El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and MARCEL JOJOLA, Chief of EL CENTRO POLICE DEPARTMENT, Charging Party.	Case No. 79-CL-23-EC 6 ALRB No. 58

ERRATUM

In our Decision in the above-captioned case, which issued on October 24, 1980, the paragraph which begins at page 5, line 18, and extends to page 6, line 4, is hereby amended to read as follows:

The United States Supreme Court has recently noted and reaffirmed "the overriding respect for the privacy of the home that has been embedded in our traditions since the origin of the republic." Payton v. New York (April 15, 1980) 48 U.S.L. Week 4375, 4383, 100 S.Ct. 1371, 1388. As a society, we have always cherished "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Justices Brandeis and Holmes, dissenting, Olmstead v. U.S. (1928) 237 U.S. 438, 478. The Supreme Court has ruled in several cases that the individual's right to be let alone in his or her home outweighs even rights of free expression ordinarily entitled to full First Amendment protection. F.C.C. v. Pacifica Foundation (1978) 438

U.S. 726; Cohen v. California (1971) 403 U.S. 15; Rowan v. Post Office Dept. (1970) 397 U.S. 728; Kovacs v. Cooper (1949) 336 U.S. 77.

Dated: November 21, 1980

HERBERT A. PERRY, Member

JOHN P. McCarthy, Member

El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and MARCEL JOJOLA, CHIEF OF EL CENTRO POLICE DEPARTMENT, Charging Party.	)	Case No. 79-CL-23-EC 6 ALRB NO. 58

DECISION AND ORDER

On August 20, 1979, Administrative Law Officer (ALO) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent timely filed exceptions, supporting briefs, and reply briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the ALO's rulings, findings, and conclusions, as modified herein.

This case presents the issue of "residential picketing" by an agricultural union. In the instant case, Respondent United Farm Workers of America, AFL-CIO (UFW) picketed the homes of agricultural employees in an effort to convince them to join its strike.

The General Counsel alleges that the UFW violated section 1154(a)(1) of the Agricultural Labor Relations Act (Act) by its picketing activities, and requests that we remedy the violation by

placing restrictions on future picketing. The ALO concluded that Respondent violated section 1154(a)(1). The UFW denies that it has violated the Act in any respect.

Facts

This case concerns three separate incidents of residential picketing in March and April, 1979,[1/] at two homes in Calexico and one in Holtville. The UFW stipulated that the pickets in all three incidents were its agents.

On March 21, approximately 50 pickets marched along the sidewalk on both sides of the corner lot in Calexico where the Sandoval residence is located. From 12:30 to 3:30 p.m., the pickets continued their activities, including chanting slogans and directing various epithets and obscenities at the residents.[2/]

Approximately 50 pickets marched along the sidewalk in front of the Camacho home in Calexico on March 22. The picketing took place for about one and one-half hours during the mid-morning. The pickets shouted slogans such as "Long live the strike," and addressed epithets at the residents by name.

On April 10, approximately 30 pickets marched in front of the Guerra home in Holtville from 4:30 until 9:00 a.m. The family was awakened by the pickets, who shouted epithets and loudly

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[1/] Unless otherwise noted, all dates refer to 1979.

[2/] The ALO noted that three masked men broke the windows on a car owned by the Sandovals during the week prior to the picketing. We find that there is insufficient evidence to attribute responsibility to the UFW. Metal Polishers and Buffers International, Local 67 (1972) 200 NLRB 335 [81 LRRM I486]; see also Dover Corp., Morris Division (1974) 211 NLRB 955 [86 LRRM 1607]; O. P. Murphy & Sons (Oct. 26, 1979) 5 ALRB No. 63, at pp. 25-26.

proclaimed that "scabs live here."[3/]

Jurisdiction

Respondent claims that the General Counsel did not prove that agricultural employees lived in the picketed homes, and that the Board is therefore without jurisdiction to find a violation of section 1154(a)(1).[4/] We reject this contention.

From the slogans and yells chanted by the pickets, who were Respondent's admitted agents, it is clear that the purpose of the pickets was to dissuade residents of the homes from working or continuing to work as agricultural employees[5/] during Respondent's strike.[6/] Respondent's conduct provides ample support for the ALO's inference that agricultural employees resided in the picketed homes. Fibreboard Paper Products v. East Bay Union of Machinists (1964) 227 Cal.App.2d 675, 697.

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[3/] The ALO noted that there were scratches on the Guerra car following the picketing. We find there is insufficient evidence to attribute these acts to the UFW. See footnote 2, supra.

[4/] Section 1154(a)(1) provides, in part: It shall be an unfair labor practice for a labor organization or its agents to ... restrain or coerce ... (agricultural employees in the exercise of the rights guaranteed in section 1152. (Emphasis added.)

[5/] We note that the National Labor Relations Board (NLRB) "has consistently stated that the definition of 'employee' in section 2(3) of the [National Labor Relations] Act covers 'applicants for employment' and 'members of the working class' generally." Houston Chapter, Associated General Contractors (1963) 143 NLRB 409, 412, fn. 8, [53 LRRM 1299, 1301] citing Briggs Manufacturing Company (1947) 75 NLRB 569 [21 LRRM 1056] and Texas Natural Gasoline Corporation (1956) 116 NLRB 405 [38 LRRM 1252]. See also Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177 [8 LRRM 439].

[6/] Manuel Figueroa, a picket, testified that this was Respondent's purpose in engaging in residential picketing in the area.

Residential Picketing

We affirm the ALO's conclusion that the UFW violated section 1154(a)(1) by picketing employees' residences in large numbers, shouting obscenities, addressing abusive epithets to the residents and, in the case of the Guerra home, commencing picketing before dawn. Respondent argues that this conduct constituted only peaceful picketing, but we conclude that in the residential settings where it occurred the conduct had a tendency to coerce or restrain agricultural employees in the exercise of protected rights, in violation of Labor Code section 1154(a)(1).

The essence of coercion or restraint is that a person is forced, according to the dictates of another and against his or her own judgment and will, to act or to refrain from acting in a certain way. Coercion and restraint attack the autonomy and integrity of the human person. The Act fosters the autonomy and integrity of agricultural employees by protecting their freedom of choice. Section 1152 provides not only that "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," but also that employees "shall also have the right to refrain from any or all such activities...." This Board cannot condone union conduct violating the freedom of choice that section 1152 guarantees.

While picketing is a form of expression and is therefore entitled to protection under the First Amendment to the United

States Constitution, both the United States Supreme Court and the California Supreme Court have held that picketing is entitled to less protection than other forms of expression. Teamsters Local 695 v. Vogt (1957) 354 U.S.' 284; Cox v. Louisiana (Cox I) (1965) 379 U.S. 536; UFW v. Superior Court (1971) 4 Cal.3d 556. California's high court has attributed the lower degree of protection for picketing to the "fact that, of itself, picketing (i.e., patrolling a particular locality) has a certain coercive aspect." UFW v. Superior Court, supra, at p. 558.

The California Supreme Court has recently stated that a union may violate section 1154(a)(1) by picketing which obstructs access to a worksite to the extent that the picketing "restrains or coerces nonstriking employees in the exercise of their right to refrain from concerted activities guaranteed by section 1152." Kaplan's Fruit and Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 71. The coercive impact of picketing is likely to be far greater at one's residence than at a worksite.

The United States Supreme Court has recently noted and reaffirmed "the overriding respect for the privacy of the home that has been embedded in our traditions since the origin of the republic." Payton v. New York (April 15, 1980) 48 U.S.L. Week 4375, 4383, 100 S.Ct. 1371, 1388. As a society, we have always cherished "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Justices Brandeis and Holmes, dissenting, Olmstead v. U. S. (1928) 237 U.S. 438, 478. The Supreme Court has ruled in several cases that the even rights of free expression ordinarily entitled to full First

Amendment protection. F.C.C. v. Pacifica Foundation (1978) 438 U.S. 726; Cohen v. California (1971) 403 U.S. 15; Rowan v. Post Office Dept. (1970) 397 U.S. 728; Kovacs v. Cooper (1949) 336 U.S. 77.

Our tradition of respect for the domestic sanctuary has created throughout American society an expectation of undisturbed privacy in the home. When the privacy and tranquility of the home are violated by conduct like that which the picketing union agents displayed here, the impact on the resident(s) will inevitably be upsetting and intimidating. In concluding that such conduct is coercive within the meaning of section 1154(a)(1), we are recognizing "a connection between preserving the sanctity of the home and protecting the integrity of personality." S. Hufstedler, The Directions and Misdirections of a Constitutional Right of Privacy (New York, 1971) p. 25. We believe that the freedom of choice afforded to employees by section 1152 requires that this connection be maintained.

Our position is consistent with that taken by the NLRB in United Mechanics' Union Local 150-f (Furworkers) (1965) 151 NLRB 386 [58 LRRM 1413], where the Board adopted its Trial Examiner's finding that the Respondent union violated section 8(b)(1) of the National Labor Relations Act by picketing and demonstrating in front of the homes of nonstriking employees. Our position is also supported by two cases in which the U. S. Supreme Court upheld decisions of a state employment relations board finding illegal, and prohibiting, the picketing by unions of domiciles of employees: Allen Bradley Local No. 1111 v. Wisconsin Labor Relations

Board(1942) 315 U.S. 740 [10 LRRM 420]; Auto Workers v. Wisconsin Labor Relations Board (1956) 351 u.s. 266 [38 LRRM 2165].

Remedy

Our remedial Order herein will provide the usual remedies of a cease and desist order, including posting, mailing, and reading of a Notice to Employees. In addition, we shall also order Respondent to submit a written apology to all of the residents of the picketed homes.

ORDER

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

1. Cease and desist from:

(a) Restraining or coercing agricultural employees in the exercise of their right to join or engage in, or to refrain from joining or engaging in, any strike or other concerted activity, by means of picketing, demonstrations, threats, abusive language, insults, or other like or related conduct at or near the home or residence of any agricultural employee.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Labor Code section 1152.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Sign the Notice to Employees attached hereto, and, after its translation by a Board agent into appropriate

languages , reproduce sufficient copies in each language for the purposes set forth hereinafter.

(b) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places at all its offices, union halls and strike headquarters throughout the State, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(c) Mail copies of the attached Notice, in all appropriate languages within 30 days after the date of issuance of this Order, to members of the Sandoval family, the Guerra family, and the Camacho family.

(d) Print the attached Notice, in all appropriate languages, in any and all news letters and other publications which it publishes and distributes to its members during the period from one month to six months following the date of issuance of this Order.

(e) Submit a written apology signed by an official representative of Respondent, to the residents of the Sandoval, Guerra, and Camacho homes and provide a copy thereof to the Regional Director.

(f) Notify the Regional Director of the San Diego Region, in writing, within 30 days after the date of issuance of this Order, of the steps it has taken to comply herewith, and

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continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: October 24, 1980

HERBERT A. PERRY, Member

JOHN P. McCarthy, Member

MEMBER RUIZ, Concurring:

I agree with the conclusion that the conduct of the Respondent labor organization amounted to a violation of section 1154 (a) (1) of the Act. I am also in agreement with the Order insofar as I read it to require a case-by-case determination that the manner of the picketing tended to restrain or coerce agricultural employees in the exercise of protected rights. However, I find that the majority's philosophical discussion on the right of privacy strongly contravenes traditional principles of labor law which permit working men and women to publicly proclaim their grievances. In addition, the discussion understates the "free speech" aspect of picketing which has been consistently protected by the Supreme Court.

I. Statutory Considerations

The question presented in this case is whether the acts and conduct of Respondent UFW tended to restrain or coerce agricultural employees in the exercise of guaranteed rights, in

violation of section 1154(a)(1) of the Act. While a discussion of the constitutional questions presented by the residential picketing of agricultural employees may be necessary, it is critical not to lose sight of the fact that the primary role of this Board is to focus on the labor law issues presented by the cases before us. Accordingly, we must resolve this case by applying statutory 'and decisional labor law principles.

Section 8(a) (1) of the National Labor Relations Act[1/] makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees" in the exercise of protected rights. During the debate leading up to the enactment of the Taft-Hartley Act, several members of the Senate Labor Committee proposed that the same language be included in section 8 (b)(1)(A)[2/] so that unions would be guilty of unfair labor practices for conduct which would be a violation if engaged in by employers. However, the words "interfere with" were dropped from section 8(b)(1)(A) because of a concern that such words would unduly restrict the organizational rights of employees.[3/]

[1/] Section 1153 of the Agricultural Labor Relations Act was modeled after this section.

[2/] Section 1154(a) of the ALRA was modeled after this section.

[3/] During the debates, several senators expressed this concern.

> "How is a labor organization or anyone trying to persuade others to join a labor organization to operate under the possible interpretation of the words "interfere with". At any rate, what would happen in this instance would be a definitive restrictive influence on the part of all those who might endeavor to organize employees ... I do not believe in espousing

[fn. 3 cont. on pg. 12;

In deleting the words "interfere with" from section 8(b)(1)(A), Congress recognized the right of unions and individuals to engage in organizational activities. The Supreme Court has also recognized this right. "Basic to the right guaranteed to employees in section 7 to form, join, or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. Indeed ... this Court has recognized a right in unions to use all lawful propaganda to enlarge their membership." [Citations.] NLRB v. Drivers Local 639 (Curtis Brothers) (1960) 362 U.S. 274, 279 [119 LRRM 232].

This right of unions and individuals to organize accounts for the high standard required to prove a violation of section 8(b)(1)(A). Violations of this section are limited to instances of union tactics involving violence, intimidation, and reprisal or threats thereof. NLRB v. Drivers Local 639, supra, 362 U.S. at 290.

In the case of residential picketing of agricultural employees, applying this standard raises serious considerations since there are two competing sets of interests involved. Section 1152 of the Act guarantees employees the right to organize, form, join, or assist labor organizations. However, that same section also guarantees agricultural employees the right to refrain from any or all of such activities. Thus, a conflict exists between the

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[fn. 3 cont.]

> any course which may be taken to discourage the legitimate organization of employees in the trade union movement. That is definitively what could be construed in this instance." Senator Ives, S. Rep. No. 105, 80th Cong., 1st Sess., 93 Cong. Rec. 4020.

clashing interests of the employees. This conflict is necessarily intensified when a labor organization resorts to picketing in an effort to organize employees who do not want to join or support the union.

When confronted with conflicting legitimate interests of parties, either involved in a proceeding or affected by it, the Board may invoke its power to balance the conflicting interests and must strike the balance that best effectuates the policy of the Act. See, Truck Drivers Local Union v. NLRB (Buffalo Linen Supply Co.) (1957) 353 U.S. 87; NLRB v. Drivers Local 639, supra, 362 U.S. 274. Thus, in the instant case, the Board must weigh the right of employees to organize by picketing residences against the right of employees to refrain from engaging in organizational activity.

In my view, the foregoing discussion of employees' rights argues strongly against the "rebuttable presumption," proposed by Member McCarthy, that all picketing of agricultural employees at their residences is illegal. The two sets of conflicting interests involved herein concern fundamental statutory rights. To impose a presumption of illegality on all residential picketing would necessarily infringe on the rights of agricultural employees to engage in organizational activities, a right guaranteed by section 1152 of the Act. A case-by-case approach whereby this Board scrutinizes the evidence to determine whether picketing at the residences of agricultural employees was conducted in a manner tending to restrain or coerce them would protect the rights of the parties involved and effectuate the policies of the Act. In addition, such an approach would permit the Board to examine and

balance conflicting legitimate interests of employees. Only under this type of approach will the guaranteed rights of agricultural employees on both sides of a residential picketing situation be protected.

II. Constitutional Considerations

Given the lack of clarity in the state of the law regarding residential picketing, a discussion of the constitutional issues involved is warranted.

Picketing in General

It is well settled that picketing is an exercise of the right of free speech, entitled to constitutional protection. Thornhill v. Alabama (1940) 310 U.S. 88 [6 LRRM 697]; American Federation of Labor v. Swing (1941) 312 U.S. 321; Edwards v. South Carolina (1963) 372 U.S. 229; Cox v. Louisiana (1965) 379 U.S. 536, Shuttlesworth v. Birmingham (1969) 394 U.S. 147; Gregory v. Chicago (1969) 394 U.S. 111. In addition, peaceful picketing also enjoys constitutional protection in California. UFW v. Superior Court (1976) 16 Cal.3d 499, 128 Cal.Rptr. 209; In re Berry (1968) 68 Cal.2d 137; Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers Union (1964) 61 Cal.2d 766.

The Supreme Court first declared picketing to be a form of speech protected by the First Amendment in Thornhill v. Alabama, supra, 310 U.S. 88. While acknowledging the presence of a valid state interest in regulating employee-employer relationships, the court felt this interest could not justify a complete prohibition on all peaceful picketing. The court implied, however, that under certain circumstances the nature of the picketing and the manner i

which it was conducted may be a permissible subject for regulation by the State. Id. at 105.

In Cox v. Louisiana (Cox I) (1965) 379 U.S. 536, the Court held that persons who communicated ideas by marching or picketing were not afforded the same degree of protection under the First and Fourteenth Amendments as those who communicated ideas by pure speech. The Court concluded that the exercise of free speech could not be permitted to threaten public order. Thus picketing is subject to reasonable regulation, "even though intertwined with expression and association."

Permissible restrictions on lawful picketing are limited to those governing time, place, and manner of picketing. These restrictions must serve to protect a substantial government interest unrelated to the suppression of free expression. Grayned v. City Of Rockford (1972) 408 U.S. 104; Erzonznik v. City of Jacksonville (1975) 422 U.S. 205. Regulation, however, must be limited to the "action" side of the protest, and not to the content of the speech. Brandenburg v. Ohio (1969) 395 U.S. 444, 455 (Douglas concurring). Governmental interests which courts have held sufficient to justify restrictions on demonstrations include the free flow of traffic (Cox I, supra, 379 U.S. 536) and the operation of vital government facilities (Cox I, supra; Adderley v. Florida (1966) 385 U.S. 39).

To prevent unwarranted infringement on First Amendment rights, these time, place, and manner regulations must also be narrowly tailored, limiting the restrictions to those reasonably necessary to protect the substantial government interest. U. S. v. O'Brien (1968) 391 U.S. 367; Brown v. Glines (1980) 444 U.S. 348;

Village of Schaumburg v. Citizens for a Better Environment (1980) 444 U.S. 620.

The manner of picketing can be regulated without infringing on free speech rights. Furthermore, if the purpose of picketing is unlawful, it may be proscribed without violating the picketers' constitutional rights, even when such picketing comports with time, place, and manner regulations. In International Brotherhood of Electrical Workers v. NLRB (1951) 341 U.S. 694 [28 LRRM 2115], the Supreme Court declared that the National Labor Relations Board's authority to enjoin secondary boycott picketing under section 8(b) (4) (A) of the NLRA did not unconstitutionally abridge the right of free speech of those desiring to picket, because such picketing would further an unlawful objective. The Court in that case stated, "... we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives." Id. at 705.

The Supreme Court has decided several cases where picketing in furtherance of an illegal purpose has been enjoined. See, e.g. Carpenter's Union v. Hitter's Cafe (1942) 315 U.S. 722 [10 LRRM 511] (secondary picketing enjoined as violative of state anti-trust law); Building Service Union v. Gazzam (1950) 339 U.S. 532 [26 LRRM 2068] (injunction against picketing to force employer to sign union shop agreement with union which had been rejected by employees); Teamsters Union v. Vogt, Inc. (1957) 354 U.S. 284 [40 LRRM 2208] (picketing aimed at achieving an illegal union shop agreement); Hughes v. Superior Court (1950) 339 U.S. 460 [26 LRRM 2072] (picketing to force employer to hire blacks violated state's

policy against involuntary employment).

Residential Picketing

While several jurisdictions have addressed the issue of the legality of bans and restrictions on residential picketing, no clear and uniform disposition is apparent. In two recent decisions, the Supreme Court has established that residential picketing falls within the protection of the First Amendment. In Gregory v. Chicago (1969) 394 U.S. Ill, the Court declared that, in the absence of a narrowly drawn statutory prohibition, the streets and sidewalks of residential neighborhoods are a public forum. The Court reversed convictions for disorderly conduct of persons demonstrating outside the home of the mayor of Chicago. The Court stated: "Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Id. at 112.

More recently in Carey v. Brown (June 20, 1980) 48 U.S.L. Week 4756, the Supreme Court ruled on the constitutionality of a state statute restricting residential picketing. It based its decision on the protected nature of residential picketing: "There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the ... statute regulates expressive conduct that falls within the First Amendment's preserve." at p. 4757.

Prior to the Supreme Court's decision in Gregory v. Chicago, supra, 394 U.S. Ill, a number of state courts upheld disorderly conduct convictions of peaceful residential picketers on the ground that residential picketing, by its very nature, was

likely to irritate onlookers and catalyze violent reactions against picketers. See, e.g., State v. Zanker (1930) 179 Minn. 355, 357, 229 N.W. 311, 312; State v. Cooper (1939) 205 Minn. 333, 285 N.W. 903 [4 LRRM 827]; State v. Perry (1936) 196 Minn. 481, 265 N.W. 302; People v. Lerner (1941) 30 N.Y.S.2d 487. Courts in several jurisdictions, however, dismissed convictions in the absence of a narrowly drawn statute.[4/] See, e.g., Flores v. City and County of Denver (1950) 122 Colo. 71, 220 P.2d 373; Hibbs v. Neighborhood Organ, to Rejuv. Tenant Hous. (1969) 433 Pa. 578, 252 A.2d 622; see, also, Annenberg v. Southern Cal. Dist. Council of Laborers (1974) 38 Cal.App.3d 637, 113 Cal.Rptr. 519 [86 LRRM 2534] (finding no constitutional right to picket residences, but permitting picketing in a case where domestic employees picketed the home of their employer, who had often opened his home to strangers).

In more recent years, a number of states have passed laws specifically prohibiting residential picketing. Litigation under these statutes has produced mixed results. While some courts have upheld convictions, see, e.g., City of Wauwatosa v. King (Wis. 1971) 49 Wis.2d 398, 182 N.W.2d 530 [76 LRRM 2403]; De Gregory v. Giesing (D. Conn. 1977) 427 F.Supp. 910 [95 LRRM 2517], others have reversed convictions on various grounds. See, e.g., State v. Anonymous (1971) 6 Conn.Cir. 372, 274 A.2d 897 (statute found not

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[4/] These courts did not specifically cite the absence of legislation prohibiting residential picketing. Instead, they simply weighed the benefits and detriments of such picketing, in light of the particular circumstances of the case. The absence of a statute articulating the governmental interests in prohibiting residential picketing, however, may have had some impact on the result.

to apply to nonlabor picketing, which is constitutionally protected); State v. Schuller (1977) 280 Md. 305, 372 A.2d 1076 (statute unconstitutionally banned all residential picketing and denied equal protection). The continuing validity of decisions based on statutes favoring one form of speech over another is highly questionable in light of the Supreme Court's recent decision in Carey v. Brown (June 20, 1980) 48 U.S.L. Week 4756 discussed below.

As discussed above, picketing is subject to regulation. A sufficiently important governmental interest in regulating the nonspeech element of picketing can justify incidental limitations on First Amendment freedoms. U.S. v. O'Brien (1968) 391 U.S. 367. However, before a court finds that an asserted governmental interest is substantial enough to justify impinging on the freedom of speech, it engages in a balancing process "... to weigh the reasons advanced in support of the regulation of the free enjoyment of the rights." Schneider v. State (1939) 308 U.S. 147 [5 LRRM 659]; Martin v. Struthers (1943) 318 U.S. 141.

The three clashing interests which are generally present in a residential picketing situation are the free speech rights of the picketers, the privacy rights of the residents, and the governmental interests in public order, and peace and tranquility in the neighborhood. See, Comment, "Picketers at the Doorstep," 9 Harv. Civ. Rts. - Civ. Lib. L. Rev. 9S (1974). It has been argued that the right of privacy is such a substantial governmental interest that it outweighs even the rights of free expression guaranteed by the First Amendment. See, e.g., Garcia v. Gray (10th

(Cir. 1974) 507 F.2d 539; City of Wauwatosa v. King (1971) 49 Wis. 398, 182 N.W.2d 530 [76 LRRM 2403];[5/] Organization for a Better Austin v. Keefe (1971) 402 U.S. 415. However, while picketing as an exercise of the freedom of speech is not an absolute privilege, neither is the right of privacy, and designating conduct as an invasion of privacy is not always sufficient to support an intrusion on the right of freedom of speech. Keefe, supra.

An added governmental interest in the case of residential picketing in the instant case, as expressed in the ALRA, is the right of agricultural employees to engage in self-organization and to refrain from organization. But in the instant case, the governmental interests are difficult to weigh, since the California legislature has not articulated any clear policy against residential picketing.

Peaceful picketing enjoys constitutional protection in California, UFW v. Superior Court (1976) 16 Cal.Sd 499, 504, 128 Cal.Rptr. 209, as does the right of privacy, California

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[5/] In Gregory v. Chicago, Justice Black agreed to the reversal of the convictions but delivered a concurring opinion which has been relied upon by some courts to uphold statutes banning residential picketing (i.e., City of Wauwatosa v. King (1971) 182 N.W.2d 530 [76 LRRM 2403]).

> ... Our Federal constitution does not render the States powerless to regulate the conduct of demonstrators and picketers, conduct which is more than "speech", more than "press," more than "assembly," and more than "petition" as those words are used in the First Amendment. Id. at 124.

Justice Black went on to argue that without regulation of residential picketing, the privacy of the home would be invaded by "... noisy, inarching, tramping, threatening picketers ...." Id. at 126.

Constitution, Article I, section 1. In the absence of any legislative pronouncements regarding picketing, it is evident that the legislature has not undertaken to weigh the interests of speech and privacy in the context of residential picketing. As an administrative agency whose role is to resolve labor disputes between growers, unions, and agricultural employees, it is not our task or within our power to attempt to resolve the balance between speech and privacy, a task given to the courts and legislature by our governmental process. The Board's role is to interpret labor law without violating constitutional rights.[6/] Without any clear legislative mandate, this Board must refrain from pronouncing upon the constitutional rights of speech and privacy of parties who come before us.

Another consideration which argues against the imposition

[6/] There is no clear NLRA precedent on this issue. I am aware of only one case decided by the NLRB involving residential picketing. In United Mechanics Union, Local 150-F (Furworkers) (1965) 151 NLRB 386 [58 LRRM 1413],the Board adopted in shortform a trial examiner's conclusion that the residential picketing of nonstriking employees by a union was conducted in an unlawful manner, violative of the Act. Citing Allen-Bradley Local No. 1111, etc, v. Wisconsin Employment Relations Board (1942) 315 U.S. 740 [10 LRRM 520], the trial examiner concluded that the conduct of the picketers was not protected by the First Amendment.

The Board in Furworkers incorrectly construed Allen-Bradley to hold that a state's curb on residential picketing was not unconstitutional under Thornhill v. Alabama, supra, 310 U.S. 88. Allen-Bradley dealt solely with the issue of preemption. The only question before the court was whether an order by the Wisconsin Board was unconstitutional and void as being repugnant to the provisions of the NLRA. The court specifically stated that it based its decision on narrow grounds and that it refrained from considering the constitutional limitations on state control of picketing. Id. at 525. In my view, the faulty analysis in the Furworkers case makes it questionable support for a ban on peaceful residential picketing.

of restrictions on residential picketing of agricultural employees by this Board is the Equal Protection clause of the constitution. Constitutionally permissible restrictions on speech may not be based on either the content or subject matter of speech. "Government action that regulates speech on the basis of its subject matter slips from the neutrality of time, place, and circumstances into *a* concern about content." Consolidated Edison Co. v. Public Service Commission (June 20, 1980) 48 U.S.L. Week 4776, 4777, citing Police Department of Chicago v. Mosley (1972) 408 U.S. 92.

The United States Supreme Court recently issued a decision concerning the constitutionality of restrictions imposed by states on residential picketing. Carey v. Brown (June 20, 1980) 48 U.S.L. Week 4756; see also Police Department of Chicago v. Mosley, supra, 408 U.S. 92. The Illinois statute at issue in Carey prohibited residential picketing, with limited exceptions including "when the residence or dwelling is used as a place of business," and "the peaceful picketing of a place of employment involved in a labor dispute." I11. Rev. Stat., Ch. 38, § 21.1-2. The Court found that the statute, by defining lawful or unlawful conduct "based upon the content of the demonstrator's communication," (Id. at p. 4757), violated the Equal Protection Clause. The Court held that since the statute permitted residential picketing based on the content of the message, i.e., labor picketing, the basis for the distinction must be substantial and the state's justification subject to strict scrutiny.

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> ... Equal Protection Clause mandates that the legislation must be finely tailored to serve substantial state interests and the justifications offered for any distinctions it draws must be carefully scrutinized. (Ibid.)

The Supreme Court found that the interests in preserving privacy and in providing special protection for labor disputes were insufficient to justify the differential treatment accorded labor picketing by the state. By permitting some residential picketing the state essentially admitted that privacy was not a "transcendent objective." (Id. at p. 4758), and by asserting that labor picketing was more deserving of protection, the state was found to have contravened First Amendment values by "favor[ing] one form of speech over all others." (Ibid.)

I find that Carey v. Brown prohibits this Board from banning residential picketing under section 1154(a)(1) of the Act. Since there is no general prohibition of residential picketing in California, reading the ALRA as banning all residential picketing of agricultural employees would attribute to the legislature an intent to single out residential picketing of agricultural employees as illegal, while other residential picketing is lawful. Under such an interpretation, the "operative distinction is the message on a picket sign." Police Department of Chicago v. Mosley, supra, 408 U.S. 92. Such a ban limited in scope to labor disputes involving agricultural employees would not result in "uniform and nondiscriminatory regulation." Carey v. Brown, supra, 48 U.S.L. Week 4756.

Conclusion

The question presented in this case is whether Respondent

UFW restrained or coerced agricultural employees in the exercise of guaranteed rights. I agree that Respondent's conduct in picketing employees' residences in large numbers, shouting obscenities, and calling the residents names amounted to a violation of section 1154 (a)(1). A case-by-case approach whereby this Board scrutinizes the evidence to determine whether picketing at the residences of agricultural employees was conducted in *a.* manner which tended to restrain or coerce employees would protect the rights of the parties involved and effectuate the policies of the Act.

Member McCarthy advocates creating a "rebuttable presumption" of unlawful restraint and coercion in residential picketing cases. McCarthy premises his position on his belief that residential picketing is almost invariably coercive and on his presumption that the moving force behind any residential picketing is an illegal purpose, the intent to coerce.

Member McCarthy's presumption of illegality ignores the fact that in residential picketing cases there are necessarily present conflicting employee interests. Both the right to engage in organizational activities and the right to refrain from engaging in organizational activities are fundamental statutory rights. By encompassing some conduct which is not coercive, Member McCarthy's presumption of illegality necessarily infringes on the rights of agricultural employees to engage in organizational activities. It also flies in the face of the higher standard of proof required to prove violations of section 1154 (a) (1). See NLRB v. Drivers Local 639, supra, 362 U.S. 274.

An additional basis for Member McCarthy's position is his assertion that residential picketing has an illegal purpose, "the intent to coerce." Member McCarthy confuses an illegal purpose with means which he would consider illegal. The purpose of the picketers herein was not to coerce employees. Rather, their purpose was to gain support for their strike. It was their means of achieving this end, i.e., by residential picketing, which McCarthy would label as presumptively illegal. The line of "illegal purpose" cases referred to above all involve picketing where the end sought was illegal.

Even peaceful picketing can be enjoined if such picketing is for illegal purposes. The cases cited by Member McCarthy fall within this category. Kaplan's Fruit and Produce v. Superior Court (1979) 26 Cal.3d 60 [91 LRRM 3100] involved picketing which blocked access at an employer's business. Hughes v. Superior Court (1950) 339 U.S. 460 [21 LRRM 2095] involved picketing to force an employer to hire blacks, contrary to a state policy against involuntary employment. Building Service Union v. Gazzam (1950) 339 U.S. 532 [26 LRRM 2068] involved picketing to compel an employer to sign a contract with a union which the employees had previously rejected. Teamsters Union v. Vogt (1957) 354 U.S. 284 [40 LRRM 2208] dealt with recognitional picketing prohibited by state law.

Where the means are peaceful, and the end sought is not illegal, however, only the time, place, or manner of the communication can be regulated. section 1154 (a) (1) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce agricultural employees in the exercise of protected rights.

Thus, in the context of residential picketing, an unfair labor practice is established only when the picketing was conducted in a coercive manner. Aside from statutory considerations, we cannot, if we wish to comport with constitutional requirements, label all residential picketing as coercive on a belief that such picketing will almost certainly tend to be coercive. Instead, we must examine each situation individually to determine if that picketing did in fact tend to coerce or restrain agricultural employees.

Member McCarthy next adopts an equal protection analysis to support his "rebuttable presumption." This argument also proves to be defective.

