Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-106-SAL 7 ALRB No. 20

ERRATUM

A phrase has been left out of Bruce Church, Inc. The first sentence of the first full paragraph on page 16 reads:

> Even during a strike, then, an employer may not institute unilateral changes in the terms and conditions of employment applicable to pre-strike unit members who may cross the picket line to go to work. Hi-Grade Materials Co. (1978) 239 NLRB 947, 955 [100 LRRM 1113].

The sentence should read:

> Even during a strike, then, an employer may not institute unilateral changes in the terms and conditions of employment applicable to pre-strike unit members who may cross the picket line to go to work, and, in some circumstances, may not unilaterally alter the wages paid to replacements. Burlington Homes, Inc. (1979) 246 NLRB No. 165 [103 LRRM 1116]; Hi-Grade Materials Co. (1978) 239 NLRB 947, 955 [100 LRRM 1113].

Dated: September 18, 1981

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

ALFRED H. SONG, Member

Salinas, California

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DISSENTING OPINION

MEMBER McCARTHY, dissenting:[1/]

I dissent. I would find that Respondent committed no unfair labor practice by denying worksite access to striking employees and union officials purportedly seeking to communicate their strike message to nonstriking employees.[2/] By requiring that employers permit such access, the majority displays an alarming lack of sensitivity to the statutory rights of agricultural workers who have chosen to refrain from union activity. The majority thereby brings into serious, question the expertise of this Board in the field of agricultural labor relations.

I.

The majority's analysis is fatally flawed from the start.

[1/]This dissent augments my preliminary dissent, which issued with the majority decision on August 10, 1981.

[2/]I note that the majority points to no instance when access was denied when sought in conformance with the guidelines set down in its opinion. Thus, even were I to agree with the majority's strike access rule, which I emphatically do not, Respondent has not been shown to have violated it.

Relying or NLRB v. Babcock and Wilcox (1955) 351 U. S . 105 [38 LRRM 2001], the majority measures the private property rights of the employer against the right of the striking employees to communicate their strike message to nonstriking employees. Babcock and Wilcox involved a weighing of the employer's property rights against a right common to ail employees in that case, i.e., the right to be apprised of matters concerning organization and representation. However, Babcock and Wilcox is inapposite, as the case before us involves competing employee interests. The majority has considered the section 1152 rights in this case as if they appertain solely to the striking workers, which they do not. Section 1152 guarantees ail agricultural employees not only the right to engage in concerted activity, but also the right to refrain from engaging in concerted activity. Furthermore, sections 1153 (a) and 1154 (a) (1) guarantee employees the right to be free from coercion and restraint in the exercise of their right to engage in or to refrain from concerted activity. By ignoring the rights of nonstrikers, the majority contravenes this Board's statutory mandate "to ensure peace in the agricultural fields by,. Guaranteeing justice for all agricultural employees . . .", ALRA section 1 (emphasis added), and substantially increases the likelihood that the opposite result will obtain.

The majority ignores a century of labor relations history when it holds that nothing in labor law supports the conclusion chat forced confrontation at the worksite between nonstrikers and strikers is inherently coercive. On the contrary, both authority and common sense fully support my conclusion chat such worksite access during a strike is, indeed, inherently coercive. The United

States Supreme Court has recognized that perimeter picketing alone "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) 351 U.S. 769, 775-776 [10 LRRM 507] (concurring opinion of Douglas, J.; quoted with approval in Teamsters Union v, Vogt (1957) 354 U.S. 284, (40 LRRM 2208]). Again, in Building Service Union v. Gaazam (1950) 339 U.S. 352 [26 LRRM 2063], the court noted that "picketing . . . establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey . . .". Id., at p. 537. And our own Supreme Court has held that "of itself, picketing [i.e., patrolling a particular locality] has a certain coercive aspect". UFW v. Superior Court (1971) 4 Cal.3d 556, 568.

The fact that both Congress and our own Legislature have determined that this particular kind of coercive conduct is permissible under certain conditions does not grant this Board license to extend the protection afforded to acceptable forms of peaceful picketing to the extreme limits involved here. There simply is no authority given us by statute or case law to require an employer to permit union agents and/or striking employees to enter its fields to proselytize among the nonstrikers, or to otherwise aid the union in its economic action against the employer.[3/]

[3/]I note that the majority's order does not preclude union acts and conduct usually associated with picketing, (e.g., patrolling, carrying placards, and using loudspeakers) during the periods of permissible strike access. Moreover, given the simple limitation of one union representative for every 15 workers on the property, there is nothing to prevent the union from using its entire complement of representatives to confront individual employees or small groups of workers who are isolated from one another on the employer's property,

Common sense provides even greater support for the proposition that all such access is inherently coercive of nonstrikers. The union's avowed purpose in an economic strike is to shut down an employer's operation until such time as the employer capitulates to the union's bargaining demands; the employer's avowed purpose is to resist the union's action and to continue operations as best it can until it achieves its economic coals. As a result of exercising their right to refrain from joining the union's economic action, the nonstrikers usually receive treatment from the union that it generally reserves for those whom it considers to be traitors. Undoubtedly aware of these strong feelings on the part of the union and the strike supporters, the nonstrikers are particularly susceptible to intimidation through subtle and not-so-subtle words and gestures which could easily be employed by union representatives under the guise of providing (unrequested) "information" about strike-related issues. In short, the face-to-face contact with union agents which the majority seeks to impose on nonstrikers, on a daily basis,[4/] whether desired or not, would tend to convert the depersonalized pressures of the picket line into highly individualized pressures that strike at the heart of the nonstriking employees' section 1152 right to refrain from union activity.

The majority fails to recognize that employees who have elected to continue working during a strike have generally done so

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[4/]The worksite access can, under the majority's order, be taken day after day for the duration of the strike. The strike message may have been drilled into the nonstrikers, yet the union would continue to be allowed to come onto the property and subject the nonstrikers to repeated harassment.

in full recognition of the fact that they may be incurring the enmity of the union and the strikers and thereby subjecting themselves to great personal risk. This is not the sort of decision that is entered into lightly. Such a decision is usually born of dire economic necessity or strongly-held personal beliefs unlikely to be changed except by coercive doses of "education" from union partisans. As previously indicated, that decision is statutorily entitled to as much respect and freedom from coercion as is the decision to participate in union activities, and it is the function of this Board to give the same protection and consideration to employees who have chosen to exercise their right to refrain from union activity as to those who have chosen to engage in a lawful economic strike.

In denying the contention that strike access to the worksite is inherently coercive, the majority relies on the "expert opinion" testimony of Monterey County Sheriff Walter Scott that such access has helped to reduce violence.[5/] The argument is sophistic.

[5/] The majority conveniently ignores a substantial portion of Scott's testimony, on, cross-examination, concerning incidents of violence at a neighboring farm, Sun Harvest, after it was ordered by the court to grant strike access. This testimony casts considerable doubt on- the validity of his opinion.

Q. Do you recall any incidents of violence in connection with taking access at Sun Harvest?

A. No, I don't, other than June 11th.

Q. What happened on June 11th?

A. All hell broke loose.

Q. Would you describe what you mean by "All hell broke loose"?

[fn. 5 cont. on p. 6.]

(fn. 5 continued)

A. Well, the United ?arm Workers en masse entered several fields belonging to several different companies.

* * *

Q. Go ahead with your narrative.

A. Okay. The first one chat I was involved in was off of Lenini Road south of Gonzales at Sun Harvest. And we had about 150 United Farm Workers down in the field about a mile off the road.

Q. What were they doing?

A. Running a crew back out of the field.

* * *

Q. Continue. They were chasing a crew?

A. They were chasing a crew back on the bus, chasing them out of the field, thinning crew.

Q. What else happened on June 11th?

A. And the next incident that I was involved in was at Growers Exchange north of Greenfield. And they did the same thing there. They sent one guy to the hospital and chased a crew off of the wrap machines.

Q. You're talking about the UFW now?

A. Yes, I act.

* * *

Q. How do you know that someone went to the hospital?

A. Because I called the ambulance.

* * *

A. The next incident was at -- that I was involved in -- there was other incidents that I was not directly involved in. But the next one was at the corner of Alisal and Old Stage at the strawberry fields belonging to Sun Harvest where about 500 United Farm Workers attacked the field and the fence, tore down the fence. We made approximately a hundred arrests.

[fn. 5 cont. on p. 7.]

The question is not whether such access is inherently violent, but whether there is anything in the nature of a forced daily confrontation between union agents/strikers and nonstrikers at the worksite which is inherently coercive. Whether such a confrontation will probably or necessarily lead to physical violence is academic, for the Act proscribes any coercion, whether violent or otherwise.

II.

The worksite access ordered by the majority is utterly without precedent. There has never been a case under the NLRA or the ALRA mandating worksite access during a strike for the purpose of communicating with nonstriking employees. In fact, it appears that only once has worksite access during a strike for any purpose even been considered. In that case, NLRB v. John Zink Co. (10th Cir. 1977) 551 P.2d 799 [94 LRRM 3067], such access was ordered to remedy the employer's failure to bargain in good faith over certain job reclassifications. The court balanced the union's need for access in order to verify whether reclassified nonstrikers were

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[fn.5 continued]

Q. Go ahead. Any other incidents you're aware of?

A. I'm aware of other incidents, but I wasn't at the location of them.

Q. When you say "of other incidents", did you dispatch people to other incidents?

A. Yes, I did.

Q. Do you have any recollection of how many arrests were made in connection with the total incidents on June 11th?

A. It was somewhat over a hundred, but I don't remember exactly.

R.T. VII, pp. 13-15; procedural discussions omitted.

performing tasks required by their new classifications against the employer's right to be free from interference with the operation of its business. In granting access' the court noted that, because no union communication with the nonstrikers was called for, there was no realistic possibility of any union interference with the employer's operation.[6/]

The majority argues that economic activity in support of a strike should receive no less protection than organizational activity. It justifies its position by grossly distorting certain language in Scott Huddens (2d Supplemental Decision and Order) (1977) 230 NLR3 414 [95 LRRM 1351]. That case involved a particular kind of activity, picketing. It did not involve any other kind of organizational or economic activity. Ignoring this crucial distinction, the majority quotes the case as follows:

> [I]t is fully recognized by Board and Court precedent, ... that (both organizational and economic strike activity] are protected by Section 7. Accordingly, economic activity deserves at least equal deference, and the fact [it is] in support of an economic strike does not warrant denying it the same measure of protection afforded co organizational [activity].

