73-0375

3.30.01

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-175638

JUL 27 1972

Dear Mr. Steiger:

Your letter of April 13, 1972, requested that we investigate the amounts and legality of expenditures made by the National Labor Relations Board for matters relating to the United Farm Workers Organizing Committee, AFL-CIO. Your letter expressed concern that the Board's use of funds to investigate the activities of the committee violated the provision attached to the Board's annual appropriation law, most recently Public Law 92-80, which states:

> "*** That no part of this appropriation shall be available *** or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers ***."

We reviewed the Board's authority to investigate the committee and believe that there is substantial support for concluding that the funds spent for the investigation were properly spent in accordance with the letter and intent of Public Law 92-80. Our review included an examination of the relevant laws and legislative history, interviews with Board officials, and analyses of the Board's justification for its investigation. This justification was forwarded to us in a letter dated May 10, 1972, from the Board's General Counsel (copy enclosed).

The Board was established in 1935 as an independent Federal agency to administer the Nation's principal labor relations law, the National Labor Relations Act. The Board has two primary functions: (1) to prevent and remedy unfair labor practices, by unions or by employers, and (2) to determine, by conducting secret-ballot elections, whether workers wish to have unions represent them in collective bargaining. The Board does not initiate action in either function but processes only those unfair labor practice charges and petitions for employee elections which are filed with it. For fiscal year 1972, $48.5 million was appropriated for Board functions.

~~944303~~ 090693

The Board investigated the committee's activities after unfair labor practice charges had been filed with 18 of the 31 Board regional offices by the Free Marketing Council, the Food Employers Council, and the H. & S. Pogue Company. The charges, filed in late December 1971, alleged that the committee was engaging in conduct which violated the secondary boycott provisions of the act. Similar charges against the committee were subsequently filed by Burke's Village Liquors, Dublin, Calif. In support of the charges, the parties submitted evidence that the committee was trying to organize, and secure collective-bargaining contracts covering, employees in wineries and other nonagricultural activities.

After the Board investigated, it concluded that there was reasonable cause to believe that the committee was a labor organization subject to the provisions of the act and was engaging in unfair labor practices as charged. After determining that formal proceedings were warranted, the Board transferred all cases to region 21 (Los Angeles, Calif.).

On March 9, 1972, the regional director of region 21 filed a petition with the District Court of the United States for the Eastern District of California for a temporary injunction to restrain the committee from the practices charged. In accordance with section 10(l) of the act, whenever it is determined that a complaint should be issued alleging a violation of section 8(b)(4)(B) of the act--which forbids certain types of secondary boycott activity--the Board is required to apply to a Federal district court for an injunction prohibiting the continuation of such conduct pending a hearing by the Board upon the charges and the Board's decision.

Prior to the date of a hearing in which the committee was required to show cause why it should not be restrained as petitioned, the court approved a postponement of the hearing to permit the committee to engage in discussions with the Board which might lead to settling the matters. Settlement discussions are a customary Board procedure in attempts to achieve voluntary settlement remedying the alleged violations.

In April 1972 the committee entered into a settlement agreement with the Board. The committee agreed to refrain from the practices charged, although it did not admit that it was a labor organization or that it had committed any unfair labor practices within the meaning of the act. As a result, the regional director decided not to institute further proceedings. On May 22, 1972, however, two charging parties, as permitted by Board rules and regulations, filed an appeal of the regional director's decision with the Board's General Counsel. On July 6, 1972, the General Counsel informed the two charging parties that the appeals were denied and the settlement agreement was deemed appropriate.

The Board estimates that it spent approximately $15,700 for investigation of the committee, preparation of papers for the court, and settlement discussions.

Board officials have not been given the opportunity to consider and comment formally on the contents of this report.

We trust that the above information is responsive to your needs. This information is being provided to several other Members of the Congress who have made similar requests.