In distinguishing the statute found to be unconstitutional in Carey v. Brown (June 20, 1980) 48 U.S.L. Week 4756, the focus of McCarthy's rule is "clearly on the tendency, purpose, or foreseeable effect of the picketing." at p. 42. Thus, McCarthy concludes, no equal protection issue is raised.

This argument is merely a reiteration of Member McCarthy's belief that residential picketing is coercive and thus illegal. We are told that the rule will focus on the tendency, purpose, or foreseeable effect of the picketing. However, McCarthy's position is that picketing is coercive and has coercion as its purpose. McCarthy has thus equated "tendency, purpose, and foreseeable effect" with coercion. Under his rule, any residential picketing of agricultural employees will be found to be coercive. After applying the rule, we come back to McCarthy's initial position: all residential picketing of agricultural employees is presumptively coercive and in effect should be banned.

Lastly, McCarthy discusses at some length the Connecticut statute which permits all residential picketing except labor picketing not conducted at the site of the dispute. The court in Carey v. Brown (June 20, 1980) 48 U.S.L. Week 4756, found that statute to be "similar in form" to the Illinois statute which it struck down. (See also footnote 5 at 4757 of Carey v. Brown, supra, where the court rejected the same interpretation of the statute which McCarthy proposes for his rule.) The continuing vitality of the Connecticut statute upon which McCarthy relies appears to be highly dubious.

In conclusion, Member McCarthy's position is based on his belief that residential picketing is almost always coercive and thus is presumptively illegal. I can find no support for this initial presumption of coerciveness.

Dated: October 24, 1980

RONALD L. RUIZ, Member

MEMBER McCarthy, Concurring:

I am in complete agreement with the conclusion that the conduct of the Respondent labor organization included several violations of section 1154(a)(1) of the Act. However, as the decision stops short of what I believe to be a complete treatment of the residential picketing issue, *I* find it necessary to add this concurring opinion.

While finding that Respondent's conduct during the picketing of three agricultural employees' residences violated section 1154(a)(1), the decision fails to indicate whether the violation stemmed from the manner in which the residential picketing was carried out or from the fact that residences were being picketed. I believe the latter approach to be both correct and necessary, and I would find picketing of any agricultural employee's home or residence by a labor organization has an inherent tendency to coerce and is therefore presumptively

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illegal.[1/] Unlike the decision's ad hoc approach, a holding here that residential picketing is presumptively coercive would provide a clear-cut directive to the General Counsel to take early action whenever it is charged that such picketing has occured. It would also serve as a deterrent to further residential picketing by putting labor organizations on notice that a residential picketing charge under our Act will result in an unfair labor practice violation unless the party responsible for the picketing can overcome a presumption that its conduct tended to restrain or coerce employees in the exercise of their section 1152 rights.

I. Picketing of an Agricultural Employee's Residence by a Labor Organization in Connection With a Labor Dispute has an Inherent Tendency to Coerce Employees in Violation of Labor Code Section 1154(a)(1) .

As noted above, I agree with the conclusion that the UFW's acts and conduct during the residential picketing in the instant case restrained and coerced employees in the exercise of their section 1152 right to refrain from engaging in union activities and thereby violated section 1154(a)(1) of the Act. Contrary to my colleagues, however, I believe that a union's picketing of employees at their residences will almost invariably tend to coerce and restrain the picketed employee(s) in violation of the Act, and therefore I would find that such picketing creates a rebuttable

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[1/]The Administrative Law Officer (ALO) recommended that Respondent be ordered to cease and desist from any further residential picketing.

presumption of unlawful restraint and coercion.[2/]

As indicated in the ALO's findings of fact, Respondent, through its agents, picketed the residences of at least two agricultural employees on at least two separate occasions. The picketers at each location ranged in number from 30 to 50, carried signs and flags, and shouted epithets and obscenities at the inhabitants of the residences they picketed. The picketing occurred at various times of day commencing in one case at 4:30 a.m., and lasted for periods ranging from one to four and one-half hours. Under these circumstances, I conclude, as did the ALO, that the picketing had a tendency to and did in fact intimidate and coerce the targeted agricultural employees in the exercise of their section 1152 right to refrain from supporting or assisting the labor organization in its strike activities, thereby constituting a violation of Labor Code section 1154(a)(1).

There should be no question that picketing agricultural employees at their homes or residences as *a* means of restraining or coercing them in the exercise of any of their section 1152 rights, is a violation of the Act. See, e.g., Kaplan's Fruit and Produce v. Superior Court (1979) 26 Cal.3d 60. Such a violation must be found by the Board whenever it determines that any conduct, including picketing or demonstrating, by any number of persons, however few, reasonably tends to coerce employees, for the

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[2/] Cf. O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons (Dec. 27, 1978) 4 ALRB No. 106, wherein the Board provided for post-certification access and established a rebuttable presumption that no alternative channels of effective communication exist.

> ... [t]est of coercion and intimidation is not whether the misconduct proves effective but rather whether, under the existing circumstances, the misconduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the act. [Local 550 Steelworkers (Redfield Co.) (1976) 223 NLRB 854.]

It is my conviction that whenever a labor organization undertakes to picket an agricultural employee at his residence in connection with a labor dispute, such conduct will almost certainly tend to coerce the employee directly, and also indirectly through his family and neighbors, in the exercise of his statutory rights. This is true regardless of whether there be one picketer or many, silent picketers or noisy ones, picketers in daylight or picketers in darkness. See Annenberg v. So. Cal. Dist. Council of Laborers (1974) 38 Cal.App.3d 637, 647; dissenting opinion of Justice Rehnquist in Carey v. Brown (June 20, 1980) 48 U.S. Law Week, 4756, 4762.

Labor organizations have long had the right under section 13 of the National Labor Relations Act (ALRA section 1166) to strike and picket an employer's facility or a job site to try to persuade employees to join the strike and/or to refrain from working. NLRB v. Longview Furniture Co. (4th Cir. 1953) 206 F.2d 274 [32 LRRM 2528] . Such job site picketing may contain elements both of persuasion and coercion [NLRB v. Knitgoods Workers Union (2nd Cir. 1959) 267 F.2d 916 [44 LRRM 2287]], and will be held to be within permissible bounds only insofar as it does not exceed the "general pressures ... implicit in economic strikes" [NLRB v. Teamsters Local 639 (1960) 362 U.S. 274]. These "general pressures" are within the reasonable expectations of those employees who choose to cross a picket line at the job site, and to the extent the picketing is free

from coercive tendencies, it ought not to be prohibited. See, e.g.. NLRB v. Knitgoods Workers Union, supra. Of course, in the instant case, we are not confronted with picketing at the situs of the labor dispute. Rather, we are dealing with a situation where a labor organization has brought the labor dispute to the homes of agricultural employees and/or prospective agricultural employees who have chosen to exercise their statutory right to refrain from supporting or assisting the labor organization. See, e.g., State v. Perry (1936) 196 Minn. 481 [265 N.W. 302].

The ALRB has frequently held that agricultural employees have the right to be contacted by, and receive communications from, labor organization representatives at their homes. Silver Creek Packing Company (Feb. 16, 1977) 3 ALRB No. 13; Whitney Farms (Aug. 18, 1977) 3 ALRB No. 68. Such communications may properly include appeals to employees to join with the labor organization in a strike, picketing, or other protected concerted activity and may involve handbilling as well as personal discussions. These forms of communication are deserving of the Board's protection since they appeal to reason, clearly lack the coercive overtones of conduct proscribed by the Act and can be rejected by employees who do not wish to receive the communication. Vista Verde Farms (Dec. 14, 1977) 3 ALRB No. 91.

A union's picketing of employees at their residences, however, is quite another matter. Its effectiveness in securing employees' agreement to join a strike or to honor the union's picket line is not based on the power of reason or peaceful persuasion but rather on the inherent tendency to coerce and restrain which such

picketing holds for its target. See Hughes v. Superior Court (1950) 339 U.S. 460. For example, picketing an employee at his home holds him or her up to ridicule and public condemnation before his or her family and neighbors [United Mechanics Union Local 150-F, et al. (1965) 151 NLRB 386]; it creates pressures and a "... not necessarily unreasonable fear of escalation – action and reaction between picketers and spectators" [City of Wauwatosa v. King (1971) 49 Wis.2d 398 [182 N.W.2d 530]]; it represents "... a threat of (i) physical violence, (ii) social ostracism," [Hellerstein, Picketing Legislation and the Courts (1931) 10 No.Car.L.Rev. 158, 186n, cited favorably in Thornhill v. Alabama (1940) 310 U.S. 88, 100-101, fn. 18]; and, "... implicit in any such demonstration is the threat it will be continued or repeated until its object is attained" [United Mechanics Union Local 150-F, et al., supra]. It also carries the threat that other nonstriking employees should join the strike or risk becoming targets and victims of picketing themselves.

It is inconceivable that such readily foreseeable effects on the nonstriking employee would be outside the contemplation of the labor organization and its picketers. On the contrary, it is plain that an intent to coerce is the moving force behind any labor organization's picketing of an agricultural employee at his or her home or residence. If coercion was not the intent, there would be no reason to use other than the traditional channels of communication. Knowing where the nonstriker lives, the labor organization could, if it were truly interested in legitimate communication, achieve personal contact by mail or at the worker's door on a one-on-one basis.

In addition to the profound coercive effect inherent in residential picketing, a real potential for violence will invariably be present. [See, e.g., State v. Cooper (1939) 205 Minn. 333 [285 N.W. 903].] Residential picketing always carries with it powerful emotional overtones which not unreasonably may cause the target employee to react forcefully out of fear, annoyance, or protective instinct. Or, as in the instant case, strong words and actions may be initiated by the picketers themselves. Violence thus begat is, of course, clearly inimical to the express purposes of the Act:

> In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state.
>
> * * * [Section 1, ALRA]

It should be made clear that I do not advocate an absolute ban on all residential picketing at all times and in all circumstances. Rather, I advocate only a rebuttable presumption of illegality with respect to any picketing by a labor organization or an agricultural employer, of any agricultural employee at his or her home or residence, because such picketing has an inherent tendency to restrain or coerce the employee in the exercise of rights guaranteed by section 1152 of the Act. The need for such a rule is made all the more compelling by the potential for violence which inevitably arises in the residential picketing context.

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II. First and Fourteenth Amendment Considerations Do Not Preclude the Board From Finding Residential Picketing Presumptively Coercive.

Historically, the courts have distinguished between speech which is represented by a pure expression of ideas and "speech plus", which term is utilized to describe labor picketing. Early on, Justice Douglas described industrial picketing as:

> ... more than free speech since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. [Bakery Drivers Local v. Wohl (1941) 315 U.S. 769, 775-776 [10 LRRM 507] (concurring opinion) (favorably cited in Teamsters Union v. Vogt (1957) 354 U.S. 284.]