The language there more accurately reads as follows:

> [I]t is fully recognized by Board and Court precedent, as well as by the parties to this proceeding, that both [organizational and economic] activity are protected by Section 7. Accordingly, economic activity deserves at least equal deference, and the fact that the picketing here was in support of an economic strike does not warrant denying it the same measure of protection afforded to

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[6/]While the remedial granting of worksite access in John Zink is thus inapposite to the case at hand, I note that the court there implicitly recognized the clash of interests between nonstrikers and the union when it commented that the nonstrikers were not likely to cooperate with the union officials.

organizational picketing." At p. 416. (Footnotes omitted and emphasis added.)

It is clear from both the general context and from the omitted footnotes that "activity" refers only to picketing. In fact, both Scott Huddens and the other case cited by the majority, Seattle First National Bank {1980} 243 NLRB No. 145 [101 LRRM 1537], both involved access during a strike to the perimeter of the struck employer's property, which happened to be on the property of a third party not involved in the labor dispute. And in each case the decision to grant limited access to the perimeter of the struck employer's property turned on the need of the strikers to identify and communicate with potential customers of the struck employer. Thus, neither case is on point with the instant one.

When the competing right of nonstriking employees to be free from union restraint or coercion is taken into consideration, it becomes all the more clear that a union's interest in worksite access for the purpose of "persuading" nonstrikers to join a work stoppage does not call for the same degree of protection as its right to limited worksite access for the purpose of soliciting support from all of the employees during an organizational campaign, as specifically provided in this Board's rules and regulations.

Undaunted by the inapplicability of Scott Huddens and Seattle First National Bank, the majority proceeds to deduce from them two so-called principles. The first is that "an employer's private property rights must give way to accommodate employees' strong section 7 [1152] rights to the extent necessary to facilitate communication with the particular audience sought to be reached." This is an overbroad generalization derived primarily from its

distorted reading of the Scott Hudgens language discussed above. A more accurate reading of the cases suggests only that the balancing of the competing concerns of the private property rights of a third party and the striking employees' right to picket at the perimeter of their struck employer's property will usually weigh in favor of the striking employees. The second "principle" the majority purports to find in the cases is that "access itself, in the sense of the ability to effectively communicate with employees, is a legitimate economic weapon of labor." This is a mere figment. Yet again, in neither of the cited cases nor in any other has it ever been held, or even suggested, that a struck employer is obligated to assist the striking union by inviting or permitting its agents and supporters to come upon the employer's premises for one hour each and every day for the purpose of communicating with nonstriking employees and enlisting their aid in the union's action against the employer.

III.

Even in the pre-election organizing context, which is free from the inherent coersiveness of a strike, insofar as access is concerned, the N'LRS requires the union to affirmatively establish that, without access, no effective means of communication with employees is available. NLRB v. Babcock and Wilcox, supra, 351 U.S. 105. The majority manages to evade the mandate of ALRA section 1143, which requires us to follow applicable NLRS precedent, by finding that in the agricultural industry there are no affective means of communication between strikers and nonstrikers other than direct confrontation at the worksite. In doing so, it relies on its

own continuing exaggeration of supposed distinctions between agriculture and other types of industry, and ignores the record in the instant case.

The majority's position with regard to union-nonstriker communications has several tenets. First, the majority asserts that customers of a struck agricultural employer and employees of other employers are not usually present at the struck employer's place of business. Thus, in order for the strike to be effective,[7/] the majority claims, the union's need to communicate with nonstrikers in agriculture is greater than it is in other industries. But large segments of industry in general are no different from agriculture with respect to the presence or nonpresence of the employer's customers and the employees of others as additional targets. For example, the mining industry and other producers of raw materials seldom see such individuals. Yet the NLRB has never held that operations of that type should provide worksite access because of the more limited audience available to the strikers.

Secondly, the majority argues that the placing of pickets when striking a farm poses serious logistical problems not present in other industries, because worksites vary from day to day and are scattered. This is simply wrong; the typical agricultural worker is more accessible to picketers than his counterpart in the industrial sector. Farmworkers are generally outside all day long and the presence of a noisy picket line at the edge of the field serves as a

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[7/] I do not believe this Board should be concerned about whether or to what degree a strike, lockout, or any other lawful economic activity, is effective.

Constant, worrisome reminder to the nonstrikers . By contrast, most industrial nonstrikers are exposed to a picket line only when they enter or leave the plant. As a result, the wearing-down effect of a strike tends to take more of a toll on nonstriking agricultural workers than it does on their counterparts in other industries.

Thirdly, the majority argues that a more readily available pool of replacements in the agricultural setting distinguishes it from other industries and necessarily renders the agricultural strike less effective. Again, the NLRB makes no exceptions in those industries, such as ruining and various forms of manufacturing, where the same situation often exists. Moreover, in agriculture especially, there is no guarantee that the need for replacements will occur at a time when replacements are, in fact, available. Once the harvest season is well underway in a particular area, for instance, the number of available workers may well be insufficient to meet even the minimum needs of the struck employer. Moreover, the perishability of the agricultural employer's produce places him in a far more vulnerable position than that of his counterpart in other industries, thus more than counterbalancing any supposed disadvantage to strikers created by the nature of the agricultural workforce .

Finally, relying on 3 California Administrative. Code section 20900 and ALRB v. Superior Court (1975) 15 Cal.3d 392, the majority finds that the alternative means of communication utilized by the union in the present case are always ineffective. The majority's reliance on the regulations is misplaced because it does not specify the means of communication it finds to be inadequate and

is predicated on communication needs that are unique to election-type organizing. An explanation of organizational rights and the benefits to be obtained from union representation requires more effort and two-way communication than does the average strike message. Moreover, as previously indicated, nonstriking workers are not so naive as to blithely cross a menacing picket line without at least being aware of the basic issues.

In ALRB v. Superior Court, the Supreme Court was apparently not apprised of the existence of foreign-language, particularly Spanish, television and radio stations whose broadcasts are generally heard by agricultural workers and utilized by the UFW. Here, the vast majority of workers listened to local Spanish-language radio stations both at home and at work. The UFW bought substantial air time from those stations for the purpose of communicating with the nonstrikers and the Spanish-speaking community at large. This would indicate that the union considered use of these local radio stations to be an effective means of communication.

Even if the nonstriking workers were to shut off their radios at work and televisions at home, they could not escape the union's message. A constant barrage of amplified pro-strike statements from the edge of the fields was used here by the union and might be as effective as any medium of communication the union might wish to employ.[8/] Unfortunately, instead of using that medium

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[8/]The union claims the Respondent used loudspeakers to drown out the amplified message which the union was trying to convey to the workers from the perimeter of the fields. Undisputed testimony from nonstriking workers establishes that the union's message was clearly heard in the fields over the loudspeakers of the employer.

as an in formative device to supplement radio announcements and ether contacts, the union used it to convey a "strike message" that consisted almost entirely of threats of violence and profane insults. Similarly, when the union had the opportunity to talk to workers at their homes or in public places, the union chose to engage in vandalism and physical violence.

Had the union not misused the available channels of communication, its strike message might have been considerably more effective. If, however, as the majority implicitly contends, no amount of lawful persuasion through the normal channels would have been effective, the mere addition of noncoercive doses of "education" on the worksite is not likely to affect the nonstriker's thinking. Given these circumstances, I can only conclude that the union wants worksite access so that it can employ subtler but more effective means of coercion than they have heretofore been able to use against nonstriking workers.

IV.

The union has shown no inclination to use available means of lawful communication in either a peaceful or responsible manner. Moreover, the violence which occurred here was instigated by the union to support its demands for strike access. This alone should preclude the union from being granted additional and unprecedented assistance from this Board, or from agricultural employers, to promulgate its strike message. Expressing the belief that its decision will help alleviate violence, the majority implies that strike access is needed to keep unions from breaking the law. I submit that to justify strike access even partly on the basis of

that reasoning is to reward the union for engaging in violence. More fundamentally, I strongly disagree with the majority decision because, as indicated above, it ignores the section 1152 rights of nonstriking agricultural workers and cannot find support in our statute, the NLRA, or court precedent. I would dismiss the complaint in its entirety. Dated: September 16, 1981

JOHN P. McCARTHY, Member

Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-106-SAL 7 ALRB No. 20

DECISION AND ORDER

On June 25, 1980, Administrative Law Officer (ALO) Beverly Axelrod issued the attached Decision finding that Respondent had violated Labor Code section 1153 (a) by denying access to representatives of the Charging Party and to striking employees during the course of a strike.

Relying upon our Decision in O. P. Murphy Produce Co., Inc. dba O. P. Murphy & Sons (Dec. 27, 1978) 4 ALRB No. 106, the ALO reasoned that because the duty to bargain is not suspended by a strike, whatever right a union ordinarily has to take access to fulfill its bargaining obligation must continue in the same measure during a strike. Finding that the union was in substantial compliance with the guidelines announced in O. P. Murphy for the taking of access, the ALO held that Respondent's denial of access constituted interference with employee rights guaranteed by Labor Code section 1152.

Respondent vigorously excepts to each of the ALO's conclusions, specifically contending that the propriety of strike

access is not governed by the principles of post-certification access announced in O. P. Murphy but, to the extent it is, that the access-seekers failed to comply with O. P. Murphy guidelines for taking it; and that, in any event, there was no need for direct access to Respondent's employees because there existed effective alternative means of communication with Respondent's workers. Respondent further contends that its denial of access was independently justified in order to prevent violence. Finally, Respondent challenges our authority to find an unfair labor practice in the denial of strike access when such access is neither specifically authorized by the Act nor by any duly promulgated regulation.

Distinguishing between the several purposes for which access was sought in this case, we conclude that the taking of post-certification access during a strike for contract negotiation and for contract administration is appropriate under our Act, but that on the facts of this case, General Counsel has failed to prove a need for such access.[1/] We also conclude that work site access for the purpose of communicating with nonstriking employees is necessary when there are no effective alternative means of communication. Since, on the facts of this case, there were no other effective alternative means, we affirm the conclusions of the ALO that Respondent violated the Act by completely denying the

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[1/] The facts in this case are not seriously in dispute; Respondent's principal factual contentions go to whether the union met O. P. Murphy guidelines in seeking strike access. As we do not base our finding of an unfair labor practice in this case on O. P. Murphy-grounds, we do not need to resolve any of the factual questions raised by Respondent.

taking of access by striking employees or union organizers who requested it on May 7, May 8, and May 11, 1979, and on other uncertain dates in May, June, and July 1979.

The ALRA was created so that nonviolent forms of dispute resolution would replace violent confrontation on California farms. We believe that where strike picketing is inadequate as a form of communication, it tends to fan frustration and tensions, and to increase the potential for violence. We believe that the result we reach here will diminish the likelihood of violence. Our view is supported by the testimony given by Monterey County Sheriff Walter Scott, who states that, in his opinion, the court-ordered access in this case helped to reduce tensions and the potential for violence rather than exacerbating them. Ultimately, of course, the parties to labor disputes determine whether rationality and order will prevail over the temptation to violence. That determination is dependent on the parties' ability to communicate effectively. We believe that expanded opportunities to communicate on a personal basis which are afforded by strike access, promote rationality between the parties, and help to reduce frustration and tensions which arise when picketing is inadequate.

After issuance of the complaint in this case, the General Counsel sought an injunction requiring Respondent to grant some limited access to its fields and labor camps during the strike. A preliminary injunction comporting with our request issued June 11, 1979. It was sought pursuant to our authority under Labor Code section 1160.4 which provides that:

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> The board shall have the power, upon issuance of a complaint as provided in Section 1160.2 charging that any person has engaged in or is engaging in an unfair labor practice, to petition the superior court ... for appropriate temporary relief or restraining order ....

Unlike the authority conferred upon us in Labor Code section 1160.6, which we have no discretion to refuse to exercise, it is within our discretion to decide whether to seek an injunction under section 1160.4. As a result of our involvement in this statutory procedure, Respondent now asserts that we are disqualified from deciding the merits of the case. Respondent cites no authority to justify what would amount to a lapse of our jurisdiction to decide unfair labor practice cases if we were to be disqualified according to its suggestion, and we are inclined to think that the rule of necessity alone would prevent such a result, Caminetti v. Pacific Mutual Life Insurance Co. (1943) 22 Cal.2d 344, 353-4; see also Olson v. Gory (1980) 26 Cal.3d 672, 677. However, we also believe that the clear provisions of the Agricultural Labor Relations Act (ALRA or the Act) will not permit it.

This Board has been given the exclusive authority to redress unfair labor practices, Labor Code section 1160.9, Belridge Farms v. Agricultural Labor Relations Board (1978) 21 Cal.3d 551, 558, and our authority to obtain temporary relief pursuant to sections 1160.4 or 1160.6 is merely ancillary to our broader authority to provide final relief. Indeed, we may not seek injunctive relief in aid of our jurisdiction unless the adjudicative machinery has been engaged, whether by the issuance of a complaint in the case of injunctions sought pursuant to 1160.4, or, in the case of injunctions sought pursuant to 1160.6, by the determination

of reasonable cause to believe that a violation has occurred.

Analysis of the legislative history of cognate provisions of the Taft-Hartley Act from which section 1160.4 is derived[2/] makes it clear that the authority to obtain injunctive relief is not an isolable power possessed by the Board, but an integral part of our remedial jurisdiction:

> Time is usually of the essence in these matters, and consequently the relative slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objective - the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the cases of all types of unfair labor practices ....
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> . . . . . .
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> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearing and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. ... Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation. Senate Report No. 105, 80th Congress, 1st Sess. Reprinted in Legislative History of the Labor Management Relations Act 1947, Vol. 1, pp. 414, 433.

California courts too have recognized the part played by our injunctive authority within the statutory scheme. Thus, in Agricultural Labor Relations Board v. Ruline Nursery (1981) 115 Cal.App.3d 1005, 1015, the court quoted federal authorities to the

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[2/] Compare 29 U.S.C. §§ 160 (j) and (l) with Labor Code sections 1160.4 and 1160.6.

effect that an injunction is proper

> [If] there exists a probability that the purposes of the Act will be frustrated ... [or] the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless ....

Respondent's argument, therefore, that we are to be disqualified by virtue of our having authorized the General Counsel to seek injunctive relief, is contrary to statute. It would put the Board to a choice of remedies the statute plainly contemplates as cumulative.

Although we thus reject the suggestion to disqualify ourselves, Respondent's appeal of the injunction in this case presents us with other problems which must be addressed before we may consider whether, and in what way, Respondent has violated the Act. On April 14, 1981, the court of appeal held that the trial court abused its discretion in ordering strike access absent a validly promulgated regulation requiring the employer to grant it.[3/] As noted, this is one of the grounds of Respondent's exceptions to the Decision of the ALO.

In light of the decision, we must consider two obviously intertwined, but nevertheless distinct questions: first, what is the effect of the decision upon our jurisdiction to entertain the

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[3/]Agricultural Labor Relations Board v. Bruce Church, April 14, 1981, 1 Civil No. 47703. Respondent appealed the granting of the preliminary injunction on the grounds, inter alia, that the trial court was without reasonable cause to order strike access because neither the ALRA nor Board regulations authorize a labor organization or striking employees to take access to employees at the work site during a strike against the employer.

question of strike access and, second, if we may entertain the question at all, what is its effect with respect to Respondent's substantive claim that the refusal to grant strike access may only be made an unfair labor practice through our rule-making authority. We must consider, in other words, the effect of the decision in both the res judicata and stare decisis senses.

The doctrine of res judicata provides that a final decision on the merits will be a bar to relitigation of the same cause of action by the same parties or those in privity with them. Panos v. Great Western Packing Company (1943) 21 Cal.2d 636. For the reasons stated below, we do not believe the decision of the court of appeals represents a decision on the merits and we do not accord it res judicata effect.

While there is some authority to the effect that the grant or denial of a preliminary injunction, in some circumstances, may be a decision on the merits (see Bomberger v. McKelvey (1950) 35 Cal.2d 612), the general rule is that it does not determine the ultimate rights of the parties. State Board of Barber Examiners v. Star (1970) 8 Cal.App.3d 736, 740; Miller Lux v. Madera Canal, etc. Co. (1906) 155 Cal. 59, 62-63; 38 Cal.Jur.3d 482 (Injunctions).

We think that rule applies with special force to matters within the exclusive jurisdiction of the Board. Ordinarily, when a trial court issues an injunction, it does so with respect to matters over which it has jurisdiction to determine the merits; in the case of injunctions issued in aid of our jurisdiction, however, it is clear that a trial court has no unfair labor practice jurisdiction of any kind. Labor Code section 1160.9. So far as it

may consider unfair labor practice questions in a proceeding pursuant to 1160.4, its jurisdiction is limited to determining whether there is reasonable cause to believe an unfair labor practice has been committed. In Agricultural Labor Relations Board v, Ruline Nursery (1981) 153 Cal.App.3d 1005, 1012-1013, the court identified the restrictions on superior court jurisdiction to inquire into the merits:

> [The board] need not establish an unfair labor practice has in fact been committed (Boire v. Pilot Freight Carriers, Inc. (5th Cir. 1975) 151 F.2d 1185, 1189 [34 A.L.R. 7th ed. 803]), nor is the court to determine the merits of the case (Agricultural Labor Relations Board v.Laflin and Laflin (1979) 89 Cal.App.3d 661, 671). Rather, the reasonable cause aspect ... is met if the ALRB's theory is neither insubstantial nor frivolous. Boire v. Pilot Freight Carriers, Inc., supra, 515 F.2d 1185, 1189.

Under the statutory scheme, the merits of an unfair labor practice are for us to determine. It was for this reason that the U. S. Supreme Court rejected a contention that a federal District Court's finding in an injunction proceeding under section 10(1) of the National Labor Relations Act (NLRA) was binding upon the national board:

> Respondents not only attack the jurisdiction of the Board on the ground that the action complained of did not affect interstate commerce, but they contend that the decision rendered on that point by the District Court ... has made the issue res judicata. We do not agree. The District Court did not have before it the record on the merits. It proceeded under § 10(1) which is designed to assist a preliminary investigation of the charges before the filing of a complaint. If the officer or regional attorney to whom the matter is referred has reasonable cause to believe that a charge is true and that a complaint should issue, the statute says that he shall petition an appropriate District Court for relief, pending final adjudication of the Board. Such proceeding is independent of that on the

> merits under § 10(a) - (d) .... [The] very scheme of the statute accordingly contemplates that a decision on jurisdiction made in independent preliminary proceeding for interlocutory relief ... shall not forclose a proceeding on the merits .... NLRB v. Denver Bldg. and Construction Trades Council (1951) 341 U.S. 675, 682-83. (Emphasis added)

As the decision of the trial court cannot, under the statutory scheme, be on the merits,

> ... it therefore follows that an appellate court in passing upon the propriety of the issuance or dissolution of a preliminary injunction will not determine the merits of the case in advance of the trial, and its decision as to the propriety of granting the writ is no intimation of what the judgment of the lower court should be at the final hearing; nor is it the law of the case in a subsequent appeal from the final judgment on the merits. Paul v. Allied Dairymen, Inc., 209 Cal.App.2d 112, 121.

On the basis of the above considerations, we conclude that the doctrine of res judicata does not render this case unsuitable for determination by us. We must, however, also consider the estoppel effect of the court of appeal's decision. Ordinarily, the doctrine of collateral estoppel--a so-called "secondary" aspect of res judicata--prevents the relitigation of issues which have once been determined between parties. Todhunter v. Smith (1908) 219 Cal. 690; Clark v. Lesher (1956) 46 Cal.2d 874; Witkin, Cal. Proc., Judgments Vol. 4, p. 3335. But unlike res judicata, the doctrine of collateral estoppel is subject to equitable qualifications:

> An important qualification of the doctrine of collateral estoppel is set forth in Section 70 of the Restatement of Judgments, which reads as follows: "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is

not conclusive if injustice would result."
Louis Stores v. Alcoholic Beverage Control (1962) 57
Cal.2d 749, 757. (Emphasis added)

Similarly, collateral estoppel has also been held not to apply when its application would disserve the public interest. See, City of Los Angeles v. City of San Fernando (1975) 14 Cal.3d 199, 230.

We believe that adherence to the statutory scheme in which this Board has primary jurisdiction to interpret the ALRA in order to determine in the first instance what conduct is protected or proscribed by it, represents the kind of consideration sufficient to permit us to determine the issue posed by this case without being restricted by the collateral estoppel effect of prior litigation.

There remains only the question of the precedential value of the decision of the court of appeal in the companion case of California Coastal Farms v. Agricultural Labor Relations Board (1981) 117 Cal.App.3d 971.[4/] Opining that past decisions have expressed a "clear preference for the resolution of access problems in the agricultural area by rule-making", the court in California Coastal Farms v. ALRB, supra, held there could not be an unfair labor practice in the denial of strike access absent a rule which authorized the taking of it. We do not see in the cases cited to support the court's proposition a "clear preference" for resolving access problems by rule. Indeed, to the extent that Agricultural

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4 Because the decision in Bruce Church,. Inc. v. Agricultural Labor Relations Board, supra, was not certified for publication, its effect need only be analyzed in terms of res judicata and law of the case. California Rules of Court, Rule 977. We have already discussed the res judicata problem above; as the doctrine of law of the case only applies to the same case, our decision in the present unfair labor practice proceeding is not affected by it.

Labor Relations Board v. Superior Court (1976) 16 Cal.Sd 392 bears upon the question, our choice to proceed by rule was affirmed and the court gave no indication that the choice was not ours to make. We made that choice, among other reasons, because we were aware of the impossibility of providing meaningful access in the context of an organizational campaign if we had to proceed on a case-by-case basis. ALRB v. Superior Court, 16 Cal.Sd at 416. No similar consideration is involved in deciding whether particular conduct is an unfair labor practice after it has occurred. Nor does San Diego Nursery Co. v. ALRB (1979) 100 Cal.App.3d 128 express a preference for rules; the error the court found there was our failure to act within the scope of either our rule-making or adjudicative authority. With all due respect to the court of appeal, we believe the issue is controlled by the pre-eminent authority of Agricultural Labor Relations Board v. Superior Court, supra, which holds that the matter of whether we proceed by rule-making or case-by-case adjudication is within our discretion:

> More importantly, in the absence of an express statutory directive to the contrary, the board could also reasonably presume that the Legislature intended to abide by the well-settled principle of administrative law that in discharging its delegated responsibilities the choice between proceeding by general rule or by ad hoc adjudication "lies primarily in the informed discretion of the administrative agency." ALRB v. Superior Court, 16 Cal.3d at 413.[5/]

[5/] In NLRB v. Bell Aerospace Co. Div. of Textron (1974) 416 U.S. 267, the Supreme Court noted that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act," 416 U.S. at 294; but it indicated that novelty of legal issues, by itself, does not create such a situation. Indeed, it went farther, suggesting that even

[fn. 5 cont. on pg. 12.]

In turning to the merits of the alleged unfair labor practice, we first note that federal and California precedent plainly establish our responsibility to strike a balance between legitimate employer interests and employee rights guaranteed by section 1152 of the Act. Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793; Labor Board v. Babcock and Wilcox (1956) 351 U.S. 105; Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d 392. It is also clear that the existence of a strike does not affect our authority in this respect, Hudgens v. NLRB (1976) 424 U.S. 507. " [It] is fully recognized by Board and Court precedent, ... that [both organizational and economic strike activity] are protected by Section 7. [See ALRA section 1152] Accordingly, economic activity deserves at least equal deference and the fact that [it is] in support of an economic strike does not warrant denying it the same measure of protection afforded to

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[fn. 5 cont.]

past reliance on a different rule (as opposed to the claim in this case that there was no rule at all) would not be sufficient to require the exercise of our rule-making authority, unless there was proof of serious adverse consequences flowing from reliance on past practice.

> [This] is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative ....
>
> It is true, of course, that rule-making would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative proceedings ... may also produce the relevant information necessary to mature and fair consideration of the issues. 416 U.S. at 395.

organizational-[activity]." Scott Hudgens (Second Supplemental Decision and Order) (1977) 230 NLRB 414 [95 LRRM 1351].

We are not without guideposts in this area, but the precise issue framed by the complaint and answer in this case is nevertheless a novel one. The NLRB has permitted access in strike situations to private roads, Holland Rantos (1978) 234 NLRB 726 [97 LRRM 1376], enf'd (3rd Cir. 1978) 538 F.2d 100 [99 LRRM 2543], into enclosed shopping malls, Scott Hudgens, supra, and within the foyer of a struck restaurant located on the 46th floor of an office building, Seattle First National Bank (1980) 243 NLRB No. 145 [101 LRRM 1537], remanded to narrow Board order (9th Cir. 1980) Dckt. No. 79-7387 [105 LRRM 3411], but no case has sanctioned work site access during a strike.[6/]

The evidence reveals three distinct purposes for the access sought by the union in this case. The first relates to the negotiating process itself and our decision in O. P. Murphy, supra, 4 ALRB No. 106, seems most directly relevant to it. The second relates to contract administration which, even if it may be broadly assimilated to O. P. Murphy-type access as a continuation of the collective bargaining obligation, was nevertheless not specifically considered by us in that decision, which concerned only the

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[6/] By work site access, we mean access both to the fields and other places where employees congregate on the employer's property. It bears mentioning, however, that the lack of national board authority in this area is not surprising: work site access is approved only when there are no alternative means of effective communication, a situation which does not often occur in the typical industrial context. Thus the novelty of the question before us is due to the atypical nature of agriculture. See e.g., Agricultural Labor Relations Board v. Superior Court, supra.

negotiation of agreements, rather than their administration and enforcement.[7/] The third purpose for which the union sought access was to convey its views about issues in the strike to nonstrikers, thereby assuring nonstrikers of the right to make an informed choice whether to join the strike.[8/] This purpose is furthest removed from the considerations governing access sought for collective bargaining purposes since the use of economic weapons, although consistent with the duty to bargain, is not embraced by it.

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors--necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms--exist side by side.
> NLRB v. Insurance Agents' International Union (1960) 361 U.S. 476, 489.

As we have noted, the ALO did not distinguish between any of these purposes; she simply reasoned that, as the parties' duty to

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[7/] This Board has consistently recognized the right of a certified representative to take access for the purposes of administering a contract. See e.g., Tomooka Bros. (Oct. 29, 1976) 2 ALRB No. 52; Bud Antle (Feb. 2, 1977) 3 ALRB No. 7.

[8/] Labor Code section 1152, which guarantees 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", also guarantees employees the "right to refrain from any or all such activities ...."

bargain is not affected by a strike, the union's right of access to fulfill the bargaining obligation must also survive the strike. Respondent apparently has no quarrel with the proposition that the duty to bargain continues during a strike, but it nevertheless asserts that O. P. Murphy, or bargaining-type, access is not appropriate during a strike, for the principal reason that the interests of the union and those of the nonstriking employees with whom the union seeks to communicate are often in sharp and bitter conflict. General Counsel and Charging Party, on the other hand, argue that a striking union needs access precisely because it must ascertain the possibly divergent needs of the nonstriking employees in order to discharge its obligations as bargaining representative to them. We think both arguments seek to prove too much.

So far as Respondent's argument goes, we do not think that the potential clash of interests between a union and nonstrikers furnishes an appropriate rationale for denying all access for collective bargaining purposes during a strike. Whatever might be said about the interests of the union and nonstrikers in general, in cases, such as here, where a strike is called after the expiration of a collective bargaining agreement, it cannot be said that the union's interests are always and necessarily opposed to those of nonstrikers. For example, it is axiomatic that although

> an employer's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions, unless the employer gives timely notice of its intention

> to modify a condition of employment and the union fails to timely request bargaining over the proposed change. Gordon L. Rayner d/b/a Bay Area Sealers (1981) (Slip Opinion) 251 NLRB No. 17 at 5 [105 LRRM 1545].

Even during a strike, then, an employer may not institute unilateral changes in the terms and conditions of employment applicable to pre-strike unit members who may cross the picket line to go to work. Hi-Grade Materials Co. (1978) 239 NLRB 947, 955 [100 LRRM 1113]. Similarly, the contractual grievance procedure may survive the expiration of a contract, Bethlehem Union of Marine and Shipbuilding Workers v. NLRB (3rd Cir. 1963) 321 F.2d 615 [53 LRRM 2878], and resort to it may still be had during a strike. See Mission Manufacturing Co. (1960) 128 NLRB 275 [46 LRRM 1289] (Employer violates 8(a)(1) and (5) by changing grievance procedure to exclude union representatives during a strike). In view of the survival of the contract's terms and conditions, and especially the survival of the grievance procedure, we cannot agree with Respondent that the fact of a strike means the union has no interests consonant with those of nonstrikers, for in the area of enforcement of contract terms and conditions its interests and theirs are often exactly the same.

But if the union might be said to share some interests with nonstrikers, we think it goes too far to assert, as the union does, that it always needs access during a strike in order to fulfill a duty of fair representation to nonstrikers.

Although only scant authority exists on the subject, what little there is recognizes the tension between the union's duty to represent nonstrikers (as unit members) and the collision of

interests between them. Thus, in NLRB v. Alva Allen Industries (8th Cir. 1966) 369 F.2d 310, 320, the court said:

> The Union had expressly stated that it was not interested in representing the strikebreakers and was only interested in its own people, which, of course, is a natural reaction in a situation of this type. The Union could not, as a practical matter, be expected to afford good faith representation in behalf of the strikebreakers. We recognize the anomalous position of Union in being obligated by law to represent the strikebreakers along with the union employees whom they had totally replaced. The Union's position was untenable. It could not fairly represent both groups. (Emphasis added)

And in Leveld Wholesale (1975) 218 NLRB 1344 189 LRRM 1889], the Board upheld the Trial Examiner's dismissal of a charge under NLRA section 8(a)(5) against an employer for failing to make fringe benefit payments on behalf of replacement workers on the grounds that, as the union could not be expected to negotiate on their behalf, neither could the employer:

> Even after termination of a contract a union represents all the employees in the bargaining unit. That includes both strikers and strike replacements. However, the interests of the two groups are not the same. Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers. In the instant case, the Union was prepared to redline the wage rates of the strikers and accept lower pay for the strike replacements. The Union also sought to have the strikers recalled to the jobs occupied by the strike replacements. It would be asking a great deal of any union to require it to negotiate in the best interests of strike replacements during the pendency of a strike, where the strikers are on the picket line .... However, I believe that the same considerations which free the employer from its obligation to bargain about wage rates for the strike replacements also apply to fringe benefits. In the circumstances of this case, I find that the Company's exclusion of the strike replacements from the contract fringe benefits and

> their inclusion in the company plans did not constitute a violation of Section 8 (a) (5) or (1) of. the Act. I shall therefore recommend that those allegations of the complaint be dismissed. Leveld Wholesale, supra, 218 NLRB 1344 at 1350. (Emphasis added)

Although these cases obviously do not analyze the relationship between a union and strikebreakers in the exact terms of a duty of fair representation, they fairly imply that a union does not breach its duty of fair representation by not representing strikebreakers. And if a union does not breach its duty, in this respect, no right of access can be made to depend upon avoiding such a breach.

Thus, we disagree with the sweep of the Respondent's claim that a union never has a legitimate interest in strike access, and with the sweep of the union's claim that it necessarily has one because of the composition of the work force. Although the two claims taken together accurately describe the tension inherent in the union's role during a strike, to conclude that one or the other completely characterizes the union's relation to nonstrikers is to arbitrarily simplify an inherently complex situation. So long as there is nothing inconsistent "between the application of economic pressure and good faith bargaining," NLRB v. Insurance Agents' International Union, supra, 361 U.S. at 494-95, there is no way to avoid this tension; the union and the employer both have underlying statutory obligations to employees and to each other which they must fulfill, and we must look to the particular facts of each case to determine whether access is necessary to fulfill them.

In this case, the union's need for access rests upon the following proof. In the negotiating of contracts the UFW utilizes

worker committees. After certification, a so-called negotiating committee is constituted, consisting of an elected worker representative from each job classification. The negotiating committee, in turn, receives information as to employee desires through the circulation of petitions among employees on various bargaining subjects, such as seniority, wages, and the like. Not only does preparation of these petitions require access, but also, even after the petitions are completed, union representatives need access to clarify certain points, or to keep workers apprised of the status of negotiations.

So far as access for these purposes is concerned, the record is devoid of any evidence of how the negotiating committee here was expected to function during the strike, or whether attempts to obtain worker petitions were frustrated by lack of access. More critical, however, is the failure of proof on the claim most strongly urged at trial that access was necessary to keep the workers informed of the progress of negotiations. There is no correlation between the times access was attempted and the occurrence of negotiations; rather there is some evidence that access was attempted in order to apprise workers of the status of negotiations when none had taken place. Similarly, with respect to contract administration, there is no evidence that any grievances were discussed or presented during the course of the strike, other than the generalized claim that the union has some obligations in this area. We do not need to anticipate the variety of situations in which a union might demonstrate a need for access in this respect, although we do not doubt that they may arise; on this

record we cannot say that they did.

We next consider the claim that the access sought in this case was necessary for the union to communicate with nonstriking workers. Regardless of any other purpose the union might have had in seeking access, the record in this case supports the finding that, when it took strike access, it did so for the purpose of soliciting support for the strike among nonstrikers. We begin our discussion of the union's right to access for this purpose with the observation that the right to strike is at the core of labor's concerted activities.

> Section 7 [analog of our section 1152] guarantees and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, H. R. Rep. No. 245, 80th Cong., 1st Sess. 26, include the right to strike. Under section 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage "membership in any labor organization," which includes discouraging participation in concerted activities, Radio Officers v. Labor Board, 347 U.S. 17, 39-40, such as a legitimate strike. Labor Board v. Wheeling Pipe Line, Inc., 229 F.2d 391; Republic Steel Corp. v. Labor Board, 114 F.2d 820. Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 59, ... This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system. NLRB v. Eric Resistor Corp. (1963) 373 U.S. 221, 233 [53 LRRM 2121]. (Emphasis added)

Under our Act, as under the NLRA, the right to strike has been given explicit protection. Labor Code section 1166 provides that "[nothing] in this part, except as specifically provided for herein, shall be construed so as to interfere with or impede or

diminish, in any way the right to strike, or affect the limitations or qualifications on that right."

In addition to the withholding of labor represented by the strike, labor has one other major weapon at its disposal, picketing:

> With the exception of the strike (of which it is a major element), picketing is organized labor's most important economic weapon. Its importance results from several different, but cognate, factors. First, picketing is probably the most efficacious means for a union to publicize its dispute with the employer and to enlist public support. Second, picketing is a very effective aid in labor's efforts to organize employees or to have the employer recognize it as the employees' bargaining agent. Third, picketing is an important means of conscripting the support of other union members. Finally, because of workers' traditional reluctance to cross a picket line, picketing has immense value to labor as a weapon of economic pressure, both at the bargaining table and during the strike itself. Kneel, Labor Law, Vol. 18f (1978) Ch. 13, p. 4-5.

Since the U. S. Supreme Court's decision in Hudgens v. NLRB (1976) 424 U.S. 507 [91 LRRM 2489], it is clear that the balancing standard established in Babcock and Wilcox (1956) 351 U.S. 105 [38 LRRM 2001] is to be used for determining the proper accommodation between employees' section 7 [or 1152] rights and legitimate employer interests in connection with strike activity.

> The Babcock and Wilcox opinion established the basic objective under the Act: accommodation of section 7 rights and private property rights "with as little destruction of one as is consistent with maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective section 7 rights and [employer] rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. [Citations] "The
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> responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." Hudgens v. NLRB, supra, at 522.

In utilizing that standard, both the national board and the courts have permitted that amount of access in a strike situation necessary to facilitate the purposes for which it was sought. For example, on remand in Scott Hudgens, supra, the board permitted pickets inside an enclosed shopping mall. Hudgens, the owner of the shopping mall inside which the union wanted to picket, had contended that the pickets should be relegated to the sidewalks surrounding the parking lot outside the mall. The national board disagreed. Noting that the pickets' intended audience comprised two distinct groups, members of the buying public considering doing business with the struck employer and nonstriking employees of the employer, the board observed that the union could only specifically identify customers as they approached the struck store. Rejecting the argument that the use of mass media, newspapers, radio, mass mailings and billboards, could effectively reach this intended target, the board held that the pickets had a right of access to the interior of the mall in order to effectively communicate with customers.

Similarly, in Seattle First National Bank v. NLRB, supra, 105 LRRM 3411, 3414, the court upheld the national board's order permitting picketers access to the 46th floor of an office building in order to provide the most effective means of communicating with customers of the restaurant.

> In the final analysis, our approval of the Board's conclusion that pickets should be allowed on the forty-sixth floor rests on the peculiar nature of picketing.

> Even if the union can adequately inform most of the restaurant's customers of. the existence of the strike without stationing picketers on the 46th floor, the union cannot fully implement its section 7 rights without confronting the customers in front of the restaurant .... The union's picketing is clearly more effective on the 46th floor, where restaurant customers and nonstriking employees are identifiable than at the entrance to the building [on the street below].

Two related principles emerge from these cases. The first is that an employer's private property rights must give way to accommodate employees strong section 7 [1152] rights to the extent necessary to facilitate communication with the particular audience sought to be reached. The second is that access itself, in the sense of the ability to effectively communicate with employees, is a legitimate economic weapon of labor. It is true that the above cases involve access for picketing which, by definition, takes place outside the workplace, Kheel, Business Organizations, Labor Law, supra, Chap. 31, p. 4-5; picketing, however, is not simply an end in itself, but also a means for communicating the union's message and for enlisting support for its strike.[9/] And the question in each

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[9/] Picketing in support of an economic strike is intended to have, and-certainly may have, economic affects on the struck business. This is true whether the picketing occurs on public or private property. Such activity is a corrollary of the strike itself and is the means by which the striking employees communicate their message to those who would do business as well as to other employees of the employer. Scott Hudgens, 230 NLRB at 418. (Emphasis added)

It is true that picketing is not pure speech because it involves an element of conduct, Amalgamated Food Employees Union Local 590 v. Logan Plaza (1968) 391 U.S. 308, 313-314; Bakery and Pastry Drivers & Helpers Local 802 v. Wohl (1942) 315 U.S. 769 (concurring opinion of Justice Douglas), but even to the extent that it is considered conduct, it is undertaken for the purpose of inducing the action of others and is persuasive in nature.

case was how deep an intrusion into an employer's property was necessary in order to accommodate employees' section 7 rights which were being exercised through picketing. In accordance with familiar principles, the answer depended upon whether there were other effective means of communication. In the context of this case in which the union had pickets at the perimeter of the employer's property, application of the Babcock and Wilcox standard gives rise to two distinct questions: first, whether picketing confined to the perimeter of the work site was an effective means of communication and second, if it was not, whether there existed alternative effective means of communication other than work site access.[10/]

With respect to the first question, we must recognize "that the agricultural context is different ... from the typical industrial context as regards the function and effectiveness of picketing ...." Bertuccio v. Superior Court (1981) 118 Cal.App.3d 363, 372 (emphasis added). First, unlike picketing in the ordinary industrial or commercial context, which aims at a number of different targets--at potential customers, at the employees of other employers doing business with the struck employer and at strikebreaking employees themselves, see United Steelworkers v. NLRB (1976) 376 U.S. 492, 499--in agriculture the work sites are typically quite isolated and the union's intended audience is generally more limited. Accordingly, as one commentator has

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[10/]We do not here treat the question of labor camp access which, as we have often held, rests on slightly different considerations. See below, p. 30.

concluded, "More than any other industry there must be some contact at the work site between strikers and potential strikebreakers to discourage the latter's entry." Unionization of Farm Labor, Legal Problems of Agricultural Labor, University of California, Davis Law Review (1970) p. 18.

At the same time that the need for such communication is increased, the nature of agriculture creates additional problems in achieving it: "The logistics of when and where to place pickets when striking a farm, however, are nearly insurmountable. Rather than a few well defined work sites as in the case of urbanized industry, the agricultural industry is scattered [over many square miles], with the actual work site varying from day to day."[11/] Unionization of Farm Labor, Legal Problems of Agricultural Labor, supra, fn. 18.

The difficulties discussed above are only compounded by the readily available pool of replacement workers who, even if they do not actually serve as strikebreakers, put a great deal of pressure on strikers to abandon the strike. Comment, Agricultural Labor Relations - The Other Farm Problem, 14 Stan. Law Rev. 120, 129. Hearings Before the Subcommittee on Agricultural Labor, Agricultural Labor Management Relations, 93rd Congress, 1st Sess.,

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[11/] This problem is exemplified by Respondent's operation. Respondent farms over 3,300 acres on more than 20 different ranch sites. Despite our conclusion that, in general, picketing in agriculture is of reduced effectiveness, we do not believe it is always ineffective. In utilizing a case-by-case approach, we have found O. P. Murphy-type access unnecessary where effective alternative means of communication exist. See Sunnyside Nurseries, Inc. (Sept. 11, 1980) 6 ALRB No. 52.

HR 881, HR 4007, HR 4011, HR 4408, HR 7513, p. 98.[12/] The existence of this pool of replacement workers, many of whom being undocumented immigrants are less inclined to assert their organizational rights, means that the union is, to some degree, in the same position during a strike as it is in any initial organizational campaign.

If picketing may be said to be of relatively reduced effectiveness to communicate the union's strike message, the question remains whether there are any other effective means of communicating with strikebreakers. Respondent contends that the evidence in this case supports the conclusion that the union did have other effective means available, namely, loudspeakers, radio, and the personal encounters described by some witnesses. As a general matter, we first note that, in adopting our organizational access regulation, 8 Cal. Admin. Code section 20900, we have already determined that these are not effective means of communication, and we do not understand how the mere fact of a strike can convert ineffective means of communication into effective ones. Our determination in regard to the inefficacy of the means suggested by Respondent has been upheld in Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d 392 in which the court specifically affirmed our conclusion, that "efforts to communicate with [employees] by advertising or broadcasting in the local media are futile." Id. at 415.

[12/]The use of illegal aliens as strikebreakers is common. See Sosnick, Hired Hands (1978) p. 426, quoting from U. S. Senate Subcommittee on Migratory Labor, The Migratory Farm Labor Problems, p. 65.

Loudspeakers and radio provide, at best, one-way communication and do not permit the element of responsiveness that is so essential to persuasion. Moreover, on this record in particular, when the evidence shows that Respondent utilized its own loudspeakers in order to drown out the union's message, we cannot conclude that broadcast techniques constitute effective means of communication. Nor do we feel that the evidence of a few personal encounters or conversations at the edge of the fields permits us to conclude that the union had other effective means of communication. In light of the fact that Respondent had over 1,200 employees, we simply cannot conclude that a few conversations with 20 or so employees here or there constitutes alternative effective channels of communication.[13/]

Having concluded that there are no other effective alternative means to communicate with nonstriking employees, we turn to the question of whether there is anything in the nature of a strike itself which requires a union to have less access than is appropriate for other situations. In this connection, we must examine both the interests of strikebreaking employees in not being coerced and the employer's interest in the continued operation of his business.

The fact that strikebreakers apparently have interests

[13/]The union sought access to nonstriking employees, some of whom were pre-strike unit members and some of whom are replacement workers. The evidence establishes that the union did not have addresses for the pre-strike unit members since the various forms it used had no place for indicating one's address and, of course, it had no opportunity at all to obtain information about replacements.

adverse to those of the union is not a sufficient reason to deny access which is otherwise necessary to effective communication. The national board has long recognized that "individual employees may abandon a strike and return to work for personal reasons wholly unrelated to any disavowal of their union as collective bargaining representative." Celanese Corp. of America (1951) 95 NLRB 667 [28 LRRM 1362]. Similarly, we do not feel that strikebreaking necessarily demonstrates antipathy towards a union; the need to earn a living is too powerful a motive for us to believe that the existence of a strike is a separate inducement to work.[14/] Moreover, to deny access during a strike on the basis of the interest of strikebreaking employees in not communicating with a union would require us to conclude that such access to them is inherently coercive. Nothing in labor law supports such a conclusion and in the past we have declined to find that even excess access necessarily coerces employees or interferes with their free choice. K. K. Ito Farms (1976) 2 ALRB No. 51; George Arakelian Farms, Inc. (1979) 4 ALRB No. 6. Indeed, the contention that access to strikebreakers at Respondent's operation was coercive in impact is seriously undercut by the testimony of Monterey County Sheriff Walter Scott who stated that, in his

[14/]The national board now presumes replacements support the union in the same ratio as the workers they have replaced. Windham Community Memorial Hospital (1977) 230 NLRB 1070 [95 LRRM 1565], enf'd NLRB v. Windham Community Memorial Hospital (2nd Cir. 1978) 577 F.2d 805. Some courts have disapproved such a presumption, see e.g., National Car Rental Systems, Inc. v. NLRB (8th Cir. 1979) 594 F.2d 1203. However, the" Second Circuit in NLRB v. Windham Community Memorial Hospital, supra, at 813, specifically concluded that there is no reason to presume that a strikebreaker is necessarily anti-union.

opinion, the court-ordered access in this case, far from exacerbating tensions, actually helped to reduce them.

With respect to the employer's interest in conducting his business, we recognize that during a strike, an employer may take measures to insure the conduct of his business. Thus, he may hire replacements, NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333; and he may lock out his employees in support of his bargaining position, American Shipbuilding v. NLRB (1965) 380 U.S. 300. However, we do not believe that insuring effective access to employees in order to permit them to hear what the union has to say will in any way interfere with legitimate employer responses to a strike. Employee ignorance is not an employer's weapon to use; the entire structure of our Act and the rights guaranteed by it tell against such a proposition. Although the grant of access to talk to nonstriking employees might to some degree impair an employer's ability to retain replacement workers, that cannot be a reason to deny access completely since, so long as employees are not coerced, whether to work or not is plainly their choice to make. Access simply permits them to make an informed choice.

Although the employer's and nonstriking employees' interest is not sufficient to permit an employer to completely deny access, we believe these interests must be taken into account in determining how much access is appropriate. In those situations where picketing is not an effective means of communication and no other effective means exists, we will grant access according to the following guidelines. In order to avoid the potential for coercion or intimidation of replacement employees, as well as the potential

for disruption of the employer's operations, we will limit the number of access takers to one for every fifteen employees. In order to permit the employer to make arrangements to hire replacements to conduct his business, we will reduce the frequency of access to less than that which we have found appropriate in the organizational context where the union does not have an interest in shutting down the employer's business. To balance the respective rights of the striking employees and the employer, we will grant lunchtime access only.[15/] Within these guidelines, we affirm the conclusions of the ALO that it was an unfair labor practice for Respondent to completely deny access to the work site.

The foregoing rules apply to work site access. In considering denials of labor camp access, we adhere to our policy that an employer may not deny access to employees homes. See e.g., Merzoian Bros, et al. {July 29, 1977) 3 ALRB No. 62; Silver Creek Packing Co. (Feb. 16, 1977) 3 ALRB No. 13. Accordingly, we affirm the conclusions of the ALO that Respondent violated the Act by denying access to its labor camps.

Respondent makes one other argument which we must address, namely, that its denials of access were justified by the violence of strikers. The record is clear, however, that there are no instances of misconduct which arose from the granting of strike access itself. We agree with the conclusions of the ALO that, absent any nexus between the acts of violence and the access taken

[15/]Where there is no established lunchtime, the access period described above refers to the time when employees actually take their lunch break. See, e.g., Ranch No. 1 (Jan. 3, 1979) 5 ALRB No. 1.

in this case, such violence as did occur is no grounds for denying access.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent Bruce Church, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Denying reasonable access to Respondent's premises to any UFW representative or other union agent for the purpose of communicating with nonstriking employees while there is a strike in progress at Respondent's premises.

(b) In any like or related manner interfering with, restraining and coercing employees in the exercise of their rights 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, or to refrain from any and all such activities.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) During any period when there is a strike in progress at Respondent's premises, permit access to its premises by UFW representatives or other union agents for the purpose of communicating with nonstriking employees. Said access takers may enter the Respondent's property for a total period of one hour during the working day for the purpose of meeting and talking with

employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall encompass such lunch break. If there is no established lunch break, the one-hour period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day. Access shall be limited to one UFW representative or union agent for every fifteen workers on the property. Said access shall continue until a voluntary agreement on access is reached by the parties, until the strike ends, or until the union ceases to be the collective bargaining representative of Respondent's employees, whichever occurs first.

(b) During any period when there is a strike in progress, permit access to its labor camps by UFW representatives or other union agents for the purpose of communicating with nonstriking employees.

(c) Sign the Notice to Agricultural 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.

(d) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of

this Order, to all employees employed by Respondent at any time during the period from May 7, 1979, until August 31, 1979.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days after the issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated:

RONALD L. RUIZ, Acting Chairman

HERBERT A. PERRY, Member

JEROME R. WALDIE, Member

ALFRED H. SONG, Member

MEMBER McCARTHY, dissenting:

I dissent. Respondent committed no unfair labor practice when it prevented the union from taking worksite access for the purpose of persuading non-striking employees to leave their jobs and join the strike. By requiring that employers permit such access, the majority displays an alarming lack of sensitivity to the statutory rights of agricultural workers who have chosen to refrain from union activity. The majority thereby brings into serious question the expertise of this Board in the field of agricultural labor relations.

It is clear, to me that, simply as a matter of policy, strike-related access to an employer's worksite should not be sanctioned under our Act, primarily because such access is an invitation to violence and other forms of unlawful coercion directed at the non-striking workers. The majority fails to recognize that the decision to work in spite of a strike is

not entered into lightly, that it is usually born of dire economic necessity or strongly held personal beliefs, and that it is not likely to be changed by non-coercive doses of education from union representatives.

Because the majority's decision went from initial draft to final draft and immediate issuance within an exceedingly short period of time, I have not had an adequate opportunity to draft a detailed dissent. Such a dissent will follow.

I do, however, wish to point out at this time another disturbing aspect of the majority's decision. The violence which occurred here was instigated by the union to support its demands for strike access. Expressing the belief that its decision will help to alleviate such violence, the majority implies that strike access is needed to keep unions from breaking the law. I submit that to justify strike access even partly on the basis of that reasoning is to reward the union for engaging in violence. Moreover, as I have indicated above, the majority's decision invites unions to rely on subtler but more effective means of coercion than they have heretofore been able to use against non-striking workers.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law during the period of May to August 1979, by refusing to allow UFW organizers and other union agents to take access to our property during a strike in order to speak to nonstriking employees. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

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

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

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

Especially:

WE WILL NOT refuse to allow agents of your certified bargaining representative to enter our property at reasonable times during a strike at our property so that they can talk to the employees who are working.

Dated: BRUCE CHURCH, INC.

By:_____
Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3160.

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

Bruce Church, Inc. (UFW) 7 ALRB No. 20
Case No. 79-CE-106-SAL

ALO DECISION

The United Farm Workers of America, AFL-CIO (UFW) was certified as the collective bargaining representative of Respondent's employees on December 13, 1977. On December 31, 1977, Respondent and the UFW entered into a collective bargaining agreement which expired on December 31, 1978. The union began an economic strike on February 9, 1979. After the strike began, representatives of the union sought access to Respondent's fields and labor camp to communicate with nonstriking employees. Respondent refused to grant such access prior to June 11, 1979, when the Superior Court of Monterey County ordered Respondent to provide access. Despite the existence of the court order, Respondent denied access on several occasions thereafter.

The complaint in this matter alleged that Respondent's denials of access violated the Act. The ALO concluded that the access sought in this case was governed by the principles set forth in our Decision in O. P. Murphy relating to access for collective bargaining purposes and that Respondent's denials of access were an unfair labor practice.

BOARD DECISION

The Board distinguished between several purposes which might be served by the access sought in this case:

1. Access sought for the purpose of negotiating on behalf of nonstriking employees;
2. Access sought for the purpose of enforcing the surviving terms and conditions of the contract;
3. Access sought for the purpose of communicating the union's strike message to nonstriking employees.

The Board found that there was insufficient evidence to prove that the union needed access for the purpose of negotiating on _ behalf of nonstriking employees or for the purpose of administering the terms and conditions of employment which survived the expiration of the contract.

The Board held, however, that union access to an employer's premises during the course of a lawful strike for the purpose of communicating with nonstriking employees facilitates the exercise of employees' section 1152 rights. Such access permits nonstriking employees to make an informed choice about whether to join the strike and is a legitimate exercise of the striking employees' section 1152 interest in communicating their strike message. The Board stated that such access will be lawful only when it is found that there is no effective alternative means of communication between the union and the nonstriking employees.

In order to protect the right of nonstriking employees to refrain from union activity and the employer's right to continue conducting his business, the Board limited the access takers to nonstrikers ratio to 1 to 15 and limited the frequency with which access may be taken to lunch periods.