Sincerely yours,

Comptroller General
of the United States

Enclosure

The Honorable William A. Steiger
House of Representatives

ENCLOSURE

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

May 10, 1972

Honorable Elmer B. Staats
Comptroller General of
the United States
General Accounting Office
Washington, D. C. 20548

Dear Mr. Staats:

Assistant Director George D. Peck advised us by letter dated April 11, 1972, that the Comptroller General has been requested by certain members of Congress to advise them on the propriety of this Agency's actions in processing certain unfair labor practice charges filed against the United Farm Workers Organizing Committee (UFWOC). These Congressional inquiries are based on a concern that a rider to our appropriations bill may preclude the Agency from making any expenditures with respect to unfair labor practice charges against UFWOC. Consistent with your request for information concerning the propriety of this Agency's actions, I am providing you with our view of the meaning of this rider and its application to this and similar cases. Initially, it is important that I describe the nature of the current proceeding and the underlying precedent therefor.

Beginning in late December 1971, a substantial number of unfair labor practice charges were filed in various of our Regional Offices by the Free Marketing Council, the Food Employers Council and H. & S. Pogue Company, alleging, in essence, that UFWOC was engaging in conduct violative of the secondary boycott provisions of the National Labor Relations Act. In support of these unfair labor practice charges, the charging parties submitted evidence that indicated that UFWOC was engaged in an effort to organize and secure collective bargaining contracts covering employees in wineries, or other non-agricultural activity. For example, a number of such employees are engaged in the process of converting

wine into champagne. In aid of this effort, UFWOC had been picketing numerous retail outlets in various locations around the country which sell the products of the winery or wineries involved. The evidence also established that an object of the picketing was to induce customers not to patronize these retail outlets; in short, to boycott the retail outlets.

Such conduct, if engaged in by a labor organization subject to the provisions of our Act, is violative of the Act. However, the question presented was whether UFWOC was a "labor organization" within the meaning of the Act. Under Section 2(3) of the Act, agricultural laborers are excluded from the statutory definition of "employee". Since the statutory definition of a "labor organization" requires employee participation, any organization in which only agricultural laborers participate would not be a labor organization subject to the provisions of our Act. UFWOC does, of course, represent agricultural laborers but the charging parties alleged, and our investigation revealed, that employees of commercial packing sheds, who are "employees" within the meaning of our Act, are members of UFWOC and, further, that UFWOC represented or sought to represent them. Indeed, in connection with the instant dispute, UFWOC sought to bargain for winery workers who are statutory employees under NLRB precedents. Thus, on the basis of the investigation and under existing Board precedents such as Masters, Mates, and Pilots, 144 NLRB 1172 and Pacific Far East Lines, 174 NLRB 1168, I concluded that UFWOC was a labor organization within the meaning of our Act inasmuch as it admitted to membership, represented and sought to represent statutory employees as well as agricultural laborers. Moreover, my decision is consistent with actions taken by my immediate predecessor as General Counsel on similar unfair labor practice charges. Thus, in 1967 and 1968 in Food Employers Council, Inc., Case No. 21-CC-987, and United Fresh Fruit and Vegetable Association, Case No. 2-CC-1068, unfair labor practice complaints and injunctive proceedings were authorized against UFWOC based on secondary boycott allegations relating to a grape boycott. The basis for those decisions was the finding that UFWOC had admitted statutory employees into the Union. These matters were resolved when these employees were separated from UFWOC and organized into a separate organization called the United Peanut Shelling Workers.

These cases did not represent UFWOC's first experience with this Agency. In earlier cases which I shall discuss more fully below, UFWOC filed petitions for Board elections on at least three occasions seeking representation elections in bargaining units of packing shed employees and on one occasion filed an unfair labor practice charge concerning the discharge of an employee allegedly in violation of Section 8(a)(3) of the Act. Moreover, in 1970 in Giumarra Vineyards, Cases Nos. 20-CC-904 and 930, an unfair labor practice complaint was authorized against UFWOC and the AFL-CIO where it was determined after an investigation that these two organizations were acting in a joint venture with respect to certain secondary boycott activities.

While this Agency did dismiss an unfair labor practice charge against UFWOC in 1971, the dismissal was based upon an investigation which did not produce evidence sufficient to support a finding that UFWOC was a labor organization. As noted above, there is such evidence in the present case.

Turning now to the rider that has been attached to this Agency's appropriations bill since 1946. This rider provides:

> That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in Section 2(3) of the (National Labor Relations Act) and as defined in Section 3(f) of the (Fair Labor Standards Act) ....