Based on this distinction the courts have clearly indicated that "speech plus" will not receive the kind of First Amendment treatment reserved for the more pure forms of expression. For example, in Cox v. Louisiana (1965) 379 U.S. 536, the Court held that:

> We emphatically reject the notion that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate by pure speech. [Id., at 555.] [3/]

Consistent with the foregoing, "speech plus", particularly in the labor context, has been acknowledged by the Court as being subject to nondiscriminatory regulation without running afoul of the First and Fourteenth Amendments, particularly where the conduct

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3/ Also see, Carey v. Brown, supra, Supreme Court indicated that nonlabor picketing is more akin to pure expression than labor picketing and should be subject to fewer restrictions.

aspects of labor picketing run counter to a valid state interest. Thus, for example, in Building Service Union v. Gazzam (1950) 339 U.S. 532 [26 LRRM 2068], the Court held that:

> ... picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. [Citations omitted.] But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. [Id., at 536-537.]

The constitutional propriety of state action to prohibit or enjoin labor picketing was most clearly articulated by the Supreme Court in 1957 when it held that:

> ... a State, in enforcing some public policy, whether of its criminal or civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy. [Teamsters Local v. Vogt (1957) 354 U.S. 284 [40 LRRM 2208] .]

California's views on the constitutional issues surrounding labor picketing, closely parallel those of the U.S. Supreme Court. For example, In U.F.W. v. Superior Court (1971) 4 Cal.3d 556, our high court noted that:

> ... it is apparent that the more limited protection given picketing as a concomitant of free speech is predicated on the dual nature of the activity, and the fact that, of itself, picketing (i.e., patrolling a particular locality) has a certain coercive aspect.

And, concerning the narrower issue of residential picketing in connection with a labor dispute, the most contemporary California appellate court opinion on the subject has observed:

> We take it as well established that employees of a business or industry which is involved in a labor dispute have no constitutional right to picket the private

residences of other employees or of the employers of that business or industry. [Annenberg v. Southern Cal. Dist. Counsel of Laborers, supra at p. 642.1

As previously stated, I would find that picketing of employees at their residences by a labor organization or an employer, has an inherent tendency, to coerce or restrain agricultural employees in violation of Labor Code section 1154(a)(1) or 1153(a), respectively. Under the foregoing case authority, this Board may properly find such picketing presumptively coercive, consistent with First and Fourteenth Amendment safeguards.

III. Equal Protection Considerations Do Not Preclude the Board From Finding Residential Picketing Presumptively Coercive.

The Meaning *of* Carey v. Brown

The position I take with respect to residential picketing is in full recognition of Carey v. Brown (June 20, 1980) 48 U.S. Law Week 4756, a recent decision by the U.S. Supreme Court concerning a similar type of picketing. At issue in Carey was an Illinois statute which prohibited picketing of residences or dwellings, but carved out an exception to the prohibition for peaceful picketing of places of employment involved in a labor dispute. The asserted rationale for the statute was the State of Illinois' interest in maintaining residential privacy.

In finding the statute to be unconstitutional, the Supreme Court made it clear that it was doing so on the basis of equal protection principles:

> Because we find the present statute defective on equal protection principles, we likewise do not consider whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments. [Id., p. 4757.]

The Court did not base its decision on the arguably protected nature of residential picketing. To be sure, the Court did indicate that First Amendment free speech considerations are a limitation on the regulation of peaceful picketing on the public streets and sidewalks in residential neighborhoods because such activity is speech related and occurs in a public forum. A competing set of First Amendment considerations was also duly noted by the Court -- namely, those concerning the right of privacy.

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Id., p. 4760.]

However, in Carey, the Court was not concerned with and did not attempt a balancing of free speech and privacy considerations. It emphasized free speech as a right under the First Amendment for the simple reason that equal protection principles must be applied more rigorously when fundamental rights may be affected:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. [Id., at p. 4757.]

The Illinois statute was unable to withstand that scrutiny because the distinctions it drew were based on content alone, as evidenced by a major inconsistency in the application of its rationale. The statute addressed itself to residential picketing as a whole, but chose to exempt from its regulatory provisions one large and basic category of residential picketing. In so doing the statute revealed a content-based nature because there was no showing that residential

picketing in the exempted category had any less impact on the privacy right which the statute purportedly sought to protect than did residential picketing in the prohibited category. In other words, there was no adequate basis shown for a statutory scheme which would allow picketing *of a* home when labor matters are at issue but would not allow picketing of the same home when nonlabor matters are at issue:

> Appellants can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. [Id., at p. 4758.]

In addition, the statute applied its purported rationale in an overbroad fashion with respect to nonlabor picketing activities since it made "no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict on the privacy interest." Id. When expressive conduct is being regulated, a proper focus can be achieved only if the statute is "narrowly drawn" or "finely tailored to serve substantial state interests", Id., at p. 4757.[4/]

It was thus apparent to the Court that, although the statute was meant to further a substantial state interest, it did not have a sufficiently narrow focus and that the dividing line the

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[4/]The Court indicated that even a statute with a content-based distinction can, under certain circumstances, withstand constitutional scrutiny if it is narrowly drawn:

> And though we might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction -- if narrowly drawn -- would be a permissible way of furthering those objectives [citation omitted], this is not such a case. [Id. , at p. 4759, fn. 13.]

statute established between permissible and impermissible forms of expression was based solely on content.

> The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed. [Emphasis added.] [Id.]
>
> 'Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.' [Emphasis added; quoted from Police Department of the City of Chicago v. Mosley (1972) 408 U.S. 92, 95-96.] [Id., at p. 4758.]

In conclusion, the Court stated:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. 'The crucial question, however, is whether [the Illinois statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.' [Citations omitted.] And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be 'No.' [Id., at p. 4760.]

Had the operative terms of the statute been, directed at the tendency, purpose, or foreseeable effect of the expressive conduct, rather than at the content of the expression, there would have been little question that the objective of the statute was advanced in a constitutionally permissible manner. The Court was careful to point out that:

> Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities, see e.g., Id. (picketing or parading prohibited near courthouses); Adderly v. Florida, 385 U.S. 39 (1966) (demonstrations prohibited on jailhouse grounds), or when it is directed toward an illegal purpose, see e.g., Teamsters Union v. Vogt, 354 U.S. 284 (1957) (prohibition of picketing directed toward achieving 'union shop' in violation of state law). [Emphasis added.] [Id.] [5/]

[5/]Contrary to the position taken by Member Ruiz, I believe that picketing of agricultural workers' homes by a labor organization can

[fn. 5 cont. on p. 41]

In the instant case, and in other situations involving picketing of employees at their residences, such conduct clearly tends to coerce or restrain them in the exercise of their section 1152 rights. As explained below, a rebuttable presumption that a labor organization or an employer violates the ALRA whenever it engages in picketing agricultural employees at their residences meets the requirements of the Equal Protection Clause because the

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[fn. 5 cont.]

be presumed to have an illegal purpose. However, I hasten to add that whether or not such a purpose exists, the undeniable tendency of such picketing is to coerce or restrain employees in the exercise of their section 1152 rights. That tendency alone is sufficient to create a violation of section 1154(a)(1), (see Steelworkers, p. 31 of this opinion) and it is that tendency at which the rebuttable presumption is directed. A rule focused in this manner would withstand scrutiny under the Equal Protection Clause regardless of whether the ultimate goal of the residential picketing could be deemed illegal.

Assuming for the sake of argument that my position is predicated on the presence of an illegal purpose, Member Ruiz' contention that the illegal purpose cases are not concerned with "means" is erroneous. Here the means employed have an inherent tendency to coerce; it is hornbook law that a person is presumed to intend the reasonably forseeable consequences of his actions. See, e.g., William L. Prosser, Law of Torts (1964) Third Edition at p. 32. Moreover, the targets of the conduct had previously expressed, by word or deed, their wish to refrain from participating in the strike and were thus exercising their rights under section 1152. The picketers' purpose can only be characterized as an attempt to stop the workers from exercising those rights. If their purpose was, as Member Ruiz claims, simply "to gain support for their strike", they would have used an appeal to reason, for which there are many avenues, rather than engaging in conduct which is far removed from an appeal to reason which has an inherent tendency to coerce. The picketers' actions were "aimed at preventing effectuation of [an established public] policy" -- i.e., protection of the agricultural workers' right to refrain from union activity -- and are therefore subject to complete prohibition. Teamsters Union v. Vogt, supra, at p. 9. I merely advocate that picketing of agricultural employees' residences by an employer or a labor organization be subject to a rebuttable presumption of illegality. By adopting such a policy, the Board would simply be taking a reasonable step in furtherance of its duty to ensure that the workers' right to refrain from union activity retains vitality under the ALRA.

presumption is based on the coercion inherent in such picketing, rather than on the content of the message, and is precisely tailored to serve substantial state interests.

Carey v. Brown Distinguished

Unlike the Illinois statute in Carey v. Brown, supra, a rebuttable presumption against picketing agricultural employees at their residences addresses itself to only one narrow form of residential picketing and would be without inconsistencies in the application of its rationale. The focus of the rule is clearly on the tendency, purpose, or foreseeable effect of the picketing, rather than on the content of the message. Thus, within the parameters of the rule, no equal protection issue is raised. Neither is that issue raised when the rule is considered in full context. The fact that the state, through this Board,[6/] may see fit to single out one form of expressive conduct for regulation, while leaving the remaining forms untouched, does not ipso facto create a content-based distinction. First of all, when one considers more than just the right of privacy, union picketing of a nonstriking worker's home is intrinsically different from either union picketing of an employer's home or any residential picketing that is not concerned with a labor

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[6/]In Auto Workers v. Wisconsin Employment Relations Board (1956) 351 U.S. 266 [38 LRRM 2165], the Supreme Court upheld an order of the Wisconsin ERB wherein the respondent union was ordered, among other things, to cease and desist from intimidating nonstrikers' families and picketing their residences. The final paragraph of the Supreme Court's opinion states:

> We hold that Wisconsin may enjoin the violent union conduct here involved. The fact that Wisconsin has chosen to entrust its power to a labor board is of no concern to this Court.

dispute. The rights affected and the degree of impact on the occupants of the home is quite different in each of those cases.[7/] Secondly, it is of no consequence that an order of this Board which prohibits a labor organization from picketing agricultural workers at their homes would leave labor organizations free to picket the homes of nonstriking industrial workers.[8/] This distinction is content-neutral, not content-based, because the union's message is the same in either instance: the nonstriking worker should join the strike. Moreover, as previously discussed, agricultural labor relations has proved to be particularly volatile in the past, and labor disputes in the agricultural sector, unlike those in the industrial sector, have shown a tendency to spread to areas at some distance from the actual work site, the true locus of the dispute. The state is free to recognize degrees of harm and confine its restrictions to those classes of cases where the need is deemed to be clearest; such action will not be considered arbitrary, unreasonable or in conflict with the Equal Protection Clause of the Fourteenth Amendment. Skinner v. Oklahoma (1942) 316 U.S. 535 [62 S.Ct. 1110]; see also cases cited at 16A Am.Jur.2d, §759 (esp. n. 74 and 79). The foregoing principles are clearly enunciated and illustrated in Simpson v. Municipal Court (1971) 14 Cal.App.3d 591 [92 Cal.Rptr. 417]:

> . . . The legislative body is not bound to extend its regulation to all cases which it might possibly reach, and

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[7/]Employers have no right guaranteed them under the Act, as do employees, to engage in, or to refrain from engaging in union activities, nor is the Act concerned with nonlabor picketing, unless it somehow constitutes restraint or coercion with respect to section 1152 rights of employees.

