

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M.

DATE: July 31, 2015

TO: Kelly Selvidge, Acting Regional Director
Region 27

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: DMM, LLC d/b/a High Level Health
Case 27-CA-146734

177-2484-1200
177-2484-1201-2500
177-5500
260-6776

The Region submitted this case for advice on (1) whether to assert jurisdiction over an enterprise that grows, processes, and sells medical and recreational marijuana in the state of Colorado and (2) whether certain workers (known as “water techs”), whose job duties include cultivating marijuana plants in an artificial warehouse setting, are “agricultural laborers” excluded from the Act’s protection. We conclude that the Board should assert jurisdiction because the enterprise meets the jurisdictional standard applicable to retail enterprises in general. We further conclude that the water techs are not “agricultural laborers” under Section 2(3) of the Act and that restrictions in a related rider to congressional appropriations for the Board are inapplicable because this case does not concern a “bargaining unit.”

FACTS

Background

Discount Medical Marijuana, LLC d/b/a High Level Health (the Employer) operates sites in Denver, Colorado known as “grow facilities,” where its employees grow and process medical and recreational marijuana. The Employer then sells the marijuana via wholesale to other sellers and via retail to consumers. The company’s gross sales revenue exceeded \$500,000 during the most recent calendar year. The Employer purchases marijuana-specific growing equipment through specialized shops and non-specialized equipment at the local Home Depot store. The Employer’s operations are legal under Colorado law and regulated by that state’s marijuana statutes.

The grow facility concerned in this case is housed in a warehouse consisting of two floors and a basement. The warehouse includes sixteen “grow rooms.” Each grow room contains rows of artificial lamps, the light output of which is regulated to induce

maximum plant growth and allow for year-round cultivation. Fans, air conditioners, and dehumidifiers are used to maintain optimal temperature and humidity levels in each grow room. The Charging Party worked at the grow facility as one of eight water technicians (“water techs”). Water techs are responsible for germinating and planting marijuana seeds; creating plant “clones”; and transplanting, watering, feeding, spraying (with pesticides and fungicides), and harvesting marijuana plants. At times, water techs have also engaged in some incidental duties, such as promoting the company’s products at industry trade shows, providing security for the facility, and constructing grow rooms.

Water techs discuss wages; two are terminated

On (b) (6), (b) (7)(C) 2015, the Charging Party attended a performance review meeting with the Employer’s (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C). The Charging Party received a positive evaluation, with the (b) (6), (b) (7)(C) saying that (b) (6), (b) (7)(C) was going to receive a raise to \$14.00 per hour. The Charging Party noted that that would in fact be a wage decrease because (b) (6), (b) (7)(C) was already earning \$15.00 per hour for (b) (6), (b) (7)(C) weekend-shift work. The (b) (6), (b) (7)(C) replied that the Charging Party was being returned to the lower-paying weekday shift and that \$14.00 per hour would be a raise relative to the lower wage level for that shift. The Charging Party stated that, in (b) (6), (b) (7)(C) view, (b) (6), (b) (7)(C) was being demoted. After further discussion, one of the (b) (6), (b) (7)(C) told the Charging Party not to discuss wages with (b) (6), (b) (7)(C) coworkers. The Charging Party challenged that instruction, but the (b) (6), (b) (7)(C) maintained that employees were prohibited from discussing wages. At some point during the meeting, the Employer distributed a new handbook broadly restricting various employee activities, including discussions regarding personnel information. The meeting ended, and the Charging Party returned to work.

When leaving work for the day, the Charging Party spoke to Employee A, a fellow water tech. The Charging Party told Employee A that (b) (6), (b) (7)(C) thought the water techs should get together for dinner the following evening to discuss their performance reviews and other work-related issues. Employee A agreed. Later that evening, the Charging Party discussed (b) (6), (b) (7)(C) performance review and the wage issue with (b) (6), (b) (7)(C) also a water tech at the grow facility. During that conversation, the (b) (6), (b) (7)(C) received a group text message from another water tech stating that the employees should hold out for higher pay.

