenities at the workers in the field. This was viewed as prima facie evidence of disruption of work as incident to the early entry onto the property. Since it has been found that the group did not enter the property prior to the proper access time and the exchange of obscenities occurred in the parking lots, with no evidence that work was disrupted thereby, it is irrelevant whether the shouting of obscenities was systematic or otherwise attributable to the union under agency principles. Thus, when placed in the proper context, the evidence of the shouting of obscenities does not constitute the basis for an independent access violation, regardless of whether the UFW could be held responsible for the conduct.

b. The Proper End of the Access Period on June 15 at Holly Ranch

It is undisputed that the UFW organizers entered the Employer's property at approximately noon and left at 1:45 p.m. The crews were instructed to cease working at noon and, with regard to crews that did not immediately cease, were again instructed to do so at 12:10 p.m. Accounting for time to have their cards punched and exit the fields, the IHE concluded that the employees were in the parking lots by 12:30 p.m., where the UFW organizers had access to them.⁵ By this account, the access

⁵Travel time, i.e., the time it takes for either the employees or the union organizers to travel to the location where the actual communication takes place does not count against a

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period would have ended at 1:30 p.m. and the organizers would have run over by 15 minutes.

However, we consider the 12:30 p.m. time noted by the IHE to be the time the harvesters would have reached the parking lot, for, as also noted by the IHE, the time cards demonstrate that other employees (punchers and tractor or truck drivers) did not cease working until either 12:30 p.m. or 1:00 p.m.. The Board has previously established that access may be staggered when groups of employees finish working at different times. (*Gourmet Harvesting- and Packing* (1978) 4 ALRB No. 14; *Triple E Produce Corp.* (1991) 17 ALRB No. 15.) Based on the facts before us, we agree with the IHE that the Employer did not carry its burden of demonstrating that the organizers showed an intentional or reckless disregard for the access rules by remaining on the property well after the access period should have ended, c. Barajas' Alleged Statement on June 15, 1996 at Holly Ranch

The Employer asserts that the IHE mistakenly discredited Daryl Valdez' testimony concerning comments attributed to Efren Barajas on June 15, 1996 at Holly Ranch on the basis that Valdez gave deliberately misleading testimony with regard to when the group entered the property on June 14, 1996 at Jensen Ranch. The Employer points out that Valdez merely testified that the group was inside the gate when he arrived at 1:00 p.m. and did not testify as to when the group actually

(...continued)
union's allotted time for access.

entered. While this appears to be correct and, therefore, one basis for the IHE's credibility determination may not be valid, we believe other considerations alleviate the need to consider Valdez' credibility.

Both Valdez and Larry Galper testified that, in the midst of a dispute as to when the hour for access began, Barajas stated that he would determine when access was over. This allegation was included in the matters set for hearing by the Board because it reflected, when viewed in conjunction with the alleged statement by Barajas on the previous day that he would follow any access rules he chose, a cavalier attitude toward the established limits on access. However, with the benefit of a full record establishing the context of the statement and in light of the failure to prove that Barajas made the more serious statement attributed to him on June 14, the June 15 statement takes on an innocuous character. In the context' of a dispute as to when the employees finished work and, thus, when the access period would end, the statement attributed to Barajas may be reasonably interpreted as nothing more than an assertion that he knew when the access period would be over and he would not take their word for it. Indeed, in light of surrounding circumstances, the incident reflects much more about the personal relationship between the parties' representatives than it does Barajas' attitude toward the integrity of the access rules. For this reason, we find that the evidence is insufficient to demonstrate that in this instance Barajas showed an intentional or reckless disregard for the access rules.

The Order

The Employer objects to the IHE's recommended order because it bars Efren Barajas from taking access in the Salinas Region, rather than specifically to the Employer's property.⁶ In our view, a remedy extending to the entire region is appropriate in this case, and we note that such a bar necessarily includes the Employer's operations. While the IHE simply modelled his order on the order issued in *Ranch No. 1* (1979) 5 ALRB No. 36, we believe that such orders are more meaningful if they cover a specified period during which access otherwise would be likely to occur. Accordingly, we shall bar any access by Barajas in the area covered by the Board's Salinas Regional Office for a period of sixty days beginning June 1, 1997.

ORDER

Having found that UFW organizer Efren Barajas has shown intentional or reckless disregard for the access regulation by leading a group of demonstrators onto the property of Gargiulo, Inc. on June 14, 1996 at Jensen Ranch, the size of said group exceeding the limitations on the number of organizers authorized under the regulation, Barajas is hereby barred from taking access

⁶The Employer also argues that the order should apply to the UFW as a whole because the UFW is responsible for the conduct of its agents and the IHE concluded that the "Union" committed a numbers violation. While it is true that on page 26 the IHE stated that the "Union" violated the numbers provision, this was obviously inadvertent. Every other reference to his findings, including the initial one on page 25, clearly refers only to Barajas. In addition, as the IHE stated, the Board specifically restricted the issues set for hearing to whether Barajas violated the access rule.

in the area covered by the Board's Salinas Regional Office for a period of sixty days beginning June 1, 1997.

DATED: April 25, 1997

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

TRICE J. HARVEY, Member

CASE SUMMARY

Gargiulo, Inc.
(UFW, Efren Barajas)

Case No. 96-PM-2-SAL
23 ALRB No. 5

Background

On January 24, 1997, Investigative Hearing Examiner (IHE) Thomas Sobel issued a decision in which he found that Efren Barajas, an organizer for the United Farm Workers of America, AFL-CIO (UFW), led a group of UFW supporters onto the property of Gargiulo, Inc. (Employer) in numbers in excess of those authorized by regulation governing organizational access, thus showing an intentional or reckless disregard for the rules set forth in the regulation. All other allegations of conduct in violation of the regulation were dismissed by the IHE. As a remedy for the violation, the IHE ordered that Efren Barajas be barred from exercising the right of access provided by the regulation anywhere in the area covered by the Board's Salinas Regional Office for a period of 60 days, commencing when the UFW next files a Notice of Intent to Take Access to the property of any agricultural employer located in that region. Both the Employer and the UFW filed exceptions to the IHE's decision.

Board Decision

The Board affirmed the IHE's decision, but modified the remedy to provide a specified period, sixty days beginning June 1, 1997, in which Barajas is to be barred from taking access within the Salinas region. In addition, the Board clarified that the shouting of obscenities in and of itself does not constitute an independent access violation, and that the evidence in the record failed to show that such activity disrupted operations. In affirming the IHE's conclusion that the Employer failed to prove the allegations of access violations on June 15, 1996 at Holly Ranch, the Board relied on a somewhat different analysis. With regard to the allegation that the UFW organizers remained on the Employer's property well after the proper end of the access period, the Board noted that some employees left the fields well after the time asserted by the Employer and that established principles allow the access period to be staggered in such circumstances. With regard to the allegation that Barajas stated that he would decide when it was time to leave, the Board found that with the benefit of a full record establishing the context of the statement and in light of the failure to prove that Barajas made the more serious statement attributed to him on June 14, the June 15 statement takes on an innocuous character that does not reflect an intentional or reckless disregard for the access rules.

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
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GARGIULO, INC.,) Case No. 96-PM-2-SAL
)
Employer,)
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and)
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UNITED FARM WORKERS OF AMERICA,)
AFL-CIO,)
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Labor Organization,)
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and)
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EFREN BARAJAS; LAURO BARAJAS;)
XAVIER ORTEGA; BALTAZAR AGUIRRE)
AND JOSE MOJTCA,)
)
UFW Organizers .)

Appearances:

Ronald Barsamian
Barsamian & Saqui
for Employer

Nate Kowalski
Darcy J. Griffin
Marcos Camacho A Law Corp
for Labor Organization &
Labor Organizers

DECISION OF THE INVESTIGATIVE BEARING EXAMINER

THOMAS SOBEL: Investigative Hearing Examiner: This case was heard by me on October 1-3, 1996 in Salinas, California. Pursuant to Title 8, Code of California Regulations, Section 20900(e)(5)(A), the Employer filed a Motion to Deny Access. The Board reviewed the showing in the Employer's Motion and set the following two questions for hearing:

1. On June 14, 1996, at Jensen Ranch, did UFW organizer Efren Barajas show an intentional and/or reckless disregard for the Board's access regulations by leading a group of supporters onto the property of the Employer about an hour and fifteen minutes before the proper time of access, where the group shouted obscenities at workers in the field and Barajas stated that he would follow any access rules that he chose?

and

2. On June 15, 1996, did UFW organizers show an intentional and/or reckless disregard for the Board's access regulations by remaining on the Employer's property for approximately 40 minutes past the proper time for access and by Efren Barajas stating that he would decide when it was time to leave?

Briefs were filed on December 12, 1996.

I. The Incident on June 14, 1996

A. Facts

1. Background

The Employer grows strawberries on a number of parcels in Monterey County. The incident on June 14 took place on the so-called Jensen Ranch. Three ranches bear the Jensen name. All of them lie at the end of a public road from which they derive their name and which splits into two branches beyond a gate so that road and branches together form a "Y." Above the gate, there is a house

which, belongs to Mike Willetz. The area which was the focus of activity in this case is roughly a triangular piece of property, one side of which is formed, on the map in evidence,¹ by the right branch of the "Y" . Through the gate and along the line of the "Y" toward this ranch, are two parking lots connected by a narrow dirt road.

2. The Events

Deputy Jeffrey Moore of the Monterey County Sheriff's Department testified that he and his partner responded to a call about a disturbance on Jensen Road on June 14. Moore's incident report indicates that he received the call at 11:38 a.m. If the call came in at 11:38 a.m., something had to have been going on at Jensen well before noon.

Moore testified that he and his partner arrived on the scene about 10-15 minutes after they received the call and observed about 60 UFW demonstrators² on both sides of Jensen Road. The Employer's other witnesses place Moore's arrival closer to 12:30 p.m.³ Whenever he arrived, Moore spoke to Manuel Izquierdo, who happened to be the first person whom he found who could speak

¹See ERX 1.

²Since the demonstrators were carrying banners with the familiar black eagle on a red field, the symbol of the United Farm Workers of America, AFL-CIO, I find them to be UFW demonstrators.

³Enrique Leal: (RT p. 58), deputies arrived 15 minutes after the first group of demonstrators who came at 12:15 p.m.; Adan Gomez: (RT p. 105) , deputies arrived after 12:15 when the first group of demonstrators arrived; Larry Galper: (RT p. 220), deputies arrived around 12:30.

English, and who told him the UFW was conducting a demonstration against Gargiulo. Izquierdo told him Lauro and Efren Barajas (hereafter Lauro and Efren) were in charge.

To the extent the Employer's witnesses described a demonstration as far in advance of noon as did Moore, it was at the Employer's Academy Ranch and not at Jensen. According to Larry Galper, the Employer's General Manager, several UFW organizers, including Lauro, met the Academy crews as they left the fields and formed a picket line. (RT p. 211.) Although Galper put this demonstration as early as 11:45, UFW witnesses placed it closer to noon. Jose Rojas, an Academy employee, who took part in the Academy demonstration, testified that he was one of the last of the Academy workers to punch out on the 14th, and he did so at 12:08, (RT p. 434.) which implies that the events at Academy went past noon. Lauro admitted organizing a demonstration around noon at the Academy,⁴ but implied that it went well past noon since, according to him, he did not arrive at Jensen until 12:45.

Galper, however, testified that he left the Academy shortly before noon and he "was followed by Lauro and the boys; they all jumped in cars and followed me." (RT p. 213.) According to him, it takes about ten minutes to drive from the Academy to the Jensen

⁴Lauro's testimony is confusing: asked what he was doing around noon on June 14th, he answered "organiz[ing] some workers to do a demonstration at the Jensen Ranch." (RT p. 470, 11. 11-13) which, as it stands, might mean that he was at the Jensen Ranch at noon. However, he later testified he arrived at the Jensen Ranch at 12:45 p.m., (RT p. 471.) Putting his answers together, I take his testimony about "organizing" some workers "around noon" to mean he was at the Academy at noon preparing the workers to go to Jensen.

Ranch and he arrived a little before noon with "Lauro and the boys" in tow. (RT p. 213.) If, as Galper testified, Lauro were present at the start of the events at Jensen,⁵ he and Galper disagree by as much as 45 minutes about when he got there.

The Employer's other witnesses also placed the start of the Jensen demonstration close to noon. Mike Willetz testified that shortly after noon, (RT p. 15.) he heard a loud chanting outside his house. Looking outside, he observed a group of 50-60 people, many of whom held UFW banners. Enrique Leal, the Employer's Ranch Manager, testified that sometime around 12:15, about 15 cars parked along Jensen Road and somewhere between 70-80 people emerged from them. (RT p. 57.) Leal recognized some of the demonstrators as Gargiulo workers, and some as UFW organizers whom he had seen before, including Lauro.

Flavio Carrillo, Roberto Valdivia and, perhaps, Adan Gomez, corroborated Willetz's and Leal's testimony to the extent they testified that sometime around 12:15 they saw the Union people arrive.⁶ I speak of Gomez as "perhaps" corroborating a noontime

⁵Lauro's testimony that it was the Academy workers "turn" to demonstrate, See, (RT p. 471), implies that the demonstration at Jensen could only have begun when he and the Academy workers arrived, provided no one but Academy workers took part. However, I take administrative notice that one of the declarations submitted with the Union's opposition to the Employer's Motion indicates that workers from another of the Employer's ranches --Cuevas -- were at Jensen on the 14th. See, Exhibit G, dated July 9, 199S, UFW Response to Motion for Hearing to Deny Access, dated July 10, 1996.

⁶Gomez, (RT pp. 105, 106) about 60-80 people; Carrillo, (RT p. 148) about 60 people, (RT pp. 151-152; Valdivia, RT pp.164, 165.)

commencement because in the same breath he also testified, that the demonstration started "around one or so." (RT p. 108, 11. 5-6.)

Carrillo's and Valdivia's testimony diverges from Galper's, Leal's, and even Willetz's, in that they testified the group went directly to the parking lots,⁷ while Gomez's testimony differs from that of Galper's and Leal's in that he testified the group may have included Efren Barajas, (RT p. 107-108.) No other Employer witness placed Efren at Jensen this early, although Efren testified that he was there between 12:00 and 12:30. With the exception of Carrillo and Valdivia, all the other Employer witnesses agree that the group initially remained outside the gate at the end of the public road and in front of Willetz's house. Indeed, Gomez testified that he placed a truck in front of the gate in order to keep the demonstrators out and Jose Rojas agreed that the demonstrators were prevented from entering the ranch. (RT p. 431.) Galper, too, testified that the group remained outside the gate until at least 12:30; according to him, the crowd was so much of a problem that the deputies enlisted Lauro's aid in moving the demonstrators away from the entrance. (RT p. 222-23.)

It is generally agreed that, while the demonstrators were outside the gate, Efren, the Third Vice-President of the UFW and the man in charge of the Union's Central Coast organizing campaign, also arrived. Galper placed his arrival with a second group of demonstrators (perhaps 30 more people) after 12:30, although he

⁷Carrillo, (RT p. 152; Valdivia, RT pp. 164, 165.) No one went to the fields, (RT p. 161.) [Valdivia.]

acknowledged that it could have been a little later, but not earlier. (RT p. 228, 230.) Leal placed it closer to 1:00, "12:50 more or less." (RT p. 96, See also, RT p. 63.) Carrillo agreed that a second group of demonstrators arrived some 45 minutes after the first group, or around 1:00, (RT p. 153) , so that if Efren was in the second group, according to Carrillo, too, he must have arrived at 1:00.

According to Galper, until Efren arrived, Lauro had restrained the demonstrators, but Efren immediately started "to rally them, "talking to [them] and leading the parade", "making hand motions", (RT p. 227-28), and sometime around 12:30, he "started going in through the gate", (RT p. 228) with "the whole" line of demonstrators trailing behind him, (RT p. 229.) Leal testified that, after the second group of demonstrators arrived, the entire group appeared "to confer and then proceeded [through the gates] to the parking lots." (RT p. 109.)

Willetz testified that sometime between 12:30 and 12:40, (RT p. 28) or perhaps half an hour after he first heard the chanting, (RT p. 18-19) the demonstrators entered the ranch and went to the parking lots. If Willetz were describing Efren's taking access with the demonstrators, in his chronology too, Efren must have arrived sometime around 12:30; however, his estimate of how many people entered the parking lot -- "several" -- does not comport with Galper's or any other of the Employer's witnesses'

testimony about how many demonstrators entered the property.⁸ Gomez, too, testified that Efren and about 100-115 people entered the property at around 12:45, although not before he also testified that the second group, including Efren, arrived at 1:45. (RT p. 112.) Although Daryl Valdez, the Employer's Director of Human Resources, did not see the group enter, he testified that by 1:00 p.m. when he arrived, there were about 50-60 UFW demonstrators, including Efren, in the parking lots. (RT p. 305, 307.)

Valdivia and Carrillo did not specify a time when the demonstrators entered the ranch. However, subtracting their estimates of the amount of time the demonstrators were inside the property before the harvest crews finished work from the time when the first crew finished, one can calculate the earliest time at which, according to them, the demonstrators must have entered the property.⁹ Although Galper testified the first harvest crews quit at 2:00, the time cards show that Crews 1 and 2 stopped at 1:30, Crew 3 stopped at 1:45, and Crews 4 and 6 stopped at 2:00, ErX 4. Thus, Valdivia's testimony that the demonstrators went to the parking lot about 45 minutes before the harvest crews finished, (RT p. 166) means that, according to him, they entered at 12:45 at the earliest; and Carrillo's testimony that they were on the ranch for about an hour and 45 minutes before the harvest crews finished

⁸To emphasize the difference between Willetz's and the others' testimony on this point, Willetz also testified that "some of the people remained on the road", that is, outside the gate, Ibid.

⁹I choose the earliest time since the Employer contends the demonstrators entered before any of the crews finished.

work, (RT p. 153) means that they must have entered at around 11:45.¹⁰

Galper testified that, as the demonstrators entered the ranch, he told Efren that access was not permitted because it was beyond the lunch hour, there, were too many people and they were not identified¹¹, (RT p. 228) to all of which Efren responded, "Fuck you, I make the rules here it is my access, I'll decide what I am going to do with it." (RT 'p. 229.) Galper, who testified he followed the crowd into the main parking, heard a woman whom he identified as "Nora", and whom he had previously seen wear the identification badge of a UFW organizer,¹² calling employees (who, according to him, were still working at least 100 yards away) "kiss asses." (RT p. 232-33.)¹³ Gomez testified that the group first went to the upper lot and then to the lower lot and, wherever they went, shouted obscenities, such as "cabrones", "barberos", "hijo de chingada. "¹⁴ (RT p. ill.) Carrillo and Valdivia testified they observed the group in the lower parking lot and after declining to

¹⁰ Recall that Carrillo testified that the first group of demonstrators entered the parking lot at 12:15, (RT pp. 151, 152) this group was in the parking lots for about 45 minutes before the second group arrived and entered. (RT p. 152.)

¹¹ The Board did not set the issue of proper identification for hearing.

¹² UFW witnesses denied any organizer is named Nora.

¹³ Carrillo placed at least one picking crew about 3-400 meters away from the parking lots. (RT p. 159.)

¹⁴ The words mean, respectively, "motherfucker", "ball-lickers", "sonsabitches." Gomez also testified the demonstrators called the workers "cowards"; although insulting, this is not an obscenity and I disregard it.

take a flag, (RT p. 156) were called "barberos and cabrones." (RT p. 153, 166.) Though Carrillo admitted he responded, he not very convincingly denied responding in kind. (RT pp 155-56.)¹⁵ Galper, however, testified that he had to warn the two not to get into it with the demonstrators. (RT p. 287.)

Union witnesses do agree that, at some point, Efren and the demonstrators entered the Employer's property; however, according to them, the group as a whole did not enter the property until after the harvest crews finished work, but remained on the public road chanting slogans (but not obscenities) until the crews finished. Efren also testified that he and four other organizers took lunchtime access at Jensen for "that's normally the time that the Company give [sic] the lunch hour to the workers", (RT p. 354)¹⁶, but he was out of the fields by 12:30. (RT p. 355.) On his way back to the office, he received a call on his earphone that something was going on at Jensen Ranch, (RT p. 355) and he returned and discovered that about 10 UFW organizers and about 25 workers from Gargiulo had set up a picket line, (RT p. 356) whereupon he joined the demonstration outside the gate.

According to Efren, he entered the property when he observed the crews' leaving work. Rojas and Lauro also testified

¹⁵I might add that Carrillo placed at least one picking crew about 300 yards away from where he stood in the fields above the lower lot when the demonstrators during these events. (RT pp. 159, 161, 162.)

¹⁶Company witnesses agreed that the workers take their lunch at noon, see, e.g., Galper (RT p. 216) [Crews take half an hour lunch at 12:00 and, in fact, took their lunch at noon on June 14th at noon.]

the demonstrators did not enter the lot until between 1:30-45 when the crews stopped working. (RT p. 433; RT p. 472.) According to Efren, he did not "take" the demonstrators in, rather they followed him in when he entered. Rojas testified that during demonstrations organizers and employees mutually reinforce each other's actions,¹⁷ but he acknowledged that organizers lay down general rules,¹⁸ and even "tell us more or less everything that we have to do." (RT p. 448.)¹⁹

Efren agreed that he and Galper spoke to each other about the propriety of taking access, but Efren added that when he spoke to Galper, he asked him to leave:

because it [was] our access time and we don't want him around because the workers they don't want to talk to the organizers if the boss is around so I asked him to leave. He refused and he complained that there is too many organizers so I offered to let the five organizers that we have that day [sic] and he refused, he don't want to do that. * * * I tell him, look, -- we, I'm here, you're here, let's count it. * * * I know who the organizers are, they're a lot of people here,²⁰

¹⁷" . . . [What they shout, we shout, we support them. Or when we shout they support us, the same words. We support each other." (RT p. 447.)

¹⁸"They tell us no drinking, no violent language", (RT p. 447) "where not to be, not to be in the way or there's a place that is forbidden." (RT p. 447.)

¹⁹Before leaving the question of "leadership" I should also note that at one point, Adan Gomez testified he heard Barajas urging the crowd to go in and "make a stoppage." (RT p. 112.) However, when asked again if it were Barajas who said this, he testified he wasn't sure. (RT p. 113.)

²⁰There seems to be no dispute that, as Efren testified he told Galper, the group consisted only of non-employee organizers and Gargiulo employees. Leal, too, described the demonstrators as either Gargiulo employees or organizers. (See, RT p. 57.)

but they're your workers and we can prove that; you know many of them and they have the Company identification card so let's resolve that. * * * And he refused to do that, too.