Section 3(f) of the Fair Labor Standards Act defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the

> raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Board recognized that it is directed to follow the definition of "agriculture" set forth in the Fair Labor Standards Act and in addition "has frequently stated that it considers it its duty to follow, whenever possible, the interpretation of Section 3(f) adopted by the Department of Labor, the agency which is charged with the responsibility for and has the experience in administering the FLSA." Bodine Produce Company, 147 NLRB 832 at 834.

From the above discussion, it is readily apparent that the subject unfair labor practice proceedings are not related in any way to the organization of, or assistance in the organization of, agricultural laborers. Indeed, an investigation of certain of the employees in question by the Wage and Hour Division of the Department of Labor confirmed the findings of the investigation that these individuals are not engaged in agriculture. Nor was this matter in any way concerned with "bargaining units composed of agricultural laborers." Rather, the instant cases involve allegations that a labor organization was engaged in a secondary boycott of stores and supermarkets (non-agricultural enterprises) with a purpose of bringing pressure on wineries to compel them to recognize UFWOC as the representative of certain of the wineries statutory and non-statutory employees. These allegations, as well as the allegations that UFWOC also represented other statutory employees, established prima facie bases for an investigation and, indeed, sworn testimony received during that investigation supported these allegations.

As you know, the processes of this Agency are not self-initiating. An unfair labor practice proceeding is initiated by a charge which can be filed by "any person". Absent some indication from the face of the charge or known fact that the charge is based on matters beyond the reach of the Act, investigation must be undertaken to permit a determination of the issues involved, including jurisdiction issues. In the instant cases, as noted, there were

such allegations and accordingly, this Agency, consistent with its obligations under the Act, conducted an investigation of all aspects of the charges, including the allegation that UFWOC represented statutory employees. Although the investigation in this case did not involve a review of employees who were, in fact, agricultural workers in an agricultural unit, such might have been the case. For that reason our investigation of this matter proceeded first to determine if the employee units investigated were agricultural or non-agricultural in nature. Had they been determined to be the former, the investigation of that unit would have ceased. In so proceeding we insured that the full intent of the rider was carried out. Thus, it is axiomatic that the rider cannot operate to forestall an investigation of unfair labor practice charges simply because an allegation is made that the union or employees involved are not covered by the Act. However, if the face of the charges or a preliminary investigation sustains such an allegation, the charges would, of course, be dismissed. However, in this particular case the charges were supported by our investigation.

Specifically, the evidence adduced during this investigation revealed:

1. One of the purposes of the wine boycott was to obtain recognition for some 110-120 winery employees. These employees work in the wineries of F. Korbel & Bros., Inc., Hanns Korrell Champagne Cellars and Sebastiani Winery. Many of them are engaged in the processing of wine into champagne, a clearly non-agricultural pursuit.

2. UFWOC represented 90-100 commercial packing shed laborers, who are not "agricultural laborers" within the meaning of the Act.

That the appropriations bill rider was not intended to exclude these packing shed employees from coverage under the Act is apparent from the legislative history of the rider and of the 1947 Amendments to the Act. Thus, the original appropriations bill rider in the House of Representatives provided that the definition of "agricultural laborers" was to be tied to the definition utilized by the Social Security Act. Although there was opposition to the rider in the House based on the view that

under that definition, workers in packing sheds would be eliminated from coverage of the Act (Cong. Rec., House, June 11, 1946, p. 6689 et seq.), the final House version contained the Social Security Act definition.

The Senate rejected the House version and, after the conferees were unable to agree, the House and Senate each reconsidered the matter. The language contained in the present rider is the product of further conference committee efforts. In the report of the rider to the Senate bill, Senator Pepper stated: " ... then the vice of the former amendment does not appear, because where a packing house or a packing shed is operated away from the farm and carried on not as a farming operation, but as an independent enterprise, it could well be and I assume would be construed as an industrial operation, and not a farming operation, ..." (Cong. Rec., Senate, July 20, 1946, p. 9515.)

At one point during 1947, one of the proposed amendments to the Act contained the FLSA definition of agriculture. In explaining its presence Senator Ball stated:

> It simply adopts the definition of "agricultural worker" which is in the Fair Labor Standards Act, and which, by reason of a rider on the appropriations bill last year, is the definition which the NLRB is now following, and to which, as I understood the testimony, the Board itself has no substantial objection. The definition does leave covered by the proposed act, packing sheds and the so-called "industrial operations" in connection with farming, and merely excludes packing actually done on the farm as an incident to the farmer's operations. (Cong. Rec., Senate, April 25, 1947, p. 4150.)