DISSENT

Member McCarthy would dismiss the complaint in its entirety, reasoning that strike-related worksite access would have an unacceptably coercive effect on workers who were exercising their right to refrain from union activity. He would find that the protection afforded to normal picket line activity does not extend to worksite access, citing both practical reasons and the fact that no case has held or supported that a struck employer is obligated to assist the union by allowing its agents to come upon the employer's premises for the purpose of enlisting the workers' aid in the union's action against the employer. He would find that there is no significant difference between agriculture and industry that necessitates an additional and unprecedented means of communication between the union and nonstriking agricultural workers. He notes that the union herein misused the available channels of communication and that strike-related worksite access is not likely to be employed by the union except as an instrument of coercion.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS

In the Matter of:	CASE NO. 79-CE-106-SAL
BRUCE CHURCH, INC.,	
Respondent,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

Frances Schreiberg, for the
General Counsel Salinas Regional
Office 112 Boronda Road Salinas,
CA 93907

William D. Claster,
for the Respondent
Gibson, Dunn & Crutcher
660 Newport Center Drive, Suite 1600
Newport Beach, CA 92660

Javier Cadena,
for the United Farm Workers of America, AFL-CIO
Coastal Plaza #35
Salinas, CA 93902

DECISION

BEVERLY AXELROD, Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before me in Salinas, California, on September 18, 19, 20, 24, and 26, 1979. The complaint issued on May 29, 1979 and alleges violation of §1153(a) of the Agricultural Labor Relations Act, herein called the Act, by Bruce Church, Inc., herein called Respondent. The complaint based on a charge

filed on May 15, 1979 by United Farm Workers of America, AFL-CIO, herein called the Union. A copy of the charge was duly served upon Respondent.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and Respondent each filed a brief in support of its respective position

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent is a corporation engaged in the growing and harvesting of vegetables in various counties of the State of California, and Is an agricultural employer within the meaning of §1140(c) of the Act.

The Union is a labor organization representing agricultural employees within the meaning of §1140.4(f) of the Act.

II. The Alleged Unfair Labor Practice

The complaint alleges that Respondent violated §1153(a) of the Act by denying limited and reasonable strike access to Union representatives and striking employees at its fields and other premises from May 7, 1979 and thereafter, and that such denial interferes with the rights Guaranteed to employees by §1152 of the Act.

Respondent denies any conduct violative of the Act, and as affirmative defenses alleges that the complaint fails to state a cause of action, that Respondent's actions were lawful, and that any alleged denial of access was justified by the vio-

lence, harassment and intimidation engaged in by the Union and striking employees against Respondent. Additionally, Respondent, in its brief, asserts that the Agricultural Labor Relations Board, herein called ALRB, should disqualify itself from considering this case because it conducted an ex parte review of General Counsel's evidence prior to the hearing.

A. Factual Background

Respondent's Salinas Valley operations are conducted on 20 different ranches comprising of about 3300 acres, and it employs approximately 1200 crew members during harvest peak. It also operates a labor camp in Salinas, housing 50 to 100 individuals. Additionally, Respondent is engaged in agricultural operations in 3 other California areas and 2 areas in Arizona.

The Union was certified as the bargaining representative of Respondent's employees on December 13, 1977. Respondent and the Union entered into a collective bargaining agreement en June 21, 1978, which provided for access by the Union to Respondent's property. This agreement expired on December 31, 1978, and since that time Respondent and the Union have been engaged in negotiations for a new agreement.

Since February 9, 1979, the Union has been on strike against Respondent. During the course of the strike, some employees have continued to work and others have participated in the strike.

The Complaint alleges denials of access on May 7, 1979 and thereafter. On June 11, 1979, subsequent to the issuance of the complaint, a Preliminary Injunction was issued by the Monterey County Superior Court granting limited access to Respondent's property by the Union.

B. Access Prior to May 7, 1979

The collective bargaining agreement between the parties, which was in effect from June 21, 1978 to December 31, 1978 provided in Article XIII:

> "All agents of the Union shall have the right to visit properties of the Company at all times and places, to conduct legitimate Union business; however, he shall not unduly interrupt operations."

No problems arose concerning the taking of access under the contract, nor after the expiration of the contract, until February, 1979, just before the strike began. At that time there were two incidents where foremen for Respondent refused access to Union representatives, saying they had orders not to allow Union representatives on the property. There were several unsuccessful attempts by the Union to take access in March, 1979. There are no allegations in the complaint concerning these incidents.

C. Access Prom May 7, 1979 Until June 11, 1979

There is testimony about four incidents where access was sought for the purpose of discussing contract negotiations and was denied:

1) In the middle of May, Merced Tiscareno, a striking employee and vice-president of the Ranch Committee, accompanied by several others, left the picket line at the Blanco Road entrance to Respondent's property and asked a foreman named Tony for permission to enter the fields where about 100 people were working. Tony, who had been Tiscareno's friend for a long time, refused, saying he was only a foreman and he only took orders.

2) On May 7, 1979, Sergio Reyes, a striking employee, member of the Ranch Committee and strike coordinator, accompanied by two others, left the picket line at Respondent's Upper Patrick Ranch and told Respondent's supervisor Cecil Almanza that they wanted to go into the field to tell the workers what was going on at the contract negotiations. Almanza refused, saying the workers knew what was going on.

3) On May 3, 1979, at Respondent's Spence Ranch property, Reyes asked a uniformed security guard for permission to enter. The guard refused, saying his order were not to let anyone from the strike into the fields.[1/]

4) On May 11, 1979, Sergio Reyes, Josafat Arias and about five other persons from the picket line in front of Respondent's Star Labor Camp approached Cecil Almanza with the intention of asking him for access through their spokesman Arias. There is no testimony concerning the content of the conversation, but the group did not enter the camp.

D. Access Subsequent to June 11, 1979

On June 11, 1979, a Preliminary Injunction was issued by the Superior Court of Monterey County, ordering Respondent to provide access to Union representatives on the terms set forth in the injunction. (See General Counsel Exhibit No. 1e)

[1/] This testimony was allowed subject to being stricken as hearsay if not shown by later testimony to be an admission by Respondent. I find that later testimony was sufficient to make this statement admissible.

Thereafter, the testimony shows six occassions in which access was sought to discuss contract negotiations and refused:

1) Shortly after the injunction issued, Respondent's supervisor Noel Carr granted the request for access of Tiscareno and others, but denied access to certain Union representatives accompanying them because they were not Respondent's employees. This reason was not used for any subsequent denials of access.

2) In early July, at about 11:45 a.m., Tiscareno asked Respondent's supervisor Roy Miller for permission to speak to irrigators who were sitting in the field at Somavia Road eating lunch. Miller refused on the grounds that it was not a proper access time.

3) In early June the request of Union representative David Valles for access to Respondent's Star Labor Camp was initially denied by a security guard on the grounds that no law enforcement officer was present. Shortly thereafter, a sheriff arrived, and the security guard then allowed Valles access.

4) In mid-July, at Blanco Road, strikers and Union representatives Raul Valle, Jesus Ortiz, and Antonio Ayala asked supervisors Manuel Lopez and Cecil Almanza for access. Lopez refused, and when asked for a reason, replied that it was because no sheriff was present.

5) A few days later, Raul Valle asked Cecil Almanza for access to Pedrazzi Ranch and was refused, first because it was too early, and later because no sheriff was present.

6) About July 20, 1979 at Pedrazzi Ranch, Respondent's personnel fieldman Max Curiel refused the request of Valles,

Valle and another for the right to enter the fields, stating that no sheriff was around.

E. Respondent's Policy Regarding Union Access

From the expiration of the collective bargaining agreement between Respondent and its Union on December 31, 1978, until the commencement of the strike on February, 1979, Respondent's allowed Union access under the terms of the expired contract.

After the strike began, Respondent admittedly denied all Union access to its property, in the belief that there was no law or regualtion permitting access by strikers.

When the injunction issued on June 11, 1979, and continuing until August 20, 1979, Respondent allowed Union access to Union representatives only when they were accompanied by a law enforcement official. This restriction was based en Respondent's erroneous belief that an informal agreement had been reached by the parties modifying the injunction to include this requirement.

After August 20, 1979, pursuant to a ruling by the judge who issued the preliminary injunction, Respondent ceased to demand that law enforcement officers accompany Union representatives taking access to its property.

During the periods at issue, Respondent communicated its access policy, either orally or in writing, to all personnel, including supervisors, foremen, security guards and others, who would be in positions to respond to requests for access.

F. Testimony Regarding Violence

Twelve witnesses testified to a variety of violent acts occurring in 1979, ranging from yelling, cursing and threats

to destruction of property and physical attacks. The perpetrators of these acts were identified as "strikers" "UFW members" "UFW pickets" "Union supporters" and the like, and described as persons carrying UFW flags,, or wearing union buttons. All of these witnesses were non-striking employees of Respondent, and included a machine crew foreman, a safety director, an insurance coordinator and a ranch manager. None identified any of the persons who engaged in such behavior by name or as a representative of the Union.

In addition, Respondent's Exhibit No. 2 contains 78 pages of newspaper clippings concerning a variety of violent strike-related incidents in the area.

Captain Walter Scott, of the Monterey County Sheriff's Department, was qualified as an expert in dealing with problems related to agricultural strike situations. He testified that in his opinion provisions for taking of strike access reduced violence.

G. Alternative Communication

Testimony indicates that on various occasions Union representatives used loudspeakers set up at the edges of fields to talk to workers. On one occasion the sheriff prohibited the use of loudspeakers by the Union. Workers in nearby fields were usually able to hear what was said on the loudspeakers despite the fact that Respondent also used loudspeakers to play music at the same time.

The Union used paid advertising on local Spanish language radio station, KCTY. There is a radio tuned to this station

or each of Respondent's lettuce machines, and the crews play the radio in the fields. This station is played in the dining room of Respondent's labor camp, and can also be heard at; workers homes.

During the time Respondent denied access to the Union, some union representatives visited some non-striking workers at their homes and motels, and met some in the streets and stores and at the edges of fields.

H. Discussion of Issues and Conclusion

1. The Right of a Union to Post-Certification Access During a Strike

In O. P. Murphy, 4 ALRB No. 106, the Board addressed itself to the issue of post-certification access as it related to a certified labor organization engaged in, or attempting to engage in collective bargaining negotiations with an employer. It held that there was a right to such access at reasonable time and places for any purpose relevant to the duty to bargain collectively.

Respondent argues that because the post-certification access in O. P. Murphy did not involve a strike and picketing similar to that in the instant case, its decision is not controlling. I do not agree. A strike in and of itself is not inconsistent with the duty to bargain in good faith. On the contrary, the necessity for good faith bargaining between parties and the availability of economic pressure device to each to make the other party incline to agree on one's terms exist side by side. NLRB v. Insurance Operators International Union, 361 US 477, 45 LRRM 2704 (1960). Furthermore, "... a strike when legitimately employed is an economic weapon, which is great measure implements

and supports the principles of the collective bargaining system." NLRB v. Erie Resistor Corp., 373 U.S. 221, 234, 53 LRRM 2121 (1963).

Respondent argues that nothing in the Board's regulations or in the Act itself provides for other than organizational access. In San Diego Nursery Co. v. ALRB, 100 Cal. App. 3d 128 (4th Dist. 1979) the Court affirmed an order enjoining board agents from entering an employers premises without consent in the absence of express statutory authorization. It held that although a regulation authorizing such access would not be unconstitutional, an ad hoc approach to the issue was improper.

The situation with respect to post certification access is distinguishable. In O. P. Murphy, the Board states, "Although our regulations contain no specific provisions for post certification access by the bargaining representative, they acknowledge that post certification access rights can come into play. Section 20900(e)(1)(C) provides in part: "Nothing herein shall be interpreted or applied to restrict or diminish whatever rights of access may accrue to a labor organization certified as a bargaining representative."

The right to post certification access in O. P. Murphy was based upon the right and duty of the exclusive representative to bargain collectively on behalf of all the employees it represents. In order to fulfill its duty to represent all employees in the bargaining unit fairly, the Union must be able to communicate with them. This ability to communicate is "fundamental to the entire expanse of a Union's relationship with the employees." Prudential Insurance Company of America v. ALRB, 412 F. 2d 77, 71 LRRM 2254 (2 Cer., 1969) cert. denied

369 U.S. 923, 72 LRRM 2695 (1969); Wallace Corporation v. NLRB. 323 U.S. 248, 15 LRRM 697 (1944).

Respondent's argues that the Union's need to communicate with employees was not demonstrated. This is not supported by the evidence. Contract negotiations were ongoing during the period in question, and all of the witnesses who testified that they had tried to take access indicated they had intended to discuss the negotiations with the non-striking workers. Contrary to Respondent's argument, the extent of the witness's personal knowledge of the details of negotiations is not relevant, nor is the lack of evidence that any non-striking worker desired to speak to Union representatives. The Union had a right and duty to convey information to and obtain information from all of Respondent's employees who would listen and speak with its representatives. Respondent cannot monitor the qualifications of those whom the Union chooses as its representatives.

2. Alternative Methods of Communication

Respondent's position is that the alternative communication channels available to and used by the Union, as set forth in G above, eliminate the necessity for access by the Union.

In O. P. Murphy, the Board reviewed the special difficulties of communication with agricultural workers which led to its adoption of the pre-election access regulation 8 Cal. Admin. Code §20900. It stated, at p. 7, "While the need for effective communication in the post-certification context arises from different considerations than those in the pre-election context, the same absence of effective alter-

native means of communicating with agricultural employees generally exist." It further stated at p. 8: "Because of the different interests involved after certification, and because of our limited experience with the effect of post-certification access on the negotiating process, we will evaluate the extent of the need for such access on a case-by-case approach.

"While we will look at the facts of each case to determine the extent of the need for post-certification access, we start with the presumption that no alternative channels of effective communication."

In asserting that no access is needed by the Union, Responent argues that the above presumption is rebuttable. That is indeed true, but Respondent has not presented any persuasive argument or evidence to rebut it. The methods of communication used were loudspeakers at the edge of the fields, broadcasts on the radio, and visits to the home of some workers. Methods such as these are available to Unions in pre-election organizing, and have been found ineffective. Agricultural Labor Relations Board v. Superior Court, 16 Cal 3d 392 414-415, 128 Cal. Rptr. 183, 546 p. 2d 687 (1976) with footnotes; 8 Cal. Admin. Cede §20900(C). There is nothing in the record to show these methods are any more effective in a post-certification setting.

Respondent's argument that the need for rapid communication warrants access prior to elections but, not afterward is without merit in this case. Since collective bargaining was ongoing, the need to transmit and collect information was con-

tinuing, prompt communication is essential if it is to be useful in preparations for collective bargaining sessions.

3. The Strike Related Violence

Respondent's argue that any right of access by the Union was forfeited by the violence described in E above. In support of this, Respondent cites NLRB cases where employers were not required to provide the union with a list of certain employees because of violence or harassment directed against them (W.L. McKnight, dba: Webster Outdoor Advertising Co., 170 NLRB 1395 (1968), enf'd sub nom, Sign and Pictorial Union v. NLRB, 419 P 2d 726 (4th Cir. 1969); Shell Oil Co. v. NLRB, 457 F. 2d 615 (9th Cir. 1972)) and where an employer was not required to continue bargaining because of activities of the union (Automobile Workers, Local 833 v. NLRB, (D.C. Cir. 1962) 300 F. 2d 699, cert. denied (1962), 370 U.S. 911).

These decisions are not persuasive in a situation where work site access is being sought. As Respondent states in its brief, the courts in those cases refused to provide a Union with-information which might lead to further violence.

In this case, there is no evidence to indicate that granting union access would increase violence - on the contrary, the expert witness testimony indicated that the taking of strike access tended to reduce violence. Good faith belief of the employer to the contrary cannot be used to deny the right of access. Jackson v. Perkins, 3 ALRB 36.

4. The Attempts To Take Access

O. P. Murphy, at pp. 9-10, set forth certain guidelines for the taking of post-certification access:

1. The purpose of taking access must be related to the collective bargaining process.

2. Absent unusual circumstances, the labor organization must give notice to the employer and seek his or her agreement before entering the employer's premises.

3. The labor organization must give such information as the number and names of the representatives who wish to take access, and the times and locations of such desired access.

4. The parties must act in good faith to reach agreement about post-certification access.

5. The right of access does not include conduct disruptive of the employer's property or agricultural operation.

I have already found that the attempts at access were related to collective bargaining, and therefore the union complied with Point 1.

There is no evidence that access was ever taken by the Union without permission from Respondent. Each incident in which access was sought involved a request for permission to enter Respondent's premises.

Although in no case was the request for access accompanied by a statement giving the number and names of the representatives, or the time and location of desired access, nevertheless, there was no failure by the Union to comply with points 2 and 3 of the guidelines, for the following reasons.

In all of the attempted entries about which there was evidence, it was apparent from the circumstances that the request for access was for the time when it was made and at the location where it was made, and for the number of persons who then and there

presented themselves. The request itself constituted notice, albeit short. In all but the two incidents which involved approaches to security guards, the names of the representatives were known to the supervisors, and in one instance a foreman, of whom the request was made.

Respondent made no showing that it refused entry on the grounds that it required more notice, or because it had not received a list of the representative's names. On the contrary, its admitted policy required refusal. In each instance except one, where there was no evidence given as to the content of the conversation, it told Union representatives that entry was denied for reasons other than any purported failure to follow the guidelines as set forth in O. P. Murphy, (see C and D, supra.)

With respect to number 4, there is no evidence concerning to the inclusion of access rights in the collective bargaining discussions. This is a responsibility of both parties, and since neither side introduced evidence of bad faith bargaining on this issue, there is no basis for finding failure to comply.

Point number 5 is not applicable to this case.

The Union was in substantial compliance with the O. P. Murphy guidelines. The policy of Respondent prior to the issuance of the injunction was total denial of access to Union representatives; subsequent to the injunction and until August 20, 1979, its policy was total denial of access without the presence of a law enforcement officer. It is clear that even rigid adherence by the Union to the guidelines would have been unavailing. In the face of company policy of continuing refusal for other reasons, the Union was not required to perform futile acts.

Respondent cannot be excused for its failure to allow access from June 1, 1979 to August 20, 1979, because it honestly believed the parties had agreed that access would be taken only in the presence of a law enforcement official. It is well settled that the motive of a party is not an issue in assessing whether conduct is violative of the Act. Jackson & Perkins Company, 3 ALRB No. 36, citing American Freightways Company, 124 NLRB No. 1 (1959), NLRB v. Burnup and Sons, Inc., 379 US 21 (1964).

5. Disqualification of ALRB

During the hearing, Respondent made an offer of proof that the members of the Board had reviewed the facts of this case, prior to the hearing, based solely on General Counsel's investigation for the purpose of seeking a preliminary injunction and temporary restraining order in Superior Court of Monterey County. An objection to admission of the offer of proof was sustained.

Respondent bases its request that the ALRB disqualify itself on this offer of proof. The offer of proof is not relevant, and Respondent's request is without merit.

For all of the foregoing reasons, I find that Respondent violated Section 1153(a) of the Act by denying reasonable access to Union representatives and striking employees at its premises from May 7, 1979 through August 20, 1979, and that such denial interfered with the rights guaranteed to employees by Section 1152 of the Act.

III. The Remedy

Having found that Respondent engaged in unfair labor practices within the meaning of Section 1153(a) of the Act, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the entire record, the findings and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended Order.

ORDER

Respondent, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Denying reasonable access to Respondent's premises to Union representatives for purposes related to the collective bargaining process;

(b) In any other manner interfering with, restraining and coercing employees in the exercise of their rights 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, or to refrain from any and all such activities.

2. Take the following affirmative action:

(a) Permit access to its premises by Union representatives for purposes related to the collective bargaining process on the same terms and conditions as is given to organizers in 8 Cal. Admin. Code Section 20900, sub-section 3A, 3B, 4A, 4B, and 4C, until a voluntary agreement on access is reached by the parties, or until the

Union ceases to be the collective bargaining representative of Respondent's employees.

(b) Sign the notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(c) Post copies of the attached Notice on its premises for 90 consecutive days, the times and places of posting to be determined by the Regional Director.

(d) Provide a copy of the Notice to each employee hired by Respondent during the six-month period following the issuance of this Decision.

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed at any time between May 7, 1979 and the date of mailing the Notice.

(f) Arrange for the attached Notice to be read in all appropriate languages on company time to all employees, by a company representative or by a Board Agent, and thereafter to accord said Board Agent the opportunity, outside the presence of Respondent's officers, agents and supervisors, to answer questions which employees may have regarding the Notice and their rights under the Agricultural Labor Relations Act.

(g) Notify the Regional Director of the ALRB Salinas Regional Office within 30 days after receipt of a copy of this decision what steps Respondent has taken to comply herewith, and to continue reporting periodically thereafter on request of the Regional Director.

DATED: June 25, 1980

Beverly Axelrod

BEVERLY AXELROD
Administrative Law Officer

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. 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; and
5. To decide not to do any of these things.

Because this is true, we promise that:

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

Especially:

WE WILL NOT refuse to allow United Farm Workers of America, AFL-CIO, representatives to enter our property at reasonable times so that they can talk with you about matters related to the negotiations between the Union and the Company.

BRUCE CHURCH, INC.

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