RT p. 358-59

Moore corroborated the Union's witnesses' account that the group only began to move through the gate when "the field workers were returning to their vehicles." (RT pp. 182, 188, 192 .)²¹ Indeed, Moore recalled Galper saying "something to the effect of here we go now, they're going to bother my workers. And at that point, all of the 60 or so demonstrators moved onto the, moved to the parking lot area where the farm workers parked their vehicles." (RT p. 182.)²² Moore was sure that no demonstrators were in the fields as the workers "were coming out of the field." (RT p. 192, 11. 21-23.)

Galper testified that employees were immediately surrounded by demonstrators who "yelled at them, and wouldn't let them take their shoes off and wouldn't let them get into their cars", who called them "a bunch of kiss asses and a bunch of dumbfucks and a bunch of mother fuckers." (RT pp. 234, 235, 240.)

²¹The Employer contends that the rest of Moore's testimony indicates that the demonstrators entered before 1:30 p.m. In this respect, the Employer relies on 1) Moore's testimony that he arrived at Jensen shortly after 12:00 noon and 2) the Employer's rendering of Moore's testimony that the demonstrators entered "approximately one hour later." Brief, p. 27. Moore did not testify that the demonstrators entered approximately one hour after he arrived, but rather that it would be difficult to provide an exact time but he believed "we were out there for at least an hour prior. ..." (RT p. 192.)

²²Galper admitted that he spoke to Moore at some point while the UFW organizers were entering the field, but implied that it took place earlier ["after 12:30 at the earliest, (RT p. 296-97.)"]

According to Galper, Efren not only did nothing to control the crowd, but was in "the middle of them trying to fire them up", (RT p. 235) "leading chants and waving his stick [flag.]" (RT p. 236; See also, Gomez: RT p. 157.)

Gomez testified the demonstrators went "round and round the cars, and . . . didn't let the people leave." (RT p.. 157.) He overheard Union people shouting obscenities and telling people to join the Union and not .to be afraid. He heard workers tell the demonstrators "move away son of a bitch" so they could leave the parking lot. (RT pp 142-43.) He also testified that demonstrators in the narrow canyon between the two lots impeded the departing workers. (RT p. 115-17.) Leal heard demonstrators tell workers not to leave, to join the Union, that they didn't have the balls to join the Union, (RT p. 76) or they were "ball-lickers. "²³

Mercedes Ramos recalled that when she left work at about 2:00 p.m., there were about 40-60 people in the main parking lot, (RT p. 200.) One of them approached her and asked her and her companion if they wanted a button. When they declined, they were called queers and whores. (RT p. 202.) She also heard people say that this group of "putos" was not going to win. Though she admitted that employees could leave once they got into their cars, (RT 204) it was not without a little delay. She did not hear obscenities being generally shouted. (RT p. 205.)

²³Leal also testified he heard the demonstrators tell workers if they didn't sign up, they would be fired in 5 days. Since the Board did not set the issue of threats for hearing, I will make no finding concerning it.

According to Galper, he went up to Efren again and told him he "had to stop this, this is crazy", "you're breaking the rules of access, you've got to follow the rules", (RT pp. 235, 236) and Efren gave him his "standard old fuck you, we'll do whatever we want, we make the rules, we take access when we want". (RT p. 236.)

So far as contacts between the demonstrators and the departing crew members is concerned, Moore observed:

In some instances we saw a group of farm workers standing in front of what I assumed was the employee's car as the employee or farm worker rather was trying to get into his or her vehicle.

* * *

The demonstrators in some instances were standing in front of the farm workers' vehicles and they were yelling back and forth in Spanish. I didn't see any real acts of violence, for that matter, but just basically prohibiting them from leaving. (RT pp. 185-86.)

Though Moore admitted he speaks no Spanish, he also testified that he knows a number of Spanish obscenities, having been called quite a few of them, (RT p. 191) such as "chingada" and "cabron", and he did not hear any of the obscenities he knows when he roamed the lots. (RT p. 195.) He did recall hearing at least one chant, "Si se puede." According to Moore, once the demonstrators entered the property, it took about an hour for the lots to clear. Galper, too, testified that once the crews left the fields, it took an hour for the lots to clear. (RT p. 243.) Lauro heard no obscenities.

B. Concluding findings

There are four elements to the inquiry as framed by the Board concerning the events at Jensen:

- 1) When did Efren and the group of supporters enter the Employer's property;
- 2) Did he "lead or encourage", the group of supporters onto the property?²⁴
- 3) Did he state that he would follow any access rules he chose?
- 4) Did the group shout obscenities at workers?

I will take up the questions in order.

- 1) When did the group enter the property?

Despite the lack of unanimity among the Employer's witnesses about when Efren and the group entered the property,²⁵ all but Moore testified that they entered before, and all the Union's witnesses and Moore testified they entered after, the harvest crews finished work. Finding truth in Moore's inconsistency, the Union urges me to credit him; finding falsehood in consistency, the Employer contends that the Union's witnesses

²⁴ See, Admin. Order 96-12, dated November 5, 1996.

²⁵ As a general matter, I do not find the range of times given by the Employer's witnesses to be surprising and, therefore, to tell against the credibility of the Employer's overall account that the group entered before the crews finished. Except for people who might have some special interest in noting when something takes place, I would not expect witnesses to more or less exciting events to be checking their watches. On the other hand, based on their obvious interest in either enforcing the limitations, or taking advantage of, the Access Rule, I would expect Galper, Valdez and Efren to be aware of the time. Unfortunately, they have opposing interests and gave conflicting testimony. In such circumstances, Moore's professionalism and lack of any obvious bias make him a particularly credible witness.

obviously collaborated so that "everything [would occur] approximately one hour later than it actually did." Brief, p. 28.

While Moore's testimony about the sequence of events is proof against this argument, the Employer nevertheless urges me to base my findings on a time line computed by adding the one hour which, according to the Employer, is approximately how long Moore testified he was on the property before the group entered, to the time he testified he arrived (before noon) in order to conclude that he actually corroborated the testimony of the Employer witnesses who related that the group entered around 1:00 p.m. However, as I have noted, Moore did not testify that he was on the property for only an hour before the demonstrators entered, but for at least an hour, which is entirely consistent with his testimony about the order of events and is thus too ambiguous for me to conclude that he was mistaken in his extremely clear and detailed testimony about the sequence of events.

The Employer also contends that, despite Moore's testimony, the Union's version, and especially Efren's testimony about taking lunchtime access before returning to Jensen around 1:00, cannot be squared with the record as a whole. Thus, the Employer argues that if Efren took lunchtime access, and if Lauro arrived at 12:45, Efren must have just missed seeing him. Post-Hearing Brief, p. 27. While this is true, I don't understand how it reflects on the credibility of either Lauro's or Efren's account. Although the particular example the Employer cites does not prove much, I don't slight the Employer's argument: it is hard to reconcile Efren's

account with certain aspects of Lauro's testimony or Moore's testimony. For example, Moore's testimony that he was at Jensen before noon and that the demonstrators were already there means that he and the demonstrators were also present while Efren was taking access, something which Efren never mentioned, and which is inconsistent with the strong implication in Lauro's testimony that the demonstration only involved the workers from the Academy and they did not arrive until well after noon.²⁶

These gaps in the Union's version of events might be more significant if Efren's testimony about taking access earlier did not receive unlikely corroboration from certain curious features of Carrillo's, Valdivia's, Gomez's and even Willetz's testimony that cannot be reconciled with the main lines of the Employer's account. Thus, Carrillo's and Valdivia's testimony that the demonstrators entered the property upon arriving, Willetz's testimony that when the demonstrators entered, only several did so and the rest remained outside the gate, and Gomez's testimony that Efren was with the initial group of demonstrators, can be explained by their confusing the later events with what Efren testified took place earlier.²⁷

²⁶I have already noted that at least one declaration submitted with the Union's response to the Employer's Motion indicates that there were employees from other ranches involved at Jensen which, if true, helps to reconcile Moore's testimony with the implication of Lauro's testimony.

²⁷I am not overlooking the inconsistencies between Efren's account and 1) Willetz's other testimony that access started at around 12:30 p.m.; 2) Carrillo's and Valdivia's testimony that all the demonstrators took access at 12:15; 3) Valdivia's testimony that when the UFW people took access, no one went to

I have no need to determine exactly when Lauro arrived or how many times Efren visited the property; my only purpose in considering such matters to the modest degree I have is to determine whether certain puzzles created by their testimony undercuts the credibility of Moore's version of events and I do not find that it does so. The Employer has offered no persuasive explanation as to why Moore's testimony should not be credited. He has no interest in these proceedings,²⁸ and the remarks he recalls Galper's making about the UFW's bothering his crews were specific and particularly credible. Accordingly, I find that the group did not enter the property until after the harvest crews finished work.

2) Did Efren lead the group onto the property?

Despite Efren's testimony that the demonstrators simply followed him onto the property, I find that, but for his entering, they would not have done so. In the first place, the demonstrators from the Academy were there because, as Rojas testified, Lauro organized them to be there. While there, they were obedient to Lauro when Moore enlisted his aid in getting them to move away from

the fields, and 4) so much of Gomez's testimony that the demonstration started at 1:00 p.m. With the exception of Valdivia's testimony concerning whether or not anyone went to the fields, all the other testimony involves estimates of time which I have already indicated I do not consider generally reliable. As to Valdivia's testimony that no one went to the fields, I note that he and Carrillo were a considerable distance from some of the crews and he may not have been aware of what was going on so far away.

²⁸Even Willetz evinced an hostility towards the demonstrators. See, e.g. RT p. 16-17, the demonstration was a riot or a public nuisance which terrified his wife and which Willetz characterized as violating his civil rights.

the gate, which is consistent with Rojas' testimony that the employees look to the organizers for leadership and the organizers "more or less" tell the employees "everything" they have to do. Finally, Leal's testimony that the entire group seemed to gather around Efren after he arrived just before moving through the gates is quite credible, and makes it more likely than not, and I so find, that the group followed Efren's lead onto the property.

3) Did Efren state he would follow any access rules he chose?

Only Galper testified that Efren told him the Union was not bound by the Access Rule and, while Efren did not directly deny saying it, he strongly implied that he did not.²⁹ Accordingly, I must separately address the question of Galper's credibility.³⁰ When asked by Employer's Counsel previous conversations with Efren about access, Galper testified:

Q: [By Counsel for the Employer] Had you had conversations with Efren Barajas before?

A: [Yes.]

Q: And had those conversations been different or the same as this conversation?

A: Pretty much similar; he's a pretty aggressive guy.

Q: Did you continue to have any more discussion with Efren at that point?

²⁹Lauro, who testified he overheard the conversation between the two, testified Efren did not say he would follow any access rules he chose. (RT p. 473.)

³⁰I focus on Galper because the Employer has the burden of proving a violation of the Access Rule. As will become obvious in my treatment of Efren's testimony about the incident on the next day, I have difficulties with his credibility as well.

A: Well, he -- it was physically threatening at that point. I could have stood in front of him, I guess, and demand that he follow the rules of access but I think trouble would have happened had I done that. Efren had been quoted" in the newspaper many times as stating that they would take access when and where they wanted to take it and the vote of the people meant nothing to him.

RT pp. 229-30

He was asked about this testimony on cross-examination:

Q: [By Counsel for the Union] You also mentioned that Efren Barajas has been quoted in the newspaper as saying things like we're going to take access whenever we want, things of that nature.

A: As close as I can get to a direct quote is that we don't, I think it's to the point that we don't, we don't care whether they vote for the contract or not, we call the shots here. I think something to that effect was in the Pajaronian [a local paper.]

Q: Have you read anything, any statements that he made regarding access?

A: That I've read about what he said * * * about access?

Q: Right.

A: I've read an awful lot of things that he said before they wacked him.

Q: Before they wacked him?

A: Right after that statement that he made in the Pajaronian, they pretty well pulled him out of town because he was an embarrassment to them.

RT p. 289-90

In the first part of this testimony, Galper portrays Efren as at least cavalier and perhaps contemptuous about the constraints of the Access Rule, having been quoted "many times" as saying he would take access "when and where" he wants. In the second part of his testimony, Galper effectively recants the first part by

admitting that the "closest" he could come to any statements by Efren did not concern access at all. Despite the retraction, he now insisted that Efren had been "wacked" by the Union. His grounds for asserting this turned out to be nothing more than his belief that is was so: "Prior to that statement I saw him all the time. After that statement at the march . . . the anti-union march, he was nowhere to be found; the pro-union march, he was nowhere to be found, he's gone." (RT. 291.)

In both these examples, Galper offered what were clearly his own rather broad interpretations of the meaning of statements or the motive behind events as evidence. In view of this propensity, I cannot be sure that his testimony about what Efren supposedly said does not reflect Galper's perception of Efren's attitude ("his standard fuck you", as Galper put it) as opposed to what Efren actually said.

In other respects, I find Galper was also deliberately misleading. As noted above, the Employer contends the Union falsely placed events an hour later than they actually occurred; but it was Galper, who, as the Employer's representative, at all times had access to the time cards of the crews, who stated that the first crews finished at 2:00, a half-hour later than the time cards show. To the extent any finding of fact must rest upon his testimony alone, I decline to make it. Accordingly, I find that Efren did not state that he would follow any access rules he chose.

4) Did the group shout obscenities?

By a number of accounts, harvest workers were prevented

from leaving for the day by the demonstrators, it seems reasonable to conclude that, to the demonstrators, anyone attempting to leave would have been perceived as resisting their efforts to make common cause with them. In such circumstances, I have no reason to doubt the testimony of the employee witnesses that some hostile encounters took place and that, as Ramos, for example, testified, some demonstrators initiated rude, even obscene comments.³¹ But if the circumstances were likely to frustrate some demonstrators, they were also likely to bother some workers who just wanted to go home and, indeed, there is not only evidence of give-and-take between the demonstrators and Gargiulo employees in Moore's testimony that the two groups yelled at each other and in Galper's testimony that he had to instruct Carrillo and Valdivia not to confront the demonstrators, but also of harvest workers themselves resorting to epithets in Gomez's testimony that workers told demonstrators to "move away son of a bitch."

However, in view of Ramos' testimony that she did not hear any general shouting of obscenities, and Moore's testimony that, while he was not familiar with some of the obscenities allegedly used by the demonstrators, he was familiar with quite a few and he did not hear the words he knew being generally shouted, I find that there was no organized shouting of obscenities.

C. Analysis

I have found that on June 14, Efren led a group of

³¹In view of the number of demonstrators, such general testimony as Union witnesses provided about what they heard cannot defeat testimony about what specific employees heard.

supporters onto the Employer's property and that while there, some members of the group either initiated or exchanged obscenities with some employees, but that there was no organized shouting of obscenities.

The Employer contends that under Frudden Produce (1981) 7 ALRB No. 22, all the members of the group that Efren led onto its property must be considered agents of the Union both for the purpose of determining whether the Union exceeded the limitation on numbers as well as for the purpose of attributing the demonstrators obscene comments to the Union. While the Union ignores the agency issue in its brief, both at hearing and in its Response to the Employer's Motion to Deny Access, it contended that, because off-duty employees have an independent right to enter an employer's parking lots, gates and other outside non-working areas, Tri-County Medical Center, Inc. (1976) 222 NLRB No. 174, Independent Stations Co. (1985) 284 NLRB No. 48, the employees who entered the property with the organizers should not be counted as organizers for the purpose of the limitations of the access rule.

In Frudden, the Board adopted the decision of the IHE holding that 25-50 unidentified Union supporters who entered the . Employer' s property with someone determined to be a UFW organizer and who both actively encouraged the supporters' interference with the Employer's operations and who failed to disavow it after it occurred were agents of the organizer. The IHE reasoned:

To determine whether the access rule was violated . . . it is necessary to decide which of the participants in this event were organizers within the scope [of the Rule] and whether the conduct of

non-organizers may be attributed to organizers who were present. As will be further set forth, I conclude that Mendoza was a UFW organizer within the meaning of [the Rule]; that the record does not establish that the 25-50 unidentified persons who took part in this incident were organizers; but that their conduct may be attributed to Mendoza for the purpose of determining whether he violated the access rule. * * *

In Ranch No. 1 . . . , the Board discussed conduct by organizers which would warrant the imposition of sanctions pursuant to the [Rule] . However, it did not address the question, presented by these facts, or union or organizer liability under the [Rule] for the conduct of unidentified persons who engage in conduct which would clearly violate the access rule if engaged in by organizers. To resolve this question, I have therefore turned to the terms of the access rule and to cases dealing with the responsibility of union agents for the conduct of pickets.

The access rule nowhere explicitly defines the term "union organizers." However, it may be inferred, based upon section 20900 (e), that an organizer for purposes of [the Rule] is any person, not an employee of the employer in question, who is authorized by a union to enter an employer's property "for the purpose of meeting and talking with employees and soliciting their support."

IHED pp. 19-21 [Emphases added]

Although neither the IHE nor the Board in Frudden addressed the rights of off-duty employees because the "supporters" in that case were unidentified, the IHE's discussion of the definition of "organizer" in the access rule supports the Union's argument that, to the extent the demonstrators in this case were employees of the employer, their numbers ought not count towards the limitations of the access rule. In other words, there is some tension between the Board's reasoning in Frudden and the results sought by the Employer

in this case.³²

Putting aside for the moment the definitional problems created by Frudden. I do not believe that it follows from the fact that off-duty employees have an independent right of access that a union cannot be held to have abused its own right of access by leading employees in the exercise of their rights. A union's right of access being contingent upon its exercise within the limitations laid down by the Board, the union's conducting a demonstration (in Izquierdo's phrase) during its access period seems to me sufficient to make the demonstrators organizers. So far as the discussion of the definition of "organizer" in Frudden is concerned, no matter whether the employees are considered organizers under the rule or agents of organizers under general agency principles, Board cases have long made it clear that when a union instigates conduct, it will be held responsible for it. Thus, in Ace Tomato (1994) 20 ALRB No. 7, the Board held that where a union has instigated, authorized, solicited, ratified, condoned or adopted the conduct of pro-union employees, it will be responsible for their conduct. Since I have found Efren led the demonstrators onto the property, and since the Board's standards of agency are quite clear, I find that Efren's leading the employee-demonstrators onto the Employer's

³²In Frudden. the conduct complained of was unprotected in itself, including throwing tomatoes and eventually forcing some harvesting operations to stop. In this case, the entry of the employee demonstrators was, in itself, protected.

property was in intentional disregard of the access rule.³³

It remains to consider the Union's responsibility for whatever misconduct took place under the same principles of agency discussed above. I have found that some demonstrators initiated obscene comments and that there was some exchange of obscenities. Other than my finding that there was no organized chanting or shouting of obscenities, I have no idea how widespread the pro-Union side of the business was. However, my finding that there was no generalized use of obscenities entails the conclusion that there is no proof the organizers instigated, authorized, or solicited whatever did take place. It remains to discuss whether the Union can be held to have condoned or adopted the conduct. Since there is no credited testimony that any organizer was aware of the rude encounters initiated by the demonstrators, I do not find that the Union condoned or adopted the conduct. Accordingly, with respect to the Jensen incident, I find that the Union violated the numbers limitation of the access rule.

³³I do not believe there is any dispute that if the total number of demonstrators counts for the purpose of the access rule, the Union exceeded the access limitations. There were five crews at Jensen, entitling the Union to 10 organizers on that basis; time cards in Evidence show that Crew #1 had 45 employees, Crew #3 had 49; Crew #4 had 46; Crew #6 had 45; and Crew #12 had 48, entitling the Union to an additional organizer for each crew and another organizer for each of the three crews with more than 45 employees for a total of 18. Since even Efren's estimate of the size of the demonstration (10 organizers and 25 workers) exceeded this number, it follows that the Union exceeded the number of organizers permitted by rule.

II. The incident on June 15, 1996

A. Facts

On June 15, 1996, the Employer scheduled a barbecue to be held in a soccer field adjacent to the parking lot. See, ERX 2, (RT pp. 119, 246, 249.) The barbecue was to start at 1:00 p.m. [Galper, (RT p. 246) Gomez, 1:30, (RT p. 119.) Five crews were at work that day and Galper ordered them to stop work at noon to be able to attend the barbecue. Three crews actually finished work by noon, but two others did not, RT pp. 248, 313) so he again ordered these crews to stop work. Galper testified that he observed the other two crews finish between seven to ten minutes later, (RT pp. 248, 275) or not later than 12:10. It took no longer than 10 minutes for the last employees to leave the field and reach the parking lot. (RT p. 275.)

Valdez provided a similar chronology. According to him, he and the Employer's attorney, Ron Barsamian, drove into the Holly Ranch "about noon". (RT p. 311.) A car with some UFW organizers was entering the field ahead of him/ just as he was commenting to Barsamian that the crews had not yet stopped working, three of the crews stopped but two continued to work. (RT p. 313.) Valdez was sure these two crews stopped at 12:09, (RT p. 313.) because he checked his watch so that he would know when the "Union's hour" was up. According to Valdez, it took the last two crews about five minutes, or, according to him, too, until shortly before 12:15, before the remaining crews actually started to leave the field. (RT p. 313.)

Jose Rojas' testimony corroborates Galper's to some extent. He agrees that his was the first crew to stop work at Holly on June 15 and that his crew stopped work at noon. According to him, it took about eight minutes to walk from the field to the parking lot. So far as when the other crews stopped, Rojas acknowledged that it could have been as early as 12:15 although he also said it could have been as late as 12:30, but he was sure that it took them until 12:40 or 12:45 to get to the parking lots. (RT p. 435.) According to him, it might have taken that long for the members of the last crews to reach the lot because they were so far from the lots and because it sometimes takes between 5 and 15 minutes to get their piece rate tickets punched.

Efren testified that he and the other organizers arrived at Holly Ranch shortly before noon. At noon, he observed "people making a move to do something and it was 12 so we thought . . . they would take lunch." (RT p. 360.) However, instead of remaining in the fields to eat their lunch, these crews started leaving the fields to go to the parking lot. (RT p. 360.) The remaining field crews did not eat their lunch, but continued to work. According to Efren, he and the other organizers took lunchtime access to these crews while they worked. (RT p. 367.) These two crews finished work at 12:30 and 12:45 and Efren and the organizers followed them to the parking lots to take after work access. (RT p. 162.) Lauro, too testified that the final crews finished at 12:30 and 12:45. (RT p. 474.) Lauro's testimony differed from Efren's in that he testified that the two crews were

not working during the noon hour. Like Efren, he testified that, had they been, the Union could have spoken to them while they worked. (RT p. 478.)³⁴ Time cards in evidence show that while most employees in the crews worked until 12:00 noon, a few employees worked past 12:00.³⁵

It is undisputed that, at some point, the organizers went to the parking lot where employees were coming and going: some had gone home to change clothes and come back, some must have just been leaving. Galper described the situation as fluid: "some people stayed, some left, some guys came back in a hurry, some guys came back later. It wasn't real structured." (RT p. 284.)

At 1:15, Valdez noted that Efren and Lauro and five or six

³⁴I might add that Adan Gomez, testified that the crews stopped work around 1:00 p.m., but he admitted that he was not "checking his watch." (RT p. 122.) This is the third time Gomez's testimony about time differed from that of everyone else. I take no account of it.

³⁵A few employees are shown to have worked beyond noon, See, in Crew #7. Ee. nos. : 2272, the stacker, (12:15), 2429, the puncher, (12:30), 2217, the truck driver, (1:00), and 2322 (1:00); in Crew #8. Ee. nos.: 2000 (1:00), 2350, the puncher, (12:30), 2024, the truck driver, (1:00), 2312, the stacker, (12:15); in Crew #9, Ee. nos.: 2383, the stacker, (listed as working 5.5 hours from 7:00 a.m. to 12:00?), 2173, the puncher, (listed as working 6 hours with a start time of 7:00 a.m.), 2025, the truck driver, (1:00), 2020, the foreman, (1:00); in Crew #10, Ee. nos.: 2254, the truck driver, (1:00), possibly 2119, the puncher, (listed as working 6 hours with a stop time of 12:00, not clear what start time is), 2293, the stacker, (listed as working 6.5 hours with a stop time of 12:30, not clear what start time is) , a foreman with no Employee number listed as 7 hours with a stop time of 1:00 i.e. ; in Crew #11. Ee. nos.:2304, the puncher, (12:30), 2062, the truck driver (1:00), 2007, FM [probably foreman?], (1:00). In addition to these employees there are a few employees in Crews 10 and 11 whose tickets have been punched (indicating the employee worked) , but have no time out indicated, i.e., in Crew # 10. See Ticket nos. 12311, 12316, 12326 and in Crew # 11, See Ticket nos. 13870, 13873, 13901.

Gargiulo employees were still in the lot. (RT pp. 314-315.) Valdez and Galper went up to Efren and told him access was over. According to Valdez, Efren "indicated he didn't feel that it was. * * * He told us he would determine when access was over." (RT p. 315.)³⁶ Efren also told him that some crews had been working later.

[W]e said no, there weren't . . . It's over. And as the discussion went on, it was clear that it was going to result in a confrontational scenario, at which point we moved into, well, what time do you think we should leave. And at that point his comment was two o'clock. We said no way, it's too late. And he said well, how about 1:45 and we said, fine, leave at 1:45. (RT p. 316.)³⁷

Efren admits speaking to Valdez and Galper and that he

³⁶Galper's testimony was consistent: according to him, Efren said he would decide what time to leave, "they chose the rights of access, the time and how they would do it." (RT p. 259.)

³⁷Efren testified the Employer agreed to permit the organizers to stay until 1:45. The Union refers to this testimony in its Post-Hearing Brief p. 19, but does not make very much of it. It is clear from Efren's testimony that he was advised that the Employer's representatives believed he had already exceeded his access time and that he believed he was entitled to more. Thus, I do not regard an apparently grudging acceptance of a 1:45 departure time as the kind of voluntary agreement the Regulations both encourage and tend to honor. See 8 Code of California Regulations Section 20900 (e) (2). If Efren did not exceed his access time, his presence on the property was arguably protected; if Efren did exceed his access time, his presence may or may not have been an unfair labor practice, 8 Code of California Regulations Section 20900 (e) (5) (B) and was, therefore, arguably prohibited. Under such circumstances, the Board's jurisdiction preempts ordinary trial court jurisdiction over trespass actions. Kaplan's Fruit and Produce, Inc. v Superior Court (1979) 26 Cal.3d 60. With recourse to trespass laws barred, short of inviting the Employer to resort to self-help to eject the organizers, it seems to me that even if Galper and Valdez agreed not to press the matter if Efren left at 1:45 p.m., the Employer should not be estopped from resorting to Board processes to determine the propriety of the Union's access claim.

"compromised" by agreeing Co leave at 1:45 p.m. (RT p. 363.) That Efren admitted "compromising" at 1:45 makes it more likely than not, and I so find, that he told Galper and Valdez that he was entitled to remain until 2:00 p.m.

B. Concluding Findings

The Board posed two questions with respect to the incident at the Holly Ranch:

- 1) Did the organizers remain on the property for 40 minutes beyond the proper access period?
- 2) Did Efren state that he would decide when it was time to leave?

There is no question that Efren and the organizers were on the property for an hour and 45 minutes. The Union contends that it was entitled to take access for this entire period because it took regular lunchtime access between 12:00 and 12:30 p.m. and "staggered" after work access between 12:45 and 1:45 p.m. or one hour from when it contends the last crew finished work. The Employer argues that the Union was entitled to one hour of access to end no later than 1:10, which is the time the last crews finished work. Post-Hearing Brief, p. 43.

However, it also contends that if, as he testified, Efren did take field access while the crews were working, he has admitted violating the Access Rule which does not permit speaking to employees while they work.³⁸ Finally, it maintains that even if

³⁸I should note that if such a violation were made out, it was not a violation set for hearing: the Employer was only complaining about access in excess of the one hour after the last crew worked.

Efren did not take field access while the crews were working, his and Lauro's testimony that they were entitled to do so reflects on his willingness to disregard the Access Rule and compels a finding that he must have said he would decide when to leave. Post-Hearing Brief, p. 48.

1. Did the organizers remain on the property beyond the access period?

It is undisputed that three crews actually finished work at noon and that, instead of taking lunch as they ordinarily would, these crews started to leave the fields. It makes sense, therefore, and I so find, as Galper and Valdez explained and Rojas confirmed, that these crews left the fields because their workday had been cut short. Since Galper had ordered all the crews to stop, it also seems more likely than not, and I so find, that upon seeing two crews continue to work, he again ordered these crews to shut down. Although there is no dispute that it took time for them to shut down, Efren's testimony that they continued to work until 12:45 at the latest is not credible.³⁹ Indeed, even Rojas testified that the last crews shut down at either 12:15, which is consistent with Galper's and Valdez's testimony, or at 12:30, which, while inconsistent with the Employer's testimony, provides no support for Efren's or Lauro's testimony that the last crew

³⁹Lauro's testimony that the crews did not work during the half-hour lunch break makes no sense at all. If the crew that supposedly stopped work at 12:30 had already stopped work when Efren and Lauro first entered, what sense does it make to say they stopped work at 12:30? Why the crew that purportedly stopped work at 12:45 would stop work for half an hour before working for 15 more minutes also escapes me.

stopped at 12:45 .

According to both. Galper and Valdez, all the crews were out of the fields and in the parking lot by about 12:15. Efren, however, maintains he was in the fields talking to employees until 12:45. Although I have declined to credit Efren's testimony that the last crew worked until 12:45, even if the last crews ceased work no later than 12:10, as Galper and Valdez: testified, it is certainly conceivable, as Rojas testified, that some or all of the employees remained in the fields until 12:30 or 12:45 in order to punch out. Indeed, the time cards do show that the punchers worked longer than the harvest employees so that, assuming⁴⁰ the punchers left when the last card was punched, the fact that the punchers of crews 7, 8, and 11 quit work at 12:30⁴¹ tends to corroborate Rojas' testimony about how long it took the workers to actually leave the fields. While the time cards for the punchers of the remaining two crews are highly ambiguous, they also indicate that the punchers worked 6 hours and the harvest employees only five hours so that if everyone started at the same time, the punchers must have left at 1:00.⁴²

⁴⁰This is a critical assumption: while it is certainly true given the punchers jobs that they couldn't leave until after the last card was punched, all the punchers could have stayed after the last card was punched.

⁴¹The time cards for these crews show a 12:30 stop time for the punchers and a 12:00 stop time for the harvest employees.

⁴²The time cards for these crews clearly demonstrate a difference between the amount of time the harvest employees worked (5 hours) and the punchers who are shown to have worked for 6 hours. Though, as I have noted, it is possible that the punchers started earlier, neither of the time cards clearly

While the time cards provide some circumstantial support for Rojas' account, as noted above, they do not independently confirm it without the use of a critical assumption. In the face of my difficulties with Efren's and Lauro's version of events, and the overall coherence of the Employer's account, including Rojas' partial corroboration of it, I find that the crews did leave the fields and were in the lots somewhere between 12:15 and 12:30. It follows that, if the organizers wanted to talk to them, they followed them to the parking lot where they remained for approximately an hour before Galper asked them to leave at 1:15.

2 . Did Efren state that he would decide when it was time to leave?

Galper and Valdez testified that Efren stated he would decide when it was time to leave. I have already expressed my doubts about Galper's credibility and I am no more inclined to rely solely on his testimony about what Efren said on the 15th than I was to rely on his testimony about what Efren said on the 14th. In considering Valdez's corroborating testimony, I first note that Valdez was among the witnesses I would have expected to pay particular attention to the timing of events and, as a result, I can only regard his testimony about when demonstrators entered 'Jens en as deliberately misleading. I am inclined, therefore, to regard his testimony about what Efren said with some caution. What

indicates they did. While the puncher's time card for Crew #10 appears to have the 7:00 start time crossed out, there is no new legible start time. The puncher's time card for Crew #9 simply has contradictory information: the puncher started work at 7:00 a.m., worked for 6 hours, and quit at 12:00.

convinces me to discount it, however, is that it does not square with the entire conversation both he and Galper reported having with Efren: it simply does not make sense to me that a man who had just purportedly claimed to arrogate to himself the right to determine when to leave would immediately "compromise" his position.

Even if I am not prepared to accept the testimony of its witnesses, the Employer contends that Efren condemned himself out of his own mouth when he testified that the Union could take lunchtime access while employees are working. According to the Employer, this proves that he is "ignorant of the true meaning", Post-Hearing Brief, p. 47, and, therefore, disdainful of the constraints of the access rule. So far as pertinent here, the Board has addressed the limitations on lunchtime access twice: the first time in Ranch No. 1 (1982) 5 ALRB No. 1 and the second time in its 1991 Revision of the Elections Manual.

In 5 ALRB No. 1, the IHE found that a UFW organizer entered the Employer's fields on three occasions when he thought employees were taking a lunch break and that he both spoke and distributed literature to people who were working. The IHE concluded that speaking to employees at work in the onions was a violation of the access rule, which only permitted access to employees who were eating, IHED p. 19. The Board disagreed:

The IHE found that [the UFW organizer] violated the access rule on three occasions, when he entered the onion fields during work hours at times he thought employees were taking a lunch break and when he spoke to and distributed literature to employees who were working as well

as those who were resting. [The organizer] testified that ... a Ranch No. 1 supervisor . . . told him that during the onion harvest, when there was no established lunch hour because of the piece rate pay, [the organizer] could go into the onion fields at any time during the day as long as he did not take more than one hour. * * * On the basis of [this] testimony, the IHE's inference that [the organizer] spoke to employees who were working while locating those who were eating, [the regulation] regarding voluntary agreements on access, and noting that there was no credited testimony indicating [the organizer] was asked to leave the fields, we find that [the organizer's] actions on these three occasions did not constitute access violations.

Ranch No. 1, pp. 3-4.

I understand the decision in Ranch No. 1 to mean that a union may talk to employees working piece rate even if they do not take a lunch break, but only for limited purposes (to locate people who were eating) and under limited circumstances (when the Employer did not complain.)

Nevertheless, the Board's 1991 Revision of the Election Manual generalizes the rule in Ranch No. 1 beyond the apparent restrictions obtaining in that case:

If workers are not taking a lunch break (i.e., employees working on a piece rate basis) union organizers may make reasonable attempts to speak to such workers to see if they are interested in being represented by a labor organization.

Election Manual (1991) p. 1-9.

While the Election Manual is not a final statement of the law, that the Board has interpreted the Access Regulation in the same way as the Union, makes it difficult for me to conclude that Efren's and Lauro's interpretation points to an intentional or reckless disregard of the Regulation. Accordingly, nothing in Efren's or

Lauro's testimony about their right to take lunchtime access to workers who decline to take lunch causes me to conclude that Efren was disdainful of the access rule and was likely to have said he would decide when it was time to leave.

C. Analysis

It is beyond dispute that the organizers entered during the normal lunch hour only to find that at least three crews were not eating lunch, but quitting work. Two other crews were still working, but within a few minutes they, too, would shut down with most workers leaving the fields. Because of the paucity of the record, I cannot determine exactly how long the organizers remained in the fields with the few remaining employees, but I have discredited the Union's version that they remained until 12:30 and 12:45 respectively. I have also found that the organizers must have followed the departing crews to the parking lot between 12:15 and 12:30 where, in the unusual circumstances of this case, workers were not only leaving, but also arriving for the barbecue.⁴³

I begin my analysis with Gourmet Harvesting- and Packing (1978) 4 ALRB No. 14, in which the Board made it clear that it is not a violation of the access rule for union organizers to take .access in excess of the usual hour when groups of employees arrive separately' at a meeting site:

⁴³I might note that this case also presents another unusual circumstance in that the Employer eliminated the usual lunch hour only to schedule a company sponsored lunch for a later hour. The Board has never previously considered how the access rule applies when, as here, an Employer's has essentially shifted its normal lunch hour. I will not take up the matter here since the Union does not contend that it was taking lunchtime access.

The IHE did not reach the question of whether . . . staggered access to separate crews at the end of each crew' s workday was permissible under the access regulation [Cite]....

[The Access Regulation] provides that "[a]ccess shall be limited to two organizers for each work crew on the property" [The Regulation also] provides that "[o]rganizers may enter the property of an employer for a total period of one hour . . . after the completion of work to meet and talk with employees in areas in which the employees congregate. . . ." Clearly the right of access to each crew is meaningless if organizers can enter the property for only a single one hour period at the end of the workday in cases where the work days for each crew end at staggered times over a period of several hours. A single hour of end-of-day access would permit access to only one or two crews instead of the 10 or 12 to which access was sought. The conduct of union organizers in entering the parking area as each crew finished work and reported to be paid, , was a reasonable and appropriate interpretation of the access regulation which compromised the union's interest in obtaining access to the crews as they completed work with the Employer's interest in limiting the time which organizers spent on the property. . . . [4 ALRB No. 14, p. 2 at n.1]

The record in this case is not as clear as it was in Gourmet that the only way to obtain access to every crew was to take it as each one arrived; nevertheless, the fact that the crews left the fields either as the organizers arrived or shortly afterwards and then returned in stages for the barbecue, causes me to conclude that the organizers' remaining for staggered access does not demonstrate either intentional or reckless disregard of the access rule.

ORDER

I have found that UFW organizers committed one access violation on June 14, 1996 in that numbers in excess of those authorized by the rule entered the Employer's property. I will

follow the order in Ranch No. 1 and hereby order that Efren Barajas⁴⁴ be barred from exercising the right of access provided by regulations anywhere in the area covered by the Board' s Salinas Regional Office for a period of 60 days on which the UFW is entitled to exercise the right of access, commencing on the day the UFW next files a Notice of Intent to Take Access for the purpose of taking access to the property of any agricultural employer located in that area.

Dated: January 24, 1997



THOMAS SOBEL

Investigative Hearing Examiner

⁴⁴The Employer has requested an order against all organizers and the UFW. Since I have found only one incident of excess access, I do not believe an order against the Union is appropriate; I also read the Board's order setting the issues for hearing as going to the conduct of Efren Barajas only.