In its treatment of the coverage of employees, the Board has relied heavily on whether the packing shed is used to pack only its own produce or is used to pack produce of other growers. In the former situation, the workers have been considered "agricultural laborers" and therefore not subject to the Act. Bodine Produce Company, supra, fn. 1. However, where produce is packed for other growers, even 15 percent of the total, the enterprise becomes commercial in nature and the workers in that

shed are not "agricultural laborers" within the meaning of Section 2(3) of the Act. The Garin Company, 148 NLRB 1499, relied on in Mikami Brothers, 188 NLRB No. 78.

Thus, the legislative history of the appropriations rider and the 1947 amendments and the Board's treatment of the cases indicate that Congress intended to be certain that commercial packing shed workers, such as those involved in the instant cases, would not be excluded from coverage of the Act.

The distinction between commercial sheds and non-commercial sheds is so well-established that UFWOC itself has utilized the Board's processes for commercial shed employees. Thus, as noted earlier, in late 1966, UFWOC, as a labor organization, filed representation petitions seeking an election in Earl Fruit Co., Case No. 31-RC-381, and Mosesian and Goldberg, Case No. 31-RC-392. The parties stipulated that these two packing sheds had at least 50 "employees" within the meaning of the Act. UFWOC was certified by the Board in Earl Fruit Co. and the representation petition in Mosesian and Goldberg was withdrawn after the employer recognized UFWOC as the representative of its agricultural laborers and its shed employees.

In Starr Produce Company, Inc., Case No. 23-CA-2583, UFWOC, as a "labor organization", filed unfair labor practice charges alleging that the employer had violated Section 8(a)(1) and (3) of the Act by discharging certain packing shed employees. While the case was being investigated, UFWOC filed a representation petition, Case No. 23-RC-2882, seeking to represent that employer's packing shed employees. An election was held and UFWOC filed objections to the election. A complaint issued in the unfair labor practice case and was consolidated for hearing with the representation case. A hearing was held and in the trial examiner's decision (TXD-697-67 issued December 18, 1967) UFWOC was found to be a "labor organization" within the meaning of the Act, and the employer found to have committed the unfair labor practice charged. It is significant to note that while UFWOC was urging "labor organization" status, the employer respondent in the case argued that the rider to the appropriations act prohibited the Board from pursuing the case. In answering this argument, the trial examiner stated:

> However, the rider to the appropriations act does not alter the definition of a labor organization contained in the Act. Rather it restricts the activities by or on behalf of labor organizations with which the Board may become involved in the administration of the Act .... The history, application, and provisions of the appropriations acts indicate that the rider was designed only to supply a definition of agricultural laborer otherwise missing from the Act and not to deny all access to the processes of the Board to an organization which could satisfy the definition of labor organization but which had dominant interests in the organizing of agricultural laborers. It is the immediate object of an organization's activity in a particular case and not its long range institutional objective with which the rider to the appropriations acts is concerned. (Ibid. at pp. 7-8.)

After the trial examiner's decision was issued, the employer agreed to comply with the decision and UFWOC withdrew its objections and petition for certification.

As noted above, the unfair labor practice charges in this case involved allegations of unlawful pressures on stores and supermarkets (clearly statutory employers) with an object, in part, of forcing wineries (again clearly statutory employers) to recognize and bargain with UFWOC (an organization which already represented some statutory employees (packing shed employees)) as the collective bargaining representative of certain statutory employees of the wineries.

To view the appropriations rider as precluding the investigation of a "secondary boycott" charge raising such issues seems wholly at odds with the language of the Act and the statutory scheme for the processing of unfair labor practice charges. It is also quite inconsistent with Court of Appeals and Supreme Court discussions and analyses of the meaning of Section 8(b)(4) of the Act.

While it is true that the Courts have never considered the meaning of the rider directly, they have considered cases where the primary employer was a "farmer" and where the object of the unlawful secondary activity was to secure recognition of agricultural laborers. Thus, in 1951, the Court of Appeals for the District of Columbia had occasion to consider the then Section 8(b)(4)(A) of the Act. Although the Court in that case found that the respondent Farm Union was not a "labor organization" because there were no statutory employees in the Farm Union, Judge Prettyman, after a detailed discussion, stated: "The statute unquestionably protects farmers from secondary boycotts by organizations in which teamsters, etc., not classified as agricultural workers, participate." 191 F.2d 642, 645 (D.C. Cir. 1951), cert. den. 342 U.S. 869, enforcing 87 NLRB 720. Under the Court's analysis, it is clear that a secondary boycott involving farmers would be proscribed by the then Section 8(b)(4)(A) if it could be shown that a "labor organization" had engaged in the then proscribed means, i.e., inducing statutory employees to strike. And, there is no indication that a secondary boycott as to which farmers were "unquestionably" protected could not be investigated or heard because of the appropriations rider which had been continuously in existence since 1946, i.e., before the introduction of the secondary boycott provisions of the NLRA.

One of the purposes of the 1959 amendments to the Act was to close certain loopholes in Section 8(b)(4)(A). One such loophole was that the proscribed means was to induce or encourage the employees of any employer, so that inducing a non-statutory worker, for example, agricultural or railroad employees, was not prohibited. Recognizing this, the Supreme Court in NLRB v. Servette, Inc., 377 U.S. 46, stated at footnote 6:

> In view of these definitions, it was permissable for a union to induce work stoppages by minor supervisors, and farm, railway or public employees .... Compare DiGiorgio Fruit Corp ....

The Court went on to state "to close these loopholes, subsection (i) substituted the phrase 'any individual employed by any person' for 'the employees of any employer,' ...." (Ibid. at 52.)

Thus, it is clear that the 1959 amendments reached secondary boycott conduct involving farmers which had not been covered under old Section 8(b)(4)(A). This was an additional proscription to that already existing. Just as nothing appears to support the view that the appropriations rider would preclude the investigation or hearing of a secondary boycott involving farmers by a "labor organization" under DiGiorgio, supra, so it seems even less supportable to find that the Congressional intent reflected in the 1959 amendments to extend the reach of the secondary boycott sections of the Act and to close previously existing loopholes was to be negated by the language in the appropriations rider since 1946.

For the reasons set forth above, it is my judgment that the actions of this Agency with respect to the instant charges were a proper exercise of the Agency's responsibility under the Act and were well within and consistent with the Congressional intent and indeed, the literal language of our appropriations rider.

Turning now to the question of expenditures in this matter. I have had our Regional Offices provide me with preliminary estimates of the time and travel expenses in these cases. Their reports to me indicate that the cost, including time in the investigation of this matter, preparation of papers for the court and settlement discussions with UFWOC is approximately $15,700. This is a rough estimate, at best, and is roughly divisible into the following categories:

	Hours	Cost
Professional	1,262.5	$13,784
Clerical (GS-6 and below)	339.0	1,429
Compensation and Benefits	1,601.5	15,213
Travel (Mileage, Per Diem and Car Rental)		454
Telephone		2
Total Cost		$15,669

Considering the fact that this proceeding is not merely one case, but rather involves unfair labor practice charges filed in eighteen different Regional Offices throughout the country,

I believe that even this rough estimate indicates that we were able to keep the costs of this case at a minimum. In part that can be attributed to the fact that upon being advised of the charges and the number and geographic dispersion thereof, I directed that the cases be centralized in one Regional Office. Upon determining that formal proceedings were warranted, I transferred all cases to Region 21 (Los Angeles) for hearing. In this way we were able to virtually eliminate any duplication of efforts and thus avoid any unnecessary expenditures.

I have not included in the above figure any time expended by me and by my Washington staff in considering this matter and in responding to the very high number of Congressional and public inquiries made of the Agency. Should you determine that such figures are necessary, I will be happy to provide you with them.

It is my judgment that this Agency so clearly proceeded in conformity with its responsibilities under the NLRA and our appropriations rider that a detailed accounting of the time and funds expended by 18 of our Regional Offices (which would be time-consuming and costly to obtain) might not be necessary. If, upon your review of the foregoing there is any further information you may deem relevant or you determine that more detail is required, please do not hesitate to contact me.

Sincerely,

Peter G. Nash
General Counsel

cc: Paul G. Dembling
Morton E. Henig