[8/]This Board has no jurisdiction over nonagricultural employees.

> an otherwise valid regulation is not nullified by confinement to a narrower field than that conceivably available. (West Coast Hotel Co. v. Parrish (1937) 300 U.S. 379, 400 [Citations omitted.].) . . . The present ban does not favor one message over another or one messenger over another.. It is aimed at a specific activity, patrol of the Capitol corridors by ensign-bearing persons; it is not discriminatory by failure to prohibit activities of an intrinsically different sort, however related in objective. [14 C.A.3d at 600.]

A rebuttable presumption that residential picketing is inherently coercive can also satisfy equal protection requirements when viewed as a "time, place-and manner" regulation. Such regulations have been allowed to impinge on the exercise of free speech and expressive conduct because the harmful consequences of the behavior in question, irrespective of whatever merit the message may have, necessitate a limitation on that behavior; the limitation is acceptable so long as it does not unduly restrict the flow of information and ideas. See Cox v. New Hampshire (1941) 312 U.S. 569. [See also Carey v. Brown, supra, p. 4760.] These principles are neatly illustrated in De Gregory v. Geising (1977) 427 F.Supp. 910, where a federal court upheld a Connecticut statute whose terms permitted all picketing in a residential area, except for labor picketing which is not being conducted at the situs of a labor dispute. The statute thus established two separate classifications: one concerning labor picketing as opposed to nonlabor picketing, the other concerning labor picketing at the situs of a labor dispute as opposed to labor picketing at all other places. With regard to the latter classification the Court stated:

> The Connecticut statute also distinguished between labor picketing at the situs of a labor dispute and labor picketing at other places; only the latter is prohibited.

> Unlike the distinction between labor and non-labor picketing, this classification is not based on subject matter, but rather on location. Hence, it is akin to traditional 'time, place and manner,' regulations. Police Department of the City of Chicago v. Mosley, supra, 408 U.S. at 98-99, 92 S.Ct. 2286. In this way, the classification advances the state's substantial interest in limiting the scope of a labor dispute to the situs of that dispute. Cf. Carpenters & Joiners Union of America, Local No. 213 v. Hitter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942); Thornhill v. Alabama, supra, 310 U.S. at 105, 60 S.Ct. 736; Gomez v. United Office and Professional Workers of America, CIO, Local 16, 73 F.Supp. 679, 683 (D.D.C. 1947). The statute specifically leaves open to labor picketing the most appropriate places for communicating its message. For these reasons this aspect of the Connecticut statute also satisfies the equal protection principles of Mosley. [Footnote omitted.] [427 F.Supp. 915.]

The rule under consideration in the instant case addresses only labor picketing at a worker's residence, but its silence as to labor picketing at all other places in effect creates a classification identical to that discussed above. Like the Connecticut statute, the rule I propose here creates a classification based on location of the picketing activity rather than on the ideas the labor organization would like to convey; it advances substantial state interests, namely, the insulation of agricultural workers from coercion in the exercise of their fundamental labor rights (as defined in the ALRA) and the lessening of strife in agricultural labor relations; and it does nothing to preclude labor organizations from availing themselves of the most appropriate places and methods of conveying their message, e.g., individual appeals at the work site or the home, picketing at the work site, leafleting or mailing of printed materials.

IV. Conclusion.

The answer to the problem posed by picketing agricultural

workers at their residences is not to be found solely in the use of general statements concerning the right of privacy. Instead, I propose the application of a narrowly focused rule which promotes the purposes and policies of the Agricultural Labor Relations Act and does so in an entirely constitutional manner. By finding that it is presumptively coercive for *a* labor organization to engage in the picketing of an agricultural worker at his or her residence, this Board would be fulfilling its mandate from the Legislature both to protect the right of farm workers to be free from coercion in the exercise of their fundamental labor rights and to ameliorate the volatile conditions that have characterized agricultural labor relations. By holding that residential picketing of agricultural workers at their dwellings is presumptively illegal, we would be giving the General Counsel a clear-cut directive to take early action against such picketing so that there would still be time to avoid irreparable harm. Moreover, each labor organization would be put on notice that, unless it can establish that there was no tendency to restrain or coerce employees inherent in its conduct of residential picketing, it will be found guilty of an unfair, labor practice for having engaged in that activity. All this would be accomplished while ensuring that labor organizations have a full opportunity to exercise peaceful persuasion through noncoercive means at any location.

Dated: October 24, 1980

JOHN P. McCarthy, Member

NOTICE TO EMPLOYEES

After a hearing where each side had a chance to present its case, the Agricultural Labor Relations Board has found that we have engaged in *a* violation of the Agricultural Labor Relations Act. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To bargain as a group and choose whom they want to speak for them.

4. To act together with other workers to try to get a contract or to help or protect one another.

5. To decide not to do any of these things.

WE WILL NOT restrain or coerce you in the exercise of your right to join or engage in, or to refrain from joining or engaging in, any strike or other concerted activity, by means of picketing, demonstrations, threats, abusive language, insults, or other like or related conduct at or near your homes or residences.

Dated:

UNITED FARM WORKERS
OF AMERICA, AFL-CIO)

By:_____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Marcel Jojola (UFW)

6 ALRB No. 58
Case No. 79-CL-23-EC

ALO DECISION

The ALO concluded that the Respondent union violated section 1154(a)(1) of the Act by picketing the residences of non-striking agricultural employees. The ALO found that the large numbers of shouting picketers in front of the workers' residences tended to have a coercive effect on the residents. Since the residences were removed from the situs of the labor dispute, the privacy of the employees and their right to refrain from participating in concerted activities outweighed Respondent's asserted right to picket the residents.

BOARD DECISION

The Board upheld the ALO's conclusion that the Respondent union violated section 1154(a)(1) in three separate instances where large numbers of union agents picketed the residences of agricultural employees, chanting slogans and shouting epithets and obscenities at the residents. The Board held that in the residential setting where it occurred, this conduct tended to coerce or restrain agricultural employees in the exercise of protected rights.

MEMBER RUIZ, CONCURRING

Member Ruiz agrees that the UFW's conduct in the instant case amounted to a violation of section 1154(a)(1), reading the Order to require a case-by-case determination that the manner of the picketing tended to restrain or coerce agricultural employees in the exercise of protected rights.

Member Ruiz argues that to establish a rebuttable presumption that all residential picketing of agricultural employees is coercive, as proposed by Member McCarthy, would infringe on the rights of agricultural employees to engage in organizational activities.

MEMBER McCarthy, CONCURRING

Member McCarthy agrees that Respondent's conduct violated section 1154(a)(1) of the Act. However, he would hold that residential picketing has an inherent tendency to restrain or coerce employees in the exercise of their section 1152 rights and should therefore be made subject to a rebuttable presumption of illegality. Member McCarthy finds that despite the presumption, labor organizations would have a full opportunity to exercise peaceful persuasion through non-coercive means at any location. He finds adoption of the presumption is necessary to preserve the workers' right under the ALRA to refrain from union activity.

Marcel Jojola (UFW)

6 ALRB No. 58
Case No. 79-CL-23-EC

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from restraining or coercing agricultural employees in the exercise of their right to join or engage in, or to refrain from joining or engaging in, any strike or other concerted activity, by means of picketing, demonstrations, threats, abusive language, or other like or related conduct at or near the home or residence of any agricultural employee, to post, read, and publish a remedial Notice to Employees, and to submit a written apology to the residents of the picketed homes.

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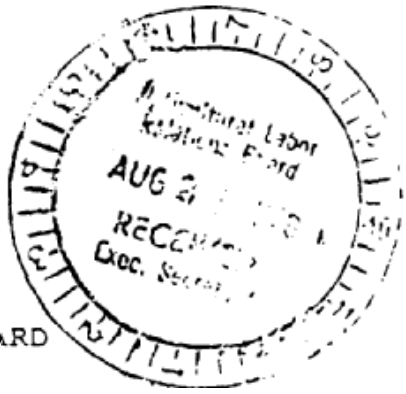

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent,. And MARCEL JOJOLA, Chief, El Centro Police Department, Charging Party.	)	Case No. 79-CL-23-EC

APPEARANCES:

Pat Zaharapoulos, Esquire, for the General Counsel

Carlos M. Alcala, Esquire, for the Respondent

BEFORE:

Matthew Goldberg, Administrative Law Officer

DECISION OF THE
ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

On March 21, 1975,1/ Marcel Jojola, Chief of the El Centro Police Department, filed the charge herein, alleging violations by the United Farm Workers of America, AFL-CIO (hereafter

1/All dates refer to 1979 unless otherwise specified.

referred to as "Respondent") of Section 1154(a)(1) of the Act. The charge was served on the same day.

Based on this charge, the General Counsel for the Board issued a complaint on March 24. Copies of the complaint and notice of hearing were duly served on Respondent, which as a consequence filed an answer essentially denying that it had committed the unfair labor practices alleged.

A hearing was held before me commencing May 1. The General Counsel and the Respondent appeared through their respective representatives and were afforded full opportunity to examine and cross-examine witnesses, introduce evidence, and submit oral arguments and briefs.

Based on the entire record in this case, including my observations of the demeanor of witnesses while they testified, having read and considered the briefs submitted to me since the hearing, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent, as it admitted in its answer, is and was, a all times material, a labor organization within the meaning of Section 1140.4(f) of the Act.

Respondent alleged as an affirmative defense that the Charging Party herein lacks standing and authorization under the El Centro City Charter to initiate civil litigation in a private labor dispute. Insofar as Jojola's "authorization" is concerned, Respondent neglected to present any evidence on this issue, or to apprise this Hearing Officer of the appropriate charter provisions to be noticed either at the hearing or in the brief it submitted. Therefore, it is concluded that Respondent failed to meet its burden of proof on this issue, and that Jojola was so authorized.

Regarding the issue of "standing," the Respondent in its brief acknowledged that the Board properly asserted jurisdiction herein, and accordingly did not address this point. Parenthetically, it should be noted that although Jojola is or was neither an agricultural employer or employee, he may file a charge with this Board. Under Board Regulation §20200, "any person [emphasis mine]] may file a charge that any person has engaged in or is engaging in an unfair labor practice." Clearly, access to the Board's processes, under this Regulation, is not restricted to individuals who have some relationship to agriculture. It is determined consequently that this Board may assert jurisdiction over situations which give rise to the filing of charges by individuals who bear no direct relationship to agriculture.

II. The Unfair Labor Practices Alleged

The central issue in dispute in this matter is whether the Respondent engaged in violations of the Act by picketing the residences of certain individuals.

The testimony of General Counsel's witnesses was essentially uncontroverted. These witnesses recounted three separate incidents of "residential picketing," where groups of between 30 and 50 were carrying signs and red and black flags from the Respondent, shouting epithets and obscenities 2/ at the inhabitants of the houses which they patrolled around. The residences were located at 445 Pauline Street, Calexico; 915 Figueroa, Holtville; and 310 Encinas, Calexico. The picketing at the Pauline Street house lasted for approximately three hours on March 21; at the Holtville address, the picketing took place from 4:30 a.m. to about 9:00 a.m. on April 10; at 310 Encinas, picketers patrolled on March 22 for one to one-and-one-half hours.

Cars belonging to residents of two of the houses were damaged around the time of the picketing. Rafaela Sandoval Galvan, who lives at the Pauline Street home, testified that her son Roberto's car had all its windows broken one evening in March by three unidentified men. Guadelupe Guerra, from the Holtville house, stated that her car, which was parked in front of the house on the day of the picketing, was scratched on both of its sides that day.

Respondent's counsel voiced continuing objections to testimony from the various witnesses concerning the particular occupations and places of employment of members of their households. Specifically, Rafaela Sandoval stated her son, Roberto, worked as a stapler for Bruce Church, Inc., and that she has seen his pay-check with that company's name on it. She also testified that four of the picketers knocked on her door and spoke to Roberto on the day of the picketing. She heard them call him a fellow worker, and invite him to help them.

Guadelupe Guerra stated that she lives at the Holtville house with her husband, two daughters and two sons. She testified that her husband is an irrigator who works for California Coastal Farms, a company then involved in a labor dispute with the Union. Her daughters work at Joe Maggio, Inc. One of them, Martha, testified that she is employed at Maggie's packing shed. This shed is recognized to be subject to the jurisdiction of the Agricultural

2/The specific words used need no undue repetition. Suffice it to say that in addition to "scab," the words were strongly-voiced, abusive vulgarities referring to canine ancestry and peculiar sexual proclivities.

Labor Relations Board in several cases, the most notable of which is 4 ALRB No. 65, in which the Fresh Fruit and Vegetable Workers Union was certified to be the collective bargaining representative of the packing shed employees. Martha Guerra also stated that the Union maintained a picket line around the Maggio shed for some time earlier that year. As a consequence, she "stayed out on strike" for 32 days.

Jesus Armente Camacho, resident at the Encinas Street house, testified that included with those living at her house at the time of the picketing were three sons who work for Let-Us-Pak. One of them is a foreman and the others are staplers. It did not appear from the record that the Union has a labor dispute with Let-Us-Pak. To the contrary, the Independent Union of Agricultural Workers has been certified as the bargaining representative of the agricultural workers there. Yet another of Mrs. Camacho's sons is employed by Coastal Farms as a foreman. A daughter, Cecilia, who also lives at the house, is a forewoman for Bruce Church. Mrs. Camacho stated that some of the picketers asked to speak with her sons.

Another woman, Cruz, lives with Mrs. Camacho. According to Mrs. Camacho, "that girl is my sister, but I raised her. It's like she were my daughter." Cruz is employed by Bruce Church, Inc., as a "machine lettuce packer," and performs her duties out in the fields as opposed to the packing shed. Mrs. Camacho did not state that she acquired knowledge of Cruz's occupation or those of other family members through first-hand observation. Rather, she said that she learned about the work done by the members of her household through what she had been told.

The parties stipulated that the residences involved herein were picketed by Respondent's pickets, and that the Respondent has or had no actual access to workers at their job site, picketing , at the job site being confined to the edges of the fields in question.

As its sole witness, Respondent called Manuel Figueroa, an irrigator who was currently on strike at the Joe Maggio Company. Figueroa admitted to participating in picketing at residences in Calexico on Second Street and at 845 Fifth. He initially stated that this picketing took place in February, but later corrected the date to March 21. He testified that on that occasion, at the Fifth Street address, the picketing was orderly, that there were no obscenities shouted, nor was ingress or egress to the house blocked. He said that the Respondent, through Candelaria Zamora, "our coordinator," instructed a group to picket the house, which belonged Mrs. Eva Ruelas , a field worker for the Joe Maggio Company.

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ANALYSIS AND CONCLUSIONS OF LAW

I. The Hearsay Problem

Respondent cogently argues that the General Counsel has not met its burden of proof to establish a violation of §1154 (a) (1) of the Act, to wit, it has not specifically demonstrated, through admissible evidence, that Respondent restrained and coerced "agricultural employees" in the exercise of their rights enumerated §1152.

Section 1160.2 of the Act states that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the Evidence Code." It has been held by this Board that hearsay evidence alone cannot be used to support a finding of fact . Patterson Farms, 2 ALRB No. 59 (1976); Abatti Farms, 3 ALRB No. 65 (1977). Although these cases arose in the context of objections to the conduct of elections, the rule from these cases should be extended to unfair labor practice proceedings, which are governed by a more strict evidentiary standard. [Compare ALRA §1160.2 and Reg. 20272 with Reg. 20370(C).]

Martha Guerra was the sole witness appearing for the General Counsel and subject to cross-examination, who testified conclusively to the effect that she was an agricultural employee. Although the Respondent argues in its brief that "the UFW picket [sic] was not directed at her," apart from the recitation from her testimony that "she did not feel the UFW had anything against her," Respondent presents no unequivocal evidence concerning the object of the picketing at the Guerra residence. Therefore, it is concluded that the picketing at this particular site had an affect on at least one agricultural employee.

Insofar as the picketing at the Sandoval and Camacho residences is concerned, however, the General Counsel presented testimony via Mrs. Sandoval and Mrs. Camacho concerning the occupations of certain of their respective family members. It is plain that their statements in this regard constitute hearsay. They were recitations to the witnesses made by persons (inferentially, the workers themselves) "other than [the] witness while testifying at the current trial . . . offered to prove the truth of the matter stated," i.e., that these workers are or were, in fact, agricultural employees (Evidence Code §225). Significantly, neither Mrs. Camacho nor Mrs. Sandoval were able to testify on this point from their own personal knowledge, that is, from knowledge gained from their first-hand observations of their family members at their jobs. 3/

3/Mrs. Guerra did testify that one day she brought lunch to her husband, an alleged irrigator for California Coastal Farms. However, on that occasion, she did not actually see — [continued]

General Counsel argues that such testimony should be admissible as it falls within the exception to the hearsay rule set forth in Evidence Code §1313 , "Reputation in Family Concerning Family History." However, this particular Evidence Code section is inapposite, as the testimony concerned the occupation of a family member, not "birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, *or* other similar fact of the family history of a member of the family by blood or marriage." Plainly, occupation does not fall within the ambit of the statute, which appears to be directed at statements regarding the hearsay declarant's lineage. No cases, other than one clearly inapplicable, 4/ were cited by General Counsel in support of its contention, and research has failed to disclose any. Accordingly, it is determined that the statements by Mrs. Camacho and Mrs. Sandoval concerning their respective family members' occupations are hearsay, not falling within an exception to the hearsay rule, and are inadmissible to prove that agricultural employees resided in their homes. As such, this testimony should and hereby is stricken from the record. As no other competent evidence was presented in support of General Counsel's assertion that agricultural employees were coerced at the Camacho residence, it is concluded that the General Counsel has failed to meet its burden of proof concerning the picketing at this particular location.

Notwithstanding the foregoing, Mrs. Sandoval' s testimony to the effect that certain of the picketers called her son a "fellow worker" and invited him to join their strike was admissible under either the adoptive admissions exception (Evidence Code §§122, 1224) or the contemporaneous statement exception (Evidence Code §1241) . Under the former, a hearsay statement is admissible I as an exception to the hearsay rule if "offered against a party to; a civil action." The "liability ... of that party is based in; whole or in part upon the liability ... of declarant," and "declarant's statement is such that it would be admissible against declarant if he were a party to an action involving that liability. . . ." Conduct or statements by persons on picket lines maintained by a labor organization can be considered as conduct of the organization itself, either expressly or impliedly authorized by the organization under applicable agency principles. See Evidence Code §1221; Colonial Hardwood, 24 LRRM 1302 (1949); Amalgamated Meat Cutters Local 222, 233 NLRB No. 136 (1977); see also Western

3/[continued]—her husband performing his duties, but saw him leaning against a truck when she arrived.

4/General Counsel cited Estate of Berg, 225 Cal.App.2d 423 (1964) , as authority for the position that occupation was an "other similar fact" under the statute concerning family history. A reading of that case discloses that an issue therein was the present and past addresses of the hearsay declarant, and not that individual's employment history.

Conference of Teamsters (V. B. Zaninovich) , 3 ALRB No. 57 (1977) . As the liability of Respondent via the conduct of its pickets for coercing agricultural employees is clearly in issue here, Mrs. Sandoval's testimony concerning statements of picketers is therefore admissible.

Similarly, the "contemporaneous statement" exception also allows the admission of this portion of Mrs. Sandoval's testimony (Evidence Code §1241). The statement was offered to "explain, qualify, or make understandable conduct of the declarant" and "the statement was made while declarant was engaged in such conduct." Based on the admission by the picketers at Mrs. Sandoval's house that her son, Roberto, was a "fellow worker," it is concluded that the General Counsel has demonstrated, by a preponderance of the evidence, that the picketing at that location was directed at an agricultural employee.

II. The Constitutional Issue

A. The Nature Of The Picketing.

The principal thrust of Respondent's defense to the charges herein is that "peaceful residential picketing is an activity protected by the First Amendment to the United States Constitution" and as such cannot be made unlawful under the Agricultural Labor Relations Act. The picketing at the Sandoval and Guerra residences, however, was accompanied by the shouting of epithets and insults. Some women picketers at the Sandoval home challenged Mrs. Sandoval to "jump the fence" around her property "so [they] can give you hell." Cars belonging to residents at each house were damaged around the time of the picketing. While the damage was not directly connected to the pickets themselves, a circumstantial inference may be drawn that this damage was somehow related to the picketing.

Although Lieutenant John Hignight, a police officer for the City of Calexico, and Respondent's witness, Figueroa, testified that the picketing that they observed was peaceful and orderly, it appears that these individuals were not present at all times during the picketing at the Sandoval and Guerra homes. 5/Thus, their testimony has little probative force vis-a-vis the picketing at these locations.

Given the uncontroverted statements by Mrs. Guerra and Mrs. Sandoval concerning the circumstances surrounding the picketing at their homes, I conclude that this picketing was by no means "peaceful." Granted there were no actual instances of

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5/Indeed, Figueroa's testimony concerned incidents of residential picketing entirely separate from those occurring at the Sandoval and Guerra houses.

physical violence accompanying it, and that the Supreme Court has noted, in the context of deciding whether state libel laws should apply to statements made in a union newspaper, that "wide latitude" is given to statements made in the course of labor controversies:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory lan guage. [National Association of Letter Carriers v. Austin, 418 U.S. 264, 272 (1973).]

That court went on to note that federal law grants a union "license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." Id. at 283. This Board has recognized that "rough language and strongly voiced sentiments are common" in picket line situations. Western Conference of Teamsters (Sam Andrews & Sons), 4 ALRB No. 46, p. 5 (1978).

Nevertheless, in an earlier case, the Supreme Court stated:

> The issue here is whether or not the con- duct and language of the strikers were likely to cause violence. Petitioners urge that all of this abusive language was protected and that they could not therefore be enjoined from using it. We cannot agree. Words can readily be so coupled with conduct as to provoke violence. Petitioners contend that the words used, principally "scab" and variations thereon are protected terminology. But if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasion and become intimidation and incitement to violence. . . . When, in a small community, more than thirty people get

> together and act as they did here, and heap abuse on their neighbors and former friends, a court is justified in finding that violence is imminent. [Youngdahl v. Rainfair, Inc., 355 U.S. 131, 41 LRRM 2169, 2172 (1957).]

I find that the above analysis applies with particular force in circumstances such, as those in the instant case, where [I the peace and sanctity of a private residence is being invaded and normal family life is subjected to disruption and annoyance.

A California Superior Court, granting an injunction prohibiting picketing of an employee's residence during the course of a labor dispute, noted that even with so-called "peaceful picketing," the threat of violence may be implied:

> Proof of intimidation may be accomplished as effectively by obstructions and annoying others and by insults and menacing attitude as by physical assault . . . Intimidation includes persuasion by or on behalf of a combination of persons resulting in coercion of the will from the mere force of numbers . . . the use of words and an aggregation of pickets which reasonably induces fear of physical molestation may properly be enjoined.

Under the circumstances, it was permissible to infer in that case that the purpose of the picketing was to "induce workers to remain at home through fear of an implied threat of force or to annoy then worker as a matter of spite, revenge, or punishment." Baby Line Furniture Company v. United Furniture Workers Local 576, 16 C .C .H. 13 Lab, Cases §65065, p. 75,376 (Calif. Sup. Ct. 1949).

Clearly, then, given the nature of the picketing herein which carried with it implications of violence and coercion, Respondent violated §1154(a) of the Act. Respondent attempted, via the picketing by large groups shouting epithets and obscenities, to restrain or coerce agricultural employees in the exercise of the rights guaranteed in §1152, namely, the right to refrain from engaging in concerted activities, or participating in strikes through work situs picket line observance.

The Unlawful Aspect Of The Picketing.

Notwithstanding the foregoing discussion, it is concluded that the picketing complained of herein constituted a violation of §1154(a)(1), even if it is assumed, contrary to the above, that the picketing was "peaceful."

It is beyond dispute that labor picketing involves the exercise of rights protected by the First Amendment to the U.S. Constitution. See Thornhill v. Alabama, 310 U.S. 38 (1940). Respondent concedes in its brief, however, that not all types of picketing are rendered immune thereby from permissible restrictions particularly where such picketing contravenes a valid state policy See Carpenters and Joiners v. Ritters Cafe, 315 U.S. 722 (1942); Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957). At the base of this legal premise is the notion that picketing involves elements of conduct in addition to "mere speech," and as such can be regulated without running afoul of constitutional guarantees. Bakery and Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Teamsters v. Vogt Inc., supra; Amalgamated Food Workers Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308(1963);Annenberg v. Southern California District Council of Laborers, 38 C.A.3d 637, 173 Cal. Rptr. 519 (1974).

A finding of a violation herein would not be based on an attempt by the state to regulate speech and thus interfere with the exercise of constitutional rights: it would be grounded on a state interest "unrelated to the suppression of free speech," namely, its policy, as codified in ALRA §§1154(a) (1) and 1152, to prevent the coercion and intimidation of workers who choose not to engage in concerted activities. See U.S. v. O'Brien, 391 U.S. 367 (1958).

The Supreme Court has recognized that labor organizations have the right to

> . . . use all lawful propaganda to enlarge their membership. . . . However, the Taft-Hartley Act added another right of employees also guaranteed protection, namely, the right to refrain from joining a union, . . . Thus tension exists between the two rights of employees protected by §7 [the counterpart to A.L.R.A. §1152]—their right to form, join or assist labor organizations, and their right to refrain from doing so. This tension is necessarily quite real when a union employs economic weapons to organize employees who do not want to join the union. [N.L.R.B. v. Local 639 (Curtis Brothers), 362 U.S. 274, 279, 780(1960).]

Much as a union's right to free speech can be grounded on the rights enumerated in Section 7 of the National Labor Relations Act and, by analogy, ALRA §1152 (National Association of Letter Carriers v. Austin, supra, at 277), so too may an employee's right of privacy, within the context of a labor dispute, i.e., the right to refrain from engaging in concerted

activity, be based on that section and on ALRA §1152. The "right to refrain," simply stated, is the right to be left alone, the right to ignore the entreaties of union officers, members, organizers or their agents, the right to tell them to go away if either their message or their method interferes with that worker's sense of intrusion. It is this right of privacy (which also has assumed constitutional dimensions) that is jeopardized by the picketing of an employee's residence, and which the state may legitimately, and constitutionally, protect by prohibiting such picketing. Annenberg, supra:

> [It is] well established that the employees of a business or industry which is involved in a labor dispute have no constitutional right to picket the private residences of other employees or of the employers of that business or industry [citations omitted]. In these cases a careful balancing of the right to picket versus the right of privacy in the home rail suited in a victory for the right of privacy. In each case, the picketing was at a situs removed from the actual scene of confrontation between employer and employee--the business or industry--and the courts have uniformly held that when picketing activities are carried into the community under these circumstances, the right of privacy must prevail. [Annenberg, supra, p. 642.]

Further, the Annenberg court went on to note that it faced:

> ... the unpleasant fact that picketing under these circumstances, no matter how peaceful or how well controlled, is an intrusion into the privacy of the home. One placard-carrying picket walking silently on the sidewalk or street in front of a man's home is an invasion into the privacy of that home. [Id. p. 647; emphasis supplied.]6/

6/The holding in the Annenberg case also disposes of another of Respondent's contentions, namely, that the free speech provision of the California Constitution, Article I, Section 2, confers a broader range of rights than the U.S. Constitution [see Robins v. Pruneyard Shopping Center, 23 Cal.3d 899 at 908 (1979)], and as such a ban on peaceful residential picketing would contravene this state's constitution. No matter how broad these rights may be, they still must be balanced against an individual's right of privacy.

The lead case under the National Labor Relations Act(see ALRA §1148) involving the picketing by a labor organization of o a worker's residence is the Fur Workers Union (American Photocopy Equipment Company) case, 151 NLRB No. 33, 58 LRRM 1413 (1965) . "in that case, the National Labor Relations Board held that it was a violation of the National Labor Relations Act equivalent to ALRA §1154(a)(1) to picket the homes of non-striking employees. There, the picketers, as they patrolled around non-strikers' residences, 5 carried signs bearing the non-strikers' names and addresses; as here, they shouted the names of the non-strikers and accused them of, "scabbing" and "taking bread out of the mouths of our kids." As the non-strikers were being held up to public condemnation and ridicule, the demonstrations in front of their homes were held to be "coercive" in the sense of National Labor Relations Act §8(b)(1)(A): implicit in the demonstration was the notion that it would be continued until its object was achieved. Thornhill v. Alabama, supra, 9 the major case recognizing the constitutional dimensions of labor picketing, was distinguished on the ground that there no invasion 10 of privacy occurred. On the other hand, in Fur Workers, the picketing occurred "miles away, from the struck plant," in front of workers' homes.

Respondent’s contention that the Fur Workers case "is now an anachronism and no longer good law" is simply unsupportable. It argues that "the O'Brien-Brandenberg [U.S. v. O'Brien, supra; Brandenberg v. Ohio, 395 U.S. 444 (1969)] doctrine . . . calls for an analysis[in picketing cases] of *whether* it is speech that the state seeks to regulate or whether the regulation of speech is only incident [sic] to a reasonable government objective." As outlined : above, the holding in Fur Workers indicates that the regulation of speech in the context of residential picketing is incidental to the government's interest in preventing employee coercion. That holding is clearly "applicable precedent" to the instant situation. 7/

In sum, therefore, it is concluded that Respondent violated §1154(a)(1) of the Act by picketing the residences of agricultural employees. The coercive nature of large numbers of shouting pickets in front of workers' residences is assumed. Fur Workers, supra. These residences, removed from the actual situs of the labor disputes involved, were entitled to be recognized as places of sanctuary for their inhabitants, whose privacy and rights i to refrain from participating in concerted activities guaranteed by §1152 could not be lawfully subjugated by Respondent's asserted j privilege to make public its disapproval of those employees'

7/Respondent also argued at the hearing that residential picketing was rendered necessary by the "lack of access" which it had to workers at the job site. This argument fails to bear up under scrutiny. The fact that numerous pickets appear at a worker's house negates the contention that the Respondent does not have "access" to that worker.

refusal to observe their work situs picket lines.

RECOMMENDED ORDER

Having found that Respondent United Farm Workers of America, AFL-CIO, has violated §1154 (a) (1) of the Agricultural Labor] Relations Act, it is hereby recommended that the Board order that the Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Picketing, or causing to be picketed, the residences of agricultural employees;

(b) In any other manner interfering with, restraining; or coercing employees in the exercise of their rights to self- i organization, to form, join, or assist labor organizations and in particular, to refrain from engaging in such activities.

2. Take the following of the affirmative action which is, deemed necessary to effectuate the policies of the Act:

(a) Post copies of the attached Notice, signed by Cesar Chavez, President of the UFW, in all its offices, union halls : and strike headquarters throughout the state and at the Department i of Employment Development office located at 221 West Second Street, Calexico, California, at times to be determined by the Regional Director. The notices shall remain posted for a period of 60 days i following the Board's issuance of its Order. Copies of the Notice shall be furnished by the Regional Director in appropriate languages. The Respondent shall exercise due care to replace any Notice which has been altered, defaced or removed.

(b) Mail copies of the aforesaid Notice to members of the Sandoval family, at 445 Pauline Street, Calexico, California, and to members of the Guerra family, at 915 Figueroa, Holtville.

(c) Tender, through an authorized representative of Respondent, a verbal apology to the residents at the above addresses, the content of said apology to be determined by the Board.

(d) Notify the Regional Director in writing, within 31 days from the receipt of the Board's Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him in writing periodically thereafter what further steps have been taken in compliance with the Board's Order.

Dated: August 20, 1979 AGRICULTURAL LABOR RELATIONS BOARD

By _____
Matthew Goldberg
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing in which all parties presented evidence, the Agricultural Labor Relations Board has found that we have engaged in violation of the Agricultural Labor Relations Act, and has ordered us to notify agricultural employees that we will remedy those violations, and that we will respect the rights of all agricultural employees in the future. Therefore, we are now telling each of you:

The Agricultural Labor Relations Act is a law that gives all agricultural workers these rights:

1. To organize themselves;

2. To form, join or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another;

5. TO DECIDE NOT TO DO ANY OF THESE THINGS;

6. No one can pressure or threaten you for speaking to union organizers, members or supporters, or REFUSING TO SPEAK WITH THEM.

Because this is true, we promise that:

1. WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

2. WE WILL NOT picket your homes regarding labor disputes or your decision to return to work during our strike.

3. WE RECOGNIZE that the Agricultural Labor Relations Act is the law in California. If you have any questions about your rights under this law, you can ask for information at the Agricultural Labor Relations Board.

Dated: _____

UNITED FARM WORKERS OF AMERICA,
AFL-CIO

By _____
Authorized Representative (Title)