The Charging Party reported to work the next morning and, at about 9:00 a.m., attended a meeting with the (b) (6), (b) (7)(C) and the (b) (6), (b) (7)(C) from the day before. Also at the meeting were three other water techs, including Employee A. One of the (b) (6), (b) (7)(C) began by telling the employees that the Employer had learned of the prior evening’s group text message and suspected that they had been involved with it. The (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) told the employees that they were not to discuss wages, stated that they were causing dissension, and accused them of trying to form a “pseudo-union” to destroy the company. The (b) (6), (b) (7)(C) then threatened to fire them. Employee A

responded that (b) (6), (b) (7)(C) had problems with working conditions and the new employee handbook and that other employees felt the same way. One of the managers replied that if the employees had any problems, they needed to come to management instead of talking with one another. At the end of the meeting, the (b) (6), (b) (7)(C) decided not to fire anyone, said there had been a “miscommunication,” and sent the employees back to work. The Charging Party then met privately with one of the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) stated (b) (6), (b) (7)(C) interest in rising through the company’s ranks, to which the (b) (6), (b) (7)(C) replied that the Charging Party was a great employee but needed to keep (b) (6) nose down. The (b) (6), (b) (7)(C) came by and briefly spoke to the (b) (6), (b) (7)(C) in private. When the (b) (6), (b) (7)(C) returned, (b) (6), (b) (7)(C) demeanor had changed, and (b) (6) told the Charging Party that issues “like this”—which the Charging Party understood to be a reference to the meeting earlier that day—were the only thing that could hold (b) (6), (b) (7)(C) back.

At about 10:30 a.m., the (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) again met with the Charging Party and Employee A. The (b) (6), (b) (7)(C) told them that they were being terminated for “just cause.” Employee A became angry and left the room. The Charging Party asked what constituted “just cause.” The (b) (6), (b) (7)(C) and a (b) (6), (b) (7)(C) replied that the Charging Party and Employee A had caused dissension and that that was not allowed. Aside from the jurisdictional questions presented here, the Region has determined that the Employer violated Section 8(a)(1) by prohibiting the Charging Party and Employee A from discussing wages and then terminating them for doing so.

ACTION

We conclude that the Board should assert jurisdiction over the Employer because it meets the jurisdictional standard applicable to retail enterprises. We further conclude that the discharged water techs are “employees” under Section 2(3)—not “agricultural laborers”—and that restrictions found in a related congressional appropriations rider do not apply in the circumstances of this case.

A. The Board should assert jurisdiction over the Employer.

In *Wellness Connection of Maine*,¹ we concluded that (i) an enterprise involved in the medical marijuana industry falls within the Board’s jurisdiction if it meets otherwise applicable jurisdictional standards and (ii) jurisdiction should be asserted over such an enterprise, notwithstanding the illegality of its operations under federal law. Those conclusions followed from the broad nature of the Board’s jurisdiction and the potential for labor disputes involving such enterprises to substantially affect

¹ *Northeast Patients Group d/b/a Wellness Connection of Maine*, Cases 01-CA-104979 and 01-CA-106405, Advice Memorandum dated Oct. 25, 2013.

interstate commerce.² In rejecting the argument that the Board should decline jurisdiction because such enterprises are formally illegal under federal law, we noted that the Department of Justice (DOJ) has indicated that prosecuting state-regulated medical marijuana operations is not an enforcement priority and that it has refused to seek to preempt Colorado's law permitting recreational marijuana use.³ We also observed that the Occupational Safety and Health Administration (OSHA) has exercised jurisdiction over employers in the medical marijuana industry. Finally, we explained that an employer's violation of one federal law does not give it license to violate another (i.e., the Act).⁴

The jurisdictional standard applicable here is the Board's standard for retail enterprises.⁵ That standard requires gross annual volume of business of at least \$500,000 and that the enterprise fall within the Board's statutory jurisdiction.⁶ The Board's statutory jurisdiction extends to all such conduct "affecting commerce" as might constitutionally be regulated under the Commerce Clause, subject only to the rule of *de minimis*.⁷

² *Id.* at pp. 6-9.

³ *Id.* at pp. 5 & nn.18-20, 10.

⁴ *Id.* at pp. 10-11.

⁵ An enterprise like the Employer, which is engaged in both retail and wholesale operations, falls within the Board's jurisdiction if it meets the jurisdictional standard applicable to *either* retail *or* wholesale enterprises, provided that neither aspect of the business is *de minimis*. *DeMarco Concrete Block Co.*, 221 NLRB 341, 341 (1975). If the Region determines that the Employer also meets the standard applicable to wholesale enterprises, *see Siemons Mailing Service*, 122 NLRB 81, 81, 85 (1959) (setting standard for nonretail enterprises at annual outflow or inflow, direct or indirect, across state lines of at least \$50,000), that would provide an additional, independent jurisdictional basis.

⁶ *Carolina Supplies & Cement Co.*, 122 NLRB 88, 89 (1959).

⁷ *NLRB v. Fainblatt*, 306 U.S. 601, 604-08 (1939); *see also J. M. Abraham, M.D., P.C.*, 242 NLRB 839, 839 (1979) (employer's receipt of Medicare funds established Board's statutory jurisdiction); *Int'l Longshoremen & Warehousemen's Union (Catalina Island Sightseeing Lines)*, 124 NLRB 813, 814-15 (1959) (regulation of employer by another federal agency under the Commerce Clause established Board's statutory jurisdiction).

Here, the Employer meets the jurisdictional standard for retailers, having admitted that its gross sales revenue exceeded \$500,000 during the most recent calendar year. Furthermore, the Board has statutory jurisdiction because the Employer's operations, although apparently confined to the state of Colorado, necessarily affect the interstate marijuana market such that labor disputes involving the Employer would undoubtedly affect interstate commerce.⁸

Because the Employer meets the jurisdictional standard for retailers, the Board should assert jurisdiction, as in *Wellness Connection of Maine*. Indeed, the rationale of that case is fully applicable here and disposes of any contrary arguments, including those based upon federal marijuana laws.

B. The discharged water techs are “employees” and not “agricultural laborers.”

1. The water techs are “employees” under the Board’s traditional interpretation of Section 2(3).

The Act's protections apply to workers who qualify as “employees” under Section 2(3). That provision's definition of “employee” excludes “any individual employed as an agricultural laborer.” The Board receives considerable deference in interpreting that provision.⁹ Early in its administration of the Act, the Board held, in *Park Floral Co.*,¹⁰ that workers who cultivate plants in artificial environments, like greenhouses,

⁸ See *Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that the Commerce Clause permits the prohibition of purely local cultivation and use of marijuana because the total aggregate incidence of such activity has a substantial effect on the national market for marijuana). We further note that DOJ and OSHA have asserted jurisdiction over operations like the Employer's, and the Board has held that regulation of an employer by another federal agency under the Commerce Clause was sufficient to establish the Board's statutory jurisdiction. *Catalina Island Sightseeing*, 124 NLRB at 814-15. The Employer's purchases of supplies from interstate retailers like Home Depot would provide additional support for finding statutory jurisdiction, provided that the Region is able to obtain evidence showing that such purchases are not *de minimis*.

⁹ *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302 (1977) (such a “conclusion by the Board is one we must respect even if the issue might with nearly equal reason be resolved one way rather than another” (internal quotation marks omitted)).

¹⁰ 19 NLRB 403 (1940).

are covered “employees” and not excluded “agricultural laborers.”¹¹ The *Park Floral* decision involved greenhouse workers (known as “growers”) whose duties included cultivating, watering, and cutting plants and flowers, as well as regulating the temperature of the greenhouse.¹² In determining that the Act protected those workers, the Board relied on the “industrial,” as opposed to “agricultural,” nature of their labor. The Board explained that an “agricultural laborer” under Section 2(3) “is a person employed by the owner or a tenant of a farm on which products in their raw or natural state are produced.”¹³ While the work of an “agricultural laborer” may include “perform[ing] services on such farm in connection with the cultivation of the soil,” the Board found that the cultivation performed by the greenhouse workers was “not done on a farm”; rather, the “[p]lanting, care, and growing of the plants and flowers ha[d] been removed from the farm and from the natural conditions which there obtain, and [were] carried on under artificial conditions and as a specialized process.”¹⁴ Thus, the Board concluded that “[t]he work in the greenhouses is industrial in nature rather than agricultural in the common understanding of that term.”¹⁵

Here, the water techs’ work is virtually identical to that of the growers in *Park Floral*. Indeed, to the extent that there are any differences, the water techs’ work is even more “industrial” in character. For example, unlike greenhouses, which ordinarily rely on natural sunlight, the water techs work in grow rooms entirely lit by artificial means. That allows for careful manipulation of the marijuana plants’ growth phases and enables optimal year-round production—something far removed from natural farm conditions. Thus, under the Board’s traditional reading of Section 2(3), the Charging Party and Employee A, as well as the Employer’s other water techs, are “employees” entitled to the Act’s protection.

¹¹ *Id.* at 414 (1940); *see also Knaust Bros., Inc.*, 36 NLRB 915, 917-18 (1941) (workers who grow mushrooms in artificial environments, such as temperature-controlled growing houses, are “employees” under Section 2(3)); *Great Western Mushroom Co.*, 27 NLRB 352, 358-59 (1940) (same).

¹² 19 NLRB at 411.

¹³ *Id.* at 413-14.

¹⁴ *Id.* at 414 (further noting that plants were grown “in soil-filled containers kept in glass-covered, heat-regulated houses” and that “[p]roduction [was] continuous throughout the year and not affected by the change of the seasons”).

¹⁵ *Id.*

2. The congressional rider that restricts the Board's use of appropriated funds does not apply in this case.

Each year since 1946, Congress has attached a rider to appropriations legislation for the Board that restricts the agency from using funds for certain purposes.¹⁶ The current rider, which in all relevant respects is identical to the previous riders, states in pertinent part:

Provided, 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 Act of July 5, 1935, and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3(f) of the Act of June 25, 1938 [i.e., Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f)]¹⁷

As the rider states, the Board cannot spend appropriated funds for certain purposes involving “agricultural laborers,” as that term is defined under Section 3(f) of the FLSA. The meaning of “agriculture” under Section 3(f) has been extensively examined in judicial decisions and administrative regulations.¹⁸ And the Board has found that, under Section 3(f), duties like those performed by the water techs are “agricultural,”¹⁹ a conclusion supported by Department of Labor regulations.²⁰ Consequently, in determining whether the rider restricts the Board from acting in the present case, we assume that the water techs are “agricultural laborers” within the meaning of Section 3(f).

¹⁶ See *Bayside Enters.*, 429 U.S. at 300 & n.6.

¹⁷ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 128 Stat. 2510.

¹⁸ See *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63 (1949); 29 C.F.R. § 780.103 *et seq.*

¹⁹ *William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948) (applying Section 3(f) and finding workers who cultivated roses in greenhouses were “agricultural laborers”).

²⁰ 29 C.F.R. § 780.106 (“It is immaterial whether the agricultural or horticultural commodities are grown in enclosed houses, as in greenhouses or mushroom cellars, or in an open field.”).

However, the rider has limited applicability. Its plain text requires application of FLSA Section 3(f) only with respect to those Board activities as to which funding is specifically restricted. In addition, it is well established that congressional appropriations riders must be narrowly construed because of the cursory legislative review that such provisions receive²¹ and because under “the express rules of both Houses of Congress, . . . appropriations measures may not change existing substantive law.”²² Moreover, the Board is disinclined to exclude workers from the Act’s protection, even where express statutory exclusions, including the “agricultural laborer” exception, are concerned.²³ Finally, the rider has never led the Board to overrule *Park Floral*’s holding that greenhouse workers are “employees” under Section 2(3). While the Board in *Elliott & Sons Co.* refused to apply the Act to a unit including greenhouse workers, that case concerned the processing of a representation petition and, for reasons elaborated upon below, is inapposite in an unfair labor practice case like the present matter.²⁴ Thus, in refusing to apply the *Park Floral* rule, the Board did not adopt a new interpretation of the term “agricultural laborer” under Section 2(3) itself.

²¹ Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 456-57 & n.183, 474 (1989) (“Courts construe appropriations provisions quite narrowly in light of judicial understandings about the character of the appropriations process, in which careful legislative deliberation is highly unlikely.”); *see also* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (noting that “repeals by implication” are disfavored, particularly when “the subsequent legislation is an *appropriations* measure” (quoting *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971)) (emphasis in original) (internal quotation marks omitted)).

²² *Tenn. Valley Auth.*, 437 U.S. at 155; RULES OF THE HOUSE OF REPRESENTATIVES, 114th Cong., R. XXI(2)(b) (2015), *available at* <http://clerk.house.gov/legislative/house-rules.pdf> (“A provision changing existing law may not be reported in a general appropriation bill”); *see also* RULES OF THE SENATE, 114th Cong., R. XVI(4) (2015), *available at* <http://www.rules.senate.gov/public/index.cfm?p=RuleXVI>.

²³ *Mississippi Chemical Corp.*, 110 NLRB 826, 828 & n.7 (1954) (rejecting broad reading of the “agricultural laborer” exception and stating that “[a]n amendatory act may not be construed to change the original act or section further than expressly declared or necessarily implied”); *see also* *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999) (“[T]he Board is cautious in finding supervisory status because supervisors are excluded from the protections of the Act. . . . [It] must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organization rights.” (internal quotation marks omitted)).

²⁴ 78 NLRB at 1078-80.

With the foregoing in mind, we conclude that the rider does not apply here because the present case will not entail the Board's use of appropriated funds either (i) "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers," or (ii) "to organize or assist in organizing agricultural laborers."

a. This case does not involve Board action "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers."

The rider precludes the Board from using appropriated funds "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers." That restriction is inapplicable here because this case does not concern a "bargaining unit." Although neither the rider nor the Act defines the term "bargaining unit," the Act strongly indicates the absence of one in a case such as this, where no party has invoked the Board's representation procedures and where the employer has not voluntarily recognized an exclusive representative of its employees for the purposes of collective bargaining.

In providing for exclusive representation, Section 9(a) refers to "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a *unit appropriate for such purposes*." That provision thus expressly links the concept of "a unit appropriate for collective bargaining," i.e., a "bargaining unit," to the existence of a designated or selected representative. Further support for that conclusion can be found in Section 9(c). Specifically, Section 9(c)(1)(A)(i), which provides for Board processing of representation petitions, refers to petitions filed by "an employee or group of employees" but does not use the term "bargaining unit." By contrast, Section 9(c)(3) mandates a 12-month bar on representation elections in "any bargaining unit" following a valid election therein. Read together and alongside Section 9(b), which provides for Board determination of an "appropriate unit," those provisions suggest that, in the context of representation elections, a "bargaining unit" arises only after the Board has found a unit appropriate for collective-bargaining purposes.²⁵

Moreover, Section 7 recognizes the right to "bargain collectively" as distinct from other protected, concerted activities, as it specifically guarantees the right "to engage in other concerted activities for the purpose of collective bargaining *or* other mutual

²⁵ See *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 12-13 (Aug. 26, 2011) (summarizing Board representation procedures), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

aid or protection.”²⁶ The right to engage in activities for “other mutual aid or protection” does not require the existence of a bargaining unit.²⁷

This interpretation of the rider’s language accords with Board precedent following the 1946 enactment of the first appropriations rider. The vast majority of cases applying the rider’s incorporation of Section 3(f) for purposes of determining “agricultural laborer” status have been representation cases and so necessarily involved “bargaining units.”²⁸ In the handful of unfair labor practice cases where the Board has applied the rider, the unfair labor practices were clearly related to already-established bargaining units or Section 7 rights closely linked to collective-bargaining.²⁹

No certified or voluntarily recognized collective-bargaining representative is involved in the present case. The workers here were unrepresented, and there is no pending petition for a representation election. In addition, the Employer’s unlawful actions consisted of prohibiting wage discussions and discharging the Charging Party and Employee A for engaging in such discussions—activity constituting “other concerted activit[y] . . . for the purpose of mutual aid or protection” under Section 7.³⁰

²⁶ (Emphasis supplied.)

²⁷ See *NLRB v. Guernsey-Muskingum Electric Co-op., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960) (affirming Board’s finding that employer unlawfully discharged employee due to his work-related complaints “even though no union activity [was] involved, or collective bargaining . . . contemplated” (internal quotation marks omitted)).

²⁸ See, e.g., *Mississippi Chemical Corp.*, 110 NLRB at 827 (“[I]t is admitted that the Board is now precluded, by the rider to its current appropriation act . . . from processing representation cases involving ‘agricultural laborers,’ as defined in [S]ection 3(f) of the [FLSA.]”).

²⁹ E.g., *Cochran Co.*, 112 NLRB 1400, 1403-06, 1409 (1955) (involving employer’s refusal to bargain with union); *Dofflemeyer Bros.*, 101 NLRB 205, 206 (1952) (involving employer’s retaliatory discharges in response to concerted walkout by a labor organization to obtain wage increase), *enforcement denied*, 206 F.2d 813 (9th Cir. 1954); *Steinberg & Co.*, 78 NLRB 211, 212-17 (1948) (involving employer’s discrimination against workers due to their union membership and activity), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950). We note that the Board did not carefully examine the rider’s scope in these cases because it found that the employees were not agricultural laborers, even under the 3(f) standard.

³⁰ *Parexel International*, 356 NLRB No. 82, slip op. at 4 (Jan. 28, 2011).

Consequently, because this case does not concern a “bargaining unit,” it will not entail the Board expending appropriated funds “in connection with investigations, hearings, directives, or orders concerning *bargaining units* composed of agricultural laborers.” (Emphasis supplied.)

b. This case does not involve Board action “to organize or assist in organizing agricultural laborers.”

This case also will not involve the Board using appropriated funds “to organize or assist in organizing agricultural laborers” as prohibited by the rider. As an initial matter, the Board plainly does not “organize” or “assist in organizing” workers of any sort. Rather, Section 7 of the Act expressly grants to *employees* the right to “self organization” and to “form, join, or assist labor organizations,” among other things. The Board’s statutory role in unfair labor practice cases is to preserve such employee rights. Accordingly, it would be a strained interpretation of the Act to conclude that the Board itself engages in organizational activity when carrying out its statutory duties.

Moreover, even if this phrase is interpreted broadly to apply to the Board’s use of funds to protect the activities of agricultural employees, the phrase “organize or assist in organizing” suggests the presence of some activity reasonably linked to a labor organization and not “other concerted activit[y] . . . for the purpose of other mutual aid or protection.” In that connection, the Railway Labor Act (the “RLA”) is instructive because it is the only federal statute that contains the phrase “organize or assist in organizing.”³¹ Because the RLA lacks language guaranteeing the right of employees to engage in “other concerted activities” for the purpose of “mutual aid or protection,” courts have construed its protections more narrowly than the Act’s.³² Unlike the Act, the RLA is “directed particularly at . . . the initial step in collective bargaining—the determination of the employees’ representatives,” and so its protections do not extend to employee activities without a direct relationship to unionization.³³ The rider’s use of the phrase “organize or assist in organizing” is best interpreted to apply, as under the RLA, to activity closely related to unionization and not to activity protected under the Act’s “mutual aid or protection” clause. Since the Charging Party and Employee A

³¹ 45 U.S.C. § 152 Fourth.

³² *Johnson v. Express One Int’l, Inc.*, 944 F.2d 247, 251-52 (5th Cir. 1991) (lack of “mutual aid or protection” clause in RLA means that nonunion employees covered by that statute do not have a *Weingarten* right to have a coworker present during investigatory interviews).

³³ *Id.* at 252-53 (internal quotation marks omitted).

were discharged for engaging in activity protected by the “mutual aid or protection” clause of Section 7, and not for organizational activities, the rider does not apply here.

Because the rider is inapplicable to this case, Section 2(3) is the sole provision governing whether the water techs are “employees” or “agricultural laborers.” As the *Park Floral* rule remains valid where the rider does not apply, the water techs are “employees” under the Act.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by prohibiting wage discussions and terminating the Charging Party and Employee A for doing so.³⁴

/s/
B.J.K.

ADV.27-CA-146734.Response.HighLevelHealth. (b) (6), (b)

³⁴ The Region is also investigating the Employer’s new handbook rules, which it has determined contain several unlawfully overbroad provisions applicable to water techs and other grow facility employees. Assuming that the Region issues complaint on that allegation, the analysis here would support the unlawfulness of the provisions insofar as the water techs are concerned. The status of the other employees does not appear to be in question.