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An Agricultural Law Research Article

The ALRB –Twenty Years Later

by

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The ALRB — Twenty Years Later

INTRODUCTION

The history of dispute and attempted resolution between employees and employers in this nation has been tense, yet fascinating. Much legislation and case law has developed over the years to assist in the efforts to afford a better environment for employees, and to protect the rights of the owners/employers of factories, natural resource plants, farmlands, medical facilities, and many other economic entities. However, the blood boils at both ends of the spectrum. While employees have seen great strides in working conditions, hours, wages and living accommodations, employers have cried out to the Legislature and courts for fairness and equality to survive the financial impact of regulations imposed. It has been more than twenty years since California passed the Agricultural Labor Relations Act (ALRA). Legislation and legal adjudication at the local, appellate, and even the California Supreme Court and the United States Supreme Court level have been greatly affected by the creation of the Agricultural Labor Relations Board (ALRB). This comment gives a brief history of the Act's creation and discusses the differences between the ALRA and the National Labor Relations Act (NLRA), the impact of the changing political environment in Sacramento, and the effect of the United Farm Workers (UFW) organization on the ALRB. Lastly, this comment analyzes the question of the future and existence of the ALRB, including the possibility of merger with the Public Employment Relations Board (PERB). All of these factors have played a significant role in the rise and fall of litigation and legislation in the labor-relations area of agricultural law.

The ALRB continues to be important to the growers and agricultural laborers in California. Initially, it is important to understand how and why the ALRA was passed, creating the ALRB. The ALRB has been a controversial and significant player in the legal rights of agricultural employers and employees. Growers were exposed to a tremendous amount of liability, while agricultural laborers gained an avenue to better working conditions and livelihood.

I. THE CREATION OF THE ALRB AND ITS EXCLUSION UNDER THE NLRA

The agricultural industry's employees and employers face the same difficulties in labor relations that other industries of our nation face, yet they have not been afforded the protection of federal legislation under the NLRA. The NLRA is the basic federal statutory scheme governing the relationship between employers and employees,¹ and gives "employees" the right to organize to form labor organizations and bargain collectively.² Most agricultural laborers do not fall within the statutory definition of an "employee."³ The NLRA does not forbid, nor does any act or statute, the right of agricultural laborers to organize unions and collectively bargain; these laborers are simply not within the scope of the NLRA.

The NLRA does not exclude all types of agricultural employees from the application of the NLRA. The National Labor Relations Board (NLRB) was required to adopt the definition of "agriculture" set forth by the Fair Labor Standards Act,⁴ which the United States Supreme Court interpreted as creating two definitions of agriculture.⁵ The primary definition of agriculture as determined by the Supreme Court encompasses all branches of farming, such as soil irrigation, dairying, raising livestock and producing stock.⁶ The secondary definition of agriculture includes practice "by a farmer or on a farm, inci-

¹ 29 U.S.C. § 141 *et seq.* (1997). The National Labor Relations Act, also known as the Wagner Act, was created in 1935. In 1947, Congress amended the Wagner Act by enacting the Labor Management Relations Act (the Taft-Hartley Act).

² 29 U.S.C. § 157 (1996).

³ 29 U.S.C. § 152(3) (1996), provides: "The term 'employee' . . . shall not include any individual employee as an agricultural employee." *See also* Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 869 (1951).

⁴ 29 U.S.C. § 203(f) (1997), states:

"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 horticulture commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended 12 U.S.C. § 114 j(g)), 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 to carriers for transportation to market.

⁵ *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949).

⁶ *Id.* at 762-63.

dently to or in conjunction with farming operations.”⁷ Yet under most circumstances the NLRA does not encompass the agricultural employee on the farms and ranches in California.⁸

There is no single reason for excluding agricultural laborers from the scope of the NLRA, but many have been willing to give their opinions. Most growers and ranchers would argue that they feel it is not necessary, and in fact would be disadvantageous for growers and landowners to be included in the Act. Additionally, they argue that the agricultural industry is too seasonal, temporary, and unpredictable to warrant the necessity of a unionized work force. On the other hand, laborers argue that without the protection of the NLRA or some other labor relations act, organizing and bargaining would be too difficult.

Advocates of the ALRA suggest that the needs of the typical farm laborer are quite different from laborers in industries covered by the NLRA. Unique problems arise out of the farm worker-grower relationship, including: (1) the seasonal character and highly perishable nature

⁷ *Id.*

⁸ DR. NEIL E. HART, AGRICULTURE LAW § 16.01, at 16-7 to 16-10 (1995).

The following workers have been held by the court or the NLRB to be “agriculture laborers” and therefore excluded from coverage under the NLRA or FLSA:

- (1) poultry company truck drivers and a full-time servicing mechanic;
- (2) poultry farm milling and distributing employees;
- (3) chicken farm truck drivers;
- (4) fish farming employees;
- (5) employees working on a duck processing company’s “grow out” farms used for raising ducks until the ducks were ready for processing;
- (6) workers employed by a coal company to revegetate land after it has been mined;
- (7) migratory field laborers and field crew chiefs;
- (8) employees at chick hatchery;
- (9) dairy farm workers;
- (10) egg farm workers;
- (11) feed mill employees;
- (12) greenhouse workers;
- (13) livestock feeders;
- (14) mushroom growers;
- (15) nursery workers;
- (16) packers of produce grown only by employer or with minimal amount of produce from other growers;
- (17) employees of rice drier and warehouse;
- (18) employees of tobacco processor and warehouse incidental to tobacco growing by employer.

of agricultural products, particularly fruit and vegetable crops; (2) the mobility of agricultural labor; and (3) the fundamental differences between agriculture and industry.⁹

In the absence of federal legislation, the burden is on individual states to manage and regulate labor-management relations, but only a small number of states have risen to the occasion. Several states have passed agricultural labor relation acts. The statutory schemes currently in effect include the Idaho Agricultural Labor Act,¹⁰ the Kansas Agricultural Employment Relations Act,¹¹ and the Arizona Agricultural Employment Relations Act.¹² However, Hawaii¹³ and Wisconsin¹⁴ have chosen to include farm workers in their general labor-relations legislation. California has also adopted an act to specifically address agricultural workers. Laborers and labor representation groups successfully persuaded the California Legislature to adopt an act modeled after the NLRA. But, even though the California legislation was modeled after the NLRA, the two acts differ in many respects. (*See* discussion *infra* Part II.A-D.)

On June 5, 1975, California Governor Jerry Brown signed the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975, commonly referred to as the California Agricultural Labor Relations Act (ALRA).¹⁵ It became effective August 28, 1975.¹⁶ The passage of this act was not like the typical adoption of a statute, especially one with such great significance. (*See* discussion *infra* Part II) The passage of the ALRA resulted in chaos for the growers and cre-

⁹ Hart, *supra* note 8, AGRICULTURE LAW § 22.01[2], at 22-3.

¹⁰ IDAHO CODE § 22-4101-4113 (1997).

¹¹ KAN. STAT. ANN. § 44-818-830 (1995).

¹² ARIZ. REV. STAT. ANN. § 23-1381-1395 (1996). Under the Arizona Sunset Law provisions, the Arizona Agricultural Labor Relations Board should have terminated on July 1, 1982 and the statute as a whole would expire on Jan. 1, 1983. However, the board and statute have continued under the Sunset Law scheme, 1980 Ariz. Sess. Laws, ch. 60, §6 and Third Special Sess., ch. 1, § 16, 19.

¹³ HAW. REV. STAT. § 337-1 *et seq.* (1996) provides that the term "employee" shall not include any individual subject to the jurisdiction of the National Labor Relations Act. Therefore, by implication, the Hawaii Employment Relations Act includes coverage of agricultural employees.

¹⁴ WIS. STAT. § 111.01 *et seq.* (1995-1996). The statute, in its declaration of policy, specifically declares that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonable production that require adequate consideration. WIS. STAT. § 111.01(2) (1995-1996).

¹⁵ 1 ALRB ANN. REP. 1976-1977, at 1 (1978). *See also* CAL. LAB. CODE § 1140-1166 (1996).

¹⁶ *Id.*

ated a board with no direct experience. Growers knew nothing about the new labor law, and within a week were facing unfair labor practice charges and worker representation elections.¹⁷ But the State of California and Governor Brown, concerned about the rights of the people in the agricultural fields, passed the ALRA. The preamble to the ALRA expresses California's desire "to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations."¹⁸ More specifically, section 1140.2 of the ALRA states the policy of the ALRA, which emphasizes California's desire to encourage and protect the rights of agricultural employees to full freedom of association, self-organization and designation of representatives of their own choosing.¹⁹ The policy also declares the state's intention to protect agricultural employees from interference and restraint or coercion by employers in the designation of such representatives, self-organization, or in other concerted activities for the purpose of collective bargaining.²⁰

¹⁷ 1 ALRB ANN. REP. 1976-1977, at 10 (1978). On September 2, 1975, the ALRB accepted the first election petitions filed under the Act. By the end of its first month of operation, the board had conducted 194 elections in which more than 30,000 agricultural employees had voted. Also in the first month, approximately 500 unfair labor practice charges were filed in the regional offices. During the same period, election objections involving approximately 150 of the elections were filed with the board.

¹⁸ Stats. 1975, Third Ex. Sess., ch. 1., at 4013. The preamble in whole states:

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

See also *Harry Carian Sales v. ALRB, United Farm Workers of America, AFL-CIO, Real Party in Interest*, 703 P.2d. 27, 36 (Cal. 1985).

¹⁹ CAL. LAB. CODE § 1140.2 (1996), states in full:

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from interference, restraint or coercion of employers of labor, on their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

See also *Harry Carian Sales v. ALRB, United Farm Workers of America, AFL-CIO, Real Party in Interest*, 703 P.2d. 27, 36 (Cal. 1985).

²⁰ *Id.*

On July 26, 1975, the first Agricultural Labor Relations Board (Board) was appointed by Governor Brown with the advice and consent of the State Senate.²¹ The members of the first Board included Bishop Roger Mahony,²² LeRoy Chatfield,²³ Joseph Grodin,²⁴ Richard Johnson, Jr.,²⁵ and Joseph Ortega.²⁶

From the beginning, the newly created Board faced a great challenge. With a brand-new law on the books, the Board was placed in a difficult position.²⁷ With only the National Labor Relations Act to guide it, the Board set out to resolve disputes in areas previously neglected. The legislators underestimated the impact of the ALRA and were not prepared to meet its challenge, at least in the beginning.²⁸

²¹ CAL. LAB. CODE § 1141, subsections (a) and (b) (1996), provide:

(a) There is hereby created in state government the Agricultural Labor Relations Board, which shall consist of five members.

(b) The members of the board shall be appointed by the governor with the advice and consent of the Senate. The term of office for the members shall be five years, and the terms shall be staggered at one-year intervals Any individual vacancy of any member shall be appointed only for the unexpired term of the member to whose term he is succeeding. The Governor shall designate one member to serve as chairperson of the board. Any member of the board may be removed by the Governor, upon notice and hearing for neglect of duty or misfeasance in office, but for no other cause.

²² 1 ALRB ANN. REP. 1976-1977, at 9 (1978). Roger Mahoney, auxiliary Bishop of the Fresno Roman Catholic Diocese and Secretary of a national bishops' committee on farm labor, was appointed chairman.

²³ *Id.* LeRoy Chatfield was the Governor's director of administration and former personal secretary to Cesar Chavez. *See also Chavez, Cesar Estrada*, MICROSOFT ENCICLOPEDIA (1994), Chavez (1927-1993). Cesar Chavez was an American labor leader born near Yuma, Arizona. He is most noted for being the President of United Farm Workers Organization and leading a nationwide boycott of California table grapes in a drive to achieve labor contracts.

²⁴ *Id.* Joseph Grodin is a professor of law at Hastings College of Law, University of California, and was an attorney representing the labor organization. He was later appointed by Governor Jerry Brown to the California Supreme Court.

²⁵ *Id.* Richard Johnson Jr. is an agricultural grower and was the executive vice-president of the Agriculture Council of California.

²⁶ *Id.* Joseph Ortega was the executive director of the Model Cities Center for Law and Justice in Los Angeles.

²⁷ Interview with Barry Bennett, former Fresno regional director of the ALRB, in Fresno, Cal. (Oct. 1996).

²⁸ Interview with Lawrence Alderete, regional director of Visalia ALRB Regional Office, in Visalia, Cal. (Jan. 22, 1997).

II. WHERE THE ALRA AND NLRA COLLIDE

As provided in the ALRA, the Board shall follow the precedent of the NLRB, where applicable.²⁹ This implies that the NLRA would have a significant impact on the interpretation and application of the ALRA, and in many ways the NLRA did have an impact. Over time, however, many of the Board's decisions have reflected a pattern of finding that the NLRA is not "applicable." Yet, many of these precedent-setting cases were expected, given that the ALRB was a newly formed administrative hearing board.

Arguably, there should be differences between the NLRA and the ALRA because of the unique characteristics of the agricultural labor force. The ALRA and NLRA differ in 11 major areas, all of which have impacted both the growers and farm laborers in California.³⁰ These 11 differences focus on four main topics: access to employees and elections, secondary impacts, remedies, and decertification.

Analyzing the declarations and policies of the two acts shows that they were implemented for different reasons. Based upon its policy statement, Congress enacted the NLRA under authority granted in the "interstate commerce clause."³¹ The purpose of the NLRA was to prescribe the rights of employees and employers thus eliminating the causes of certain substantial obstructions to the free flow of commerce. This included encouraging collective bargaining and eliminating unfair labor practices.³² In contrast, the ALRA sought to protect and encourage the rights of agricultural employees by providing collective

²⁹ CAL. LAB. CODE § 1148 (1996), provides in full: "The board shall follow applicable precedents of the National Labor Relations Act, as amended."

³⁰ Telephone Interview with Thomas Campagne, Agricultural Law attorney (Jan. 30, 1997).

³¹ U.S. CONST. art. I, § 8. The Commerce Clause of the Constitution empowers Congress "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

³² 29 U.S.C. § 141 (1997) states:

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

bargaining rights.³³ Nowhere in the California preamble does it mention any of the growers' interests or the interest of California in protecting the agricultural industry or the flow of commerce. The ALRA and NLRA are similar with respect to their emphasis on collective bargaining as a solution or means to solve their respective problems, but the NLRA views the breakdown in employee-employer relationships as an obstruction to commerce, "by preventing the free flow of goods . . . through strikes and other forms of industrial unrest."³⁴ The ALRA emphasizes the breakdown in employee-employer relationship with respect to its effects on the employees' right to organize and negotiate terms and conditions of their employment, and freedom from restraint or coercion by the employer.³⁵ With different objectives in mind, it is not surprising the acts would receive differing interpretations.

Another important distinction between the NLRA and the ALRA relates to preparation time afforded affected parties prior to passage. The NLRA took substantially longer to become law. Industrial employers had ample time to educate themselves on the new law, warn their employees, and regulate the application of the law slowly and thoroughly. Conversely, even though the ALRA was debated in the Legislature, it was done very quickly. The Act was signed by Governor Brown on June 5, 1975, and became effective on August 28, 1975, less than three months later.³⁶ Employers knew nothing about the law, yet were sued the very next day in federal courts.³⁷

More importantly, administrative agencies have the ability to make regulations, and typically before a regulation becomes binding legislation, it must go through the proper rule-making procedures, as provided for under the Administrative Procedure Act (APA).³⁸ The APA applies

³³ See *supra* text accompanying note 18.

³⁴ 29 U.S.C. § 141 (1997).

³⁵ See *supra* text accompanying note 18.

³⁶ 1 ALRB ANN. REP. 1976-1977, at 1 (1977).

³⁷ See *supra* text accompanying note 17.

³⁸ Administrative Procedure Act § 553, 5 U.S.C. § 553, subsections (b)-(e) (1996) provide:

(b) General Notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms of substance or the proposed rule or a description

only at the national level, but many states have adopted similar acts that allow administrative agencies to promulgate regulations that are too burdensome or tedious for Congress or the state legislatures to enact.³⁹ Agencies may also enact “emergency” legislation, which does not require notice, public comment, a 30-day grace period, or the right to petition the agency to adopt or revise the rule.⁴⁰ From the beginning, the Board adopted emergency rules and regulations governing representation elections and unfair labor practices.⁴¹ One of these regulations was the “access rule,” which generated a great deal of controversy during the term of the first Board.⁴²

A. *Access To Employees And Elections*

1. The Access Rule

The first major difference between the NLRA and the ALRA is in the application of the access rule. An access rule gives union organizers the right to enter a grower’s property to have access to the

of the subjects and issues involved.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment or repeal of the rule.

See also 1981 Model State APA § 3-103-107.

³⁹ Model State APA § 3-103-107.

⁴⁰ CAL. GOV. CODE § 11346.1, subsections (b) and (d) (1996), provide in relevant part:

(b) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

⁴¹ 1 ALRB ANN. REP. 1976-1977, at 9 (1978).

⁴² *Id.*

farm workers.⁴³ Under the NLRB, there is no access rule. Access to employees covered by the NLRA is protected by implication and will only be guaranteed if: (1) the employer's facility is open to the general public, for example a shopping mall,⁴⁴ or (2) the union establishes there is no reasonable, practical or effective means of communication, except by allowing access to the employees.⁴⁵ Realistically, the agricultural environment creates especially difficult logistical problems for the union organizer. In an effort to resolve this problem, California's ALRB promulgated regulations to ensure that union organizers have access to farm workers. Section 20900 of the California Regulations under the ALRA gives the right of access by union organizers to agricultural fields, specifically limited in purpose, time, place and number of organizers permitted to participate.⁴⁶ The regulations also forbid

⁴³ Hart, *supra* note 8, AGRICULTURE LAW § 22.02[3], at 22-21.

⁴⁴ *Hudgens v. NLRB*, 424 U.S. 507 (1976). *See also* Scott *Hudgens* 230 N.L.R.B. 414 (1977).

⁴⁵ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). There, the court stated: "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."

⁴⁶ CAL. CODE REGS. tit. 8, § 20900, (e)(3)(A)(B)-(4)(A)(B) (Deering, LEXIS through Jan. 31, 1997 Sess.), provides:

(3) Time and Place of Access.

(A) Organizers may enter the property of an employer for a total period of an hour before the start of work and one hour after the completion of work to meet and talk with employees in areas in which employees congregate before and after working. Such areas shall include buses provided by an employer or by a labor contractor in which employees ride to and from work, while such buses are parked at sites at which employees are picked up or delivered to work. Where employees board such buses more than one hour before the start of work, organizers may have access to such buses from the time when employees begin to board until such time as the bus departs.

(B) In addition, organizers may enter the employer's property for a single period not to exceed 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 not an 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.

(4) Numbers of Organizers; Identification, Prohibited Conduct

(A) Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

(B) Upon request, organizers shall identify themselves by name and labor organization to the employers or his agent. Organizers shall also wear

conduct, other than speech, disruptive to the employer's property or agricultural operations, or injurious to crops or machinery.⁴⁷ These regulations serve a function analogous to that served by a court order that specifies the conditions permitting access to farm workers.

At its inception, the "access rule" had a serious and disruptive impact on growers. Not only was the rule passed without the typical administrative procedural requirements,⁴⁸ but it created harmful economic effects. As an emergency bill, it was effective immediately.⁴⁹ Growers feared disruption during their crucial peak time — the harvest. Growers perceived that the union organizers were disrupting their employees while crops were being harvested, and believed organizers were maliciously sabotaging their equipment.⁵⁰ Furthermore, growers claimed that organizers were bringing diseases on their shoes, which contaminated their crops, and were creating other hygiene concerns.⁵¹ Later, the access rule was modified and now limits the number of union organizers allowed on the fields to two.⁵² Further, the organizers are allowed access to the fields for only one hour during the work day, and all disruptive behavior is to be eliminated.⁵³

a badge which clearly states his or her name, and the name of the organization which the organizer represents.

⁴⁷ CAL. CODE REGS. tit. 8, § 20900, (e)(4)(C) (Deering, LEXIS through Jan. 31, 1997 Sess.). "The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access."

⁴⁸ CAL. CODE REGS. tit. 8, § 20900 (1997) (Amendment filed 11-29-76 as an emergency; designed effective 12-1-76; Register 76, No. 40).

⁴⁹ CAL. GOV'T. CODE, tit. 2, § 11346.1, subsections (b) and (d) (1996), provide:

(b) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in written instrument filed with, or as a part of, the regulation or order of repeal.

⁵⁰ Telephone Interview with Thomas Campagne, Agricultural Law attorney (Jan. 30, 1997).

⁵¹ *Id.*

⁵² See *supra* text accompanying notes 46-47.

⁵³ *Id.*

Generally, unions seeking to organize agricultural employees do not have the alternative channels that are found adequate in industrial settings. While the NLRB permits organizational access on a case-by-case basis, depending on whether alternative means of organization communication exist, the ALRB has chosen to adopt a general rule.⁵⁴ The ALRB has held that because of the agricultural setting, the alternative means of communication of the proposed organization are never adequate. Therefore, the ALRB adopted California Code of Regulations 20900, defining the parameters of reasonable organizational access.⁵⁵ This has enabled growers to know and understand the union organizers' "access" to their property, without risking the uncertainty of court decisions.

2. Mandatory Relinquishment of Employees' Names and Addresses

The ALRB requires the employer to relinquish the names and addresses of all the employees in the bargaining unit sought by the petitioner of the election.⁵⁶ The petitioner is typically a labor union organization seeking an election. Though the employer must avoid speaking to employees at their homes, unions are not under a similar restriction.⁵⁷ Under California Code of Regulations, title 8, section 20310, an employer shall provide a complete and accurate list of the complete and full names, current street addresses and job classification of all agricultural employees.⁵⁸ Under an administrative rule adopted by the

⁵⁴ ALRB v. California Coastal Farms, Inc., 645 P.2d 739, 742 (Cal. 1982), "Unlike the NLRB, which permits organizational access on a case-by-case basis depending on whether alternative means of organization communication exists, the ALRB chose to deal with this issue by exercising its rule-making powers." *Id.* at 476. *See also* CAL. CODE REGS. tit. 8, § 20900 (d), which provides:

The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Regulation of the issues to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections.

⁵⁵ ALRB v. California Coastal Farms, Inc., 645 P.2d 739, 742 (Cal. 1982). *See also* CAL. CODE REGS. tit. 8, § 20900(c)(1997).

⁵⁶ CAL. CODE REGS. tit. 8, § 20310(2)(1997).

⁵⁷ Robert H. Brumfield, Howard A. Sagaser, Gary W. Sawyers & Janet L. Wright, *Current Issues Affecting Agricultural Law in California*, (Nat'l Bus. Inst., Inc.), 1994, at 255.

⁵⁸ CAL. CODE REGS. tit 8, § 20310, subsections (2), (3) and (5) (1997) state in perti-

NLRB, employees' names and addresses are released only if 30 percent of all employees in a given bargaining unit have signed a petition for election.⁵⁹ Farmers argue that under the current law, their employees can be intimidated by the union organizers in their homes. The unions stress, however, that the existence of the law is crucial to reaching the employees, especially with the limitations on their access to the employees at the work site.

3. Signatures Required for Petition for Election

The ALRB allows any employee who has worked for the grower in the past year to sign a petition to hold an election for unionization.⁶⁰ This includes employees who have worked on the grower's land for only one day or even one hour within the past year. It is not uncommon for a laborer to work such short intervals, as many growers use labor contractor crews that move from one field to the next in a single day's work.⁶¹ If the grower uses a labor contractor, and the laborers are unionized, these workers may be used to reach the number of signatures required to hold an election.⁶²

ment part:

(2) A complete and accurate list of the complete and full names, current street addresses, and job classification of all agricultural employees, including employees hired through labor contractor, in the bargaining unit sought by the petitioner in the payroll operated immediately preceding the filing sought by the petition. The employee list shall also include the names, current street addresses, and job classifications of persons working for the employer as part of a family or other group for which the name of only one group member appears on the payroll

(3) The names of employees employed each day during the payroll period immediately preceding the filing of the petition, the hours worked by each employee, or if employment is on a piece-rate basis, the number of units credited to each employee

(5) The names, addresses, and telephone numbers of all labor contractors supplying labor during the pertinent payroll period(s).

See also Scheid Vineyards and Management Co. v. ALRB, 22 Cal.App.4th 139, 142-43 (1994).

⁵⁹ ROBERT G. HULTENG AND JEFFREY M. TANENBAUM, *LABOR LAW PRACTICE: THE NLRA AND THE NLRB* at 10 (Aug. 1984).

⁶⁰ CAL. CODE REGS. tit. 8, § 20310, subsection (a)(2)(1997) states that "agricultural employees" includes employees hired through a labor contractor and those persons working for the employer as part of a family or other group for which the name of only one group member appears on the payroll.

⁶¹ *Id.*

⁶² *Id.*

The NLRB does not allow independent labor contract workers' signatures to be counted in the petition to hold an election for unionization.⁶³ The NLRB has the authority to compose the members of the bargaining unit based on the employer, craft, or plant unit, or a subdivision thereof.⁶⁴ However, the NLRA does not give the NLRB the authority to use laborers brought in by labor contractors or subcontractors.

4. Issues of Voting Eligibility Resolved Prior to the Election

Under the NLRA, when an election is petitioned, the Board may be required to hold a hearing to determine the appropriate "unit of employees" for the election and which individual employees are eligible to vote.⁶⁵ In industries characterized as seasonal, the NLRB requires the election be held the next year during the peak employment period. As a result, both sides have at least one year to object on any issues regarding the election process prior to the election.

Under the ALRA, once an election petition has been filed, all issues pertaining to the election are resolved by a post-election hearing, instead of the NLRA pre-election hearing.⁶⁶ This is designed to allow for a speedier election, since the ALRB requires the election be conducted within seven days of the filing of the petition.⁶⁷ Typically, the sooner the election, the more likely the union will succeed. Therefore, under the ALRA, any objections to the petition or election would have to be litigated afterward. Under the NLRB, these matters can be litigated before the election.

B. Secondary Impacts

1. Secondary Boycotts Allowable

A secondary boycott occurs when union members attempt to persuade an employer (secondary employer) or its employees who are not engaged in a current labor dispute to refrain from transacting business with an employer (primary employer) who is involved in a labor dispute.⁶⁸ The main purpose of prohibiting secondary boycotts is to prevent employer-employee controversies from intruding upon the pri-

⁶³ 29 U.S.C. § 159(b)(1996).

⁶⁴ *Id.*

⁶⁵ 29 U.S.C. § 159 (c)(1)(A) (1996). *See also* NLRA § 9 (c)(1)(A).

⁶⁶ CAL. LAB. CODE § 1156 (1996).

⁶⁷ *Id.*

⁶⁸ Hart, *supra* note 8, AGRICULTURE LAW § 22.04[3], at 22-32.

mary right of third parties to earn a livelihood, transact business, and engage in the ordinary affairs of life.⁶⁹ Initially, growers believed that secondary boycotts would be prohibited under the ALRA. However, under section 1154 of the ALRA, publicity that has the effect of requesting that the public cease patronizing the affected employer is permitted.⁷⁰ This includes picketing by labor organizations.⁷¹ The ALRA requires the current labor organization be certified as the representative of the primary employer's employees to conduct any of these activities.⁷² Peaceful demonstrations that do not include picketing are permitted if: (1) the labor organization has not lost an election for the primary employer's employees within the preceding 12-month period and (2) no other labor organization is currently certified as the bargaining representative of the primary employer's employees.⁷³ Therefore, if union organizers lose an election they cannot create secondary boycotts within twelve months of the loss, but if they win the election they can employ secondary boycotts as an employee weapon. Most growers are unhappy with labor organizations' ability to invoke secondary boycotts, because they believed that they would receive blanket protection from secondary boycotts under the ALRA.⁷⁴ This is very harmful to the growers because it discourages people from buying all of that particular crop.⁷⁵ For example, if the boycott is against a local lettuce grower, the union may encourage people to boycott lettuce, which affects all lettuce growers regardless of their good standing with

⁶⁹ *Id.* at 22-33.

⁷⁰ CAL. LAB. CODE § 1154(d)(4) (1996). *But cf.* CAL. LAB. CODE § 1154 (1996) which states in relevant part:

It shall be an unfair labor practice for a labor organization or its agents to do any of the following: . . . (ii) to threaten, coerce, or restrain any person; where . . . an object thereof is any of the following: . . . (2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with another person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. Nothing contained in this paragraph shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

See also United Farm Workers of Am., AFL-CIO v. ALRB, 41 Cal.4th 303, 307, (1995).

⁷¹ CAL. LAB. CODE § 1154(d)(4) (1996).

⁷² *Id.*

⁷³ CAL. LAB. CODE § 1154(g) (1996).

⁷⁴ CAL. LAB. CODE § 1154 (1996).

⁷⁵ Telephone Interview with Thomas Campagne, *supra* note 30.

the union. Secondly, there is no legal remedy for the damages caused by the boycott, and if the grower has to endure these losses it may result in his financial devastation.⁷⁶

Under the NLRA, secondary boycotts are prohibited, except in the construction and garment industries. Secondary boycotts were lawful under the NLRA until the 1947 Taft-Hartley amendments.⁷⁷ The ALRB has not followed the NLRB precedent, but instead has created a right for the unions to have secondary boycotts.⁷⁸ The ALRA provides the unions with another bargaining tool by allowing the unions, subject to limitations, to bring indirect pressure on a primary employer by requesting that the public not patronize the neutral party who is doing business with the primary employer.⁷⁹

Despite general prohibition of secondary activity, both the NLRB and the ALRB have permitted labor organizations to engage in activities for the purpose of truthfully advising the public that a commodity is produced by an employer with whom the organization has a primary dispute and is distributed by another employer.⁸⁰ Both Boards allow la-

⁷⁶ *Id.*

⁷⁷ 29 U.S.C. § 158 (e) (1996), states:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter obtaining such an agreement shall be to such extent unenforceable and void

⁷⁸ CAL. LAB. CODE § 1154 (1996), subsection (d)(1)-(2) which states in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents to do any of the following:

(d) [E]ngage in, or to induce or encourage any individual employed by any person to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services: . . . where . . . an object thereof is . . . :

(1) Forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 1154.5.

(2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person

. . . .

⁷⁹ Telephone Interview with Thomas Campagne, *supra* note 30.

⁸⁰ Harl, *supra* note 8, AGRICULTURAL LAW § 22.04[3], at 22-33-34.

bor organizations to exercise these First Amendment rights.⁸¹

2. Hot Cargo Modification

When a labor organization and an employer enter into an agreement under which the employer would cease using, handling, selling, or transporting, or delay purchasing the products of any other employer, or cease doing business with the person, it is called a "hot cargo" agreement.⁸² The NLRA prohibits hot cargo bans,⁸³ but the ALRA allows them in limited circumstances. Under the ALRA, a hot cargo prohibition does not apply to an agreement between the primary employer and the labor organization representing his employees, which prohibits the use of a supplier whose goods are integrated into the product that is being distributed or manufactured by the employer.⁸⁴ However, the labor organization must also be the certified representative of the employees of the supplier, and there cannot be a collective bargaining agreement between the supplier and the labor organization.⁸⁵

3. Changes In Ownership

The ALRB has determined that union contracts, like many other covenants, can run with the land. Therefore, if the owner of the land wants to sell his property, whether retaining the employees or not, the union will remain. In *San Clemente Ranch, Ltd. v. Agricultural Labor Relations Board*, the California Supreme Court found that the ALRB is not bound by the NLRB precedent, taking into consideration the significant differences that exist between the industrial setting of the NLRA and the agricultural setting of the ALRA.⁸⁶ The ALRA has adopted a case-by-case approach under which all relevant considerations relating to a change of ownership are taken into account.⁸⁷ Not only are there frequent land transactions, including changes in ownership of land and crops, but the Board emphasized "that the problems created by the unique attributes of employers and the frequency of land transactions in the agricultural setting are magnified by the distinct nature of the work force governed by the ALRA."⁸⁸ These

⁸¹ *Id.*

⁸² 29 U.S.C. § 158(e) (1996).

⁸³ *Id.*

⁸⁴ CAL. LAB. CODE § 1154.5 (1996).

⁸⁵ *Id.*

⁸⁶ *San Clemente Ranch, Ltd. v. ALRB*, 633 P.2d 964 (Cal. 1981).

⁸⁷ *Id.*

⁸⁸ *Id.* at 969.

unique attributes include a work force that moves from one section of the state to another according to the change of crop season, the seasonal nature of the work, high labor turnover, unskilled nature of the work, presence of labor contractors, and the number of workers needed on a day-to-day basis.⁸⁹ Based upon these observations, the California Supreme Court upheld the Board's ability to consider *all* these factors, in addition to the continuity of the work force.⁹⁰

It is also important to note if the ALRB finds the new landowner to be a successor employer for collective bargaining purposes, the new owner is jointly and severally liable for the prior owner's unfair labor practices relating to the discriminatory treatment and discharge of employees, if the successor had knowledge of the pending unfair labor charges.⁹¹

Under the NLRB, if the new owner does not hire a majority of the former employees, no union has been acquired with the property, unless the employer acquires a part or all of the assets of its predecessors, or purchases the entire business of its predecessor.⁹² But, like the ALRB, the NLRB also initiates a balancing test to determine on a case-by-case basis whether in fact the duty to bargain with the union should pass with the land purchase.⁹³

Regardless of the similarities between the ALRA and the NLRA, growers argue that successorship duties place illegal restraints on alienation of the land, and property is much more difficult to sell because of the union attachment. However, the unions and employees agree with the courts that the right of employers to buy and sell agricultural businesses should "be balanced by some protection to the employees from a sudden change in the employment relationship."⁹⁴

C. Remedies

1. Allowance of Make-Whole Remedies

A "make-whole remedy" is authorized by statute to make an employee whole by compensating for loss in pay resulting from the employer's refusal to bargain.⁹⁵ The California Supreme Court, in *J.R.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 970.

⁹¹ *Id.* at 970 n.10.

⁹² *Id.* at 970.

⁹³ *Id.*

⁹⁴ *Id.* at 971.

⁹⁵ CAL. LAB. CODE § 1160.3 (Deering 1995) states:

[T]he board shall state its findings of fact and shall issue and cause to be

Norton Co. v. Agricultural Labor Relations Board, set forth the following standard for determining when the make-whole remedy is appropriate:

[T]he Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted.⁹⁶

This was echoed in *Scheid Vineyards and Management Company v. Agricultural Labor Relations Board*, where the court found:

[R]easonableness of an employer's litigation posture can be determined by "an objective evaluation of the claims in the light of legal precedent, common sense, and standards of judicial review, and the board must look to the nature of the objections, its own prior substantive rulings and appellate court decisions on the issues of substance"⁹⁷

This standard allows the ALRB to award make-whole remedies that may result in more than one million dollars in back pay, which could ostensibly put many growers out of business. This remedy led one farmer to commit suicide after he was hit hard by a "make-whole remedy" by the ALRB.⁹⁸

On the other hand, the NLRB has not been interpreted to allow "make-whole remedies." Supporters of the elimination of make whole remedies believe the NLRB's approach has allowed the unions and industrial employers to efficiently work together to reach economically sound solutions.⁹⁹

served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part

See also *J.R. Norton Co. v. ALRB*, 603 P.2d 1306, 1323 (Cal. 1979), where the court stated, "[I]t is clear that make-whole relief is appropriate when an employer refuses to bargain for the purpose of delaying the collective bargaining process."

⁹⁶ *J.R. Norton Co. v. ALRB*, 603 P.2d 1306, 1328 (Cal. 1979).

⁹⁷ *Scheid Vineyards and Management Co. v. ALRB*, 22 Cal.App.4th 139, 149 (1994) (quoting *George Arakelian Farms, Inc. v. ALRB*, 710 P.2d 288, 294 (Cal. 1989)).

⁹⁸ Telephone Interview with Thomas Campagne, *supra* note 30.

⁹⁹ *Id.*

2. *Gissel* Bargaining Orders

Gissel bargaining orders, named after the United States Supreme Court case *NLRB v. Gissel Packing Co.*, are issued by the NLRB as a remedy where an employer has committed "unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside."¹⁰⁰ The NLRB will hand down a *Gissel* order only in exceptional cases marked by outrageous, pervasive and unfair labor practices, unless there is a showing that the union enjoyed a card majority.¹⁰¹ The ALRB devised its own system of issuing *Gissel* orders. Under the NLRB, *Gissel* orders were designed to assist unions where there has been extreme unfair labor practice or tampering with the election process. The ALRB grants *Gissel* orders to establish unions, where the Board believes employees have been prevented from winning union elections by unfair practices by the employers. Critics of *Gissel* orders believe the orders are granted irrespective of the workers' true desires, but instead are issued whenever the unions are not winning elections.¹⁰²

It has been argued that it is inappropriate for California courts to apply the NLRB's use of *Gissel* orders, because the NLRB gets its authority to establish *Gissel* orders, not as a remedy, but because section 9(a) of the NLRA does not specify precisely how the representative unit is to be chosen.¹⁰³ The NLRA provides no exclusive method on how an organization is selected as a representative; therefore, the NLRB may designate a representative as a remedy for the employer's unfair labor practice.¹⁰⁴ However, the ALRA clearly prohibits recognition of an organization as a representative unless that organization has won a secret ballot election.¹⁰⁵ Thus, the courts are allowing the

¹⁰⁰ *Harry Carian Sales v. ALRB*, 703 P.2d 27, 34 (Cal. 1985) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969)).

¹⁰¹ *Id.* at 35 n. 4. The court stated:

"Card Majority" refers to the possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. Under both the NLRA and ALRA, authorization cards are submitted to the labor boards by unions in support of their election petitions. In addition, under the NLRA, authorization cards are used by unions to support bargaining demands made directly to the employer.

¹⁰² Telephone Interview with Thomas Campagne, *supra* note 30.

¹⁰³ *Harry Carian Sales v. ALRB*, 703 P.2d 27, 56-57 (Cal. 1985)(Mosk, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

ALRB to issue a *Gissel*-type bargaining order as a remedy, and not a recognition decision, as under the NLRA.¹⁰⁶

D. Decertification

1. Decertification — Only After the Privilege of Living Under Contract

Under the NLRB, a union cannot be decertified within its first twelve months after certification. A union may not be decertified under the ALRB unless the employees first have had the privilege of living under contract. Thus, the ALRA requires the employer to sign an employee contract or “collective bargaining agreement,” and this contract must be in effect for at least one year.¹⁰⁷ Section 1156.7, subdivision (b) establishes that an existing collective bargaining agreement shall bar a petition for election among the employees for the term set by the agreement, as long as it does not exceed three years.¹⁰⁸ This is referred to as a contract bar.¹⁰⁹ Section 1156.7, subdivision (c) creates an exception to the contract bar, allowing decertification through direct election when 30 percent of the employees in the bargaining unit under the particular contract sign a petition requesting that the labor organization be decertified.¹¹⁰ The petition shall not be deemed timely unless it is filed during the year preceding the expiration of a collective bargaining agreement. Otherwise, an election is barred.¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ CAL. LAB. CODE § 1156.7(c)(1996), provides:

Upon the filing with the board by an employee or group of employees of a petition signed by 30 percent or more of the agricultural employees in a bargaining unit represented by a certified labor organization which is a party to a valid collective-bargaining agreement, requesting that such labor organization be decertified, the board shall conduct an election by secret ballot pursuant to the applicable provisions of this chapter, and shall certify the result to such labor organization and employer. However, such a petition shall not be deemed timely unless it is filed during the year preceding the expiration of a collective-bargaining agreement which would otherwise bar the holding of an election, and when the number of agricultural employees is not less than 50 percent of the employer's peak agricultural employment for the current calendar year.

¹⁰⁸ *Jose L. Cadiz, et al., v. ALRB*, 92 Cal.App.3d 365, 371 (1979).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Unlike the ALRA, the NLRA contains no legislative direction or guidelines governing the principle of contract bar, but the Board has developed practices pursuant to its broad authority delegated by Congress.¹¹² Under NLRB precedents, the Board has set a 30-day open period (between 90 and 60 days before expiration of the contract), in contrast with the one-year option period contained in section 1156.7, subdivision (c) of the ALRA.¹¹³ However, the California courts have found the NLRB precedent inapplicable in this situation because the California statutory contract bar clearly addresses the issue, to which there is no federal statutory equivalent.¹¹⁴ Since the ALRB follows NLRB precedent only when “applicable,” the board is authorized to give weight to the California statutory provisions that distinguish California agriculture from the industries referred to in the NLRB decisions.¹¹⁵

2. Decertification Elections

Under the ALRB, decertification elections are done by the Board.¹¹⁶ A petition for decertification requires the signatures of 30 percent of the employees in the bargaining unit.¹¹⁷ It must be filed when the number of agricultural employees is not less than 50 percent of the employer’s peak agricultural employment for the current calendar year, and it may be filed only during the statutory open period when the union’s collective bargaining agreement does not function as a contract bar.¹¹⁸ These elections are to be initiated by a petition from an employee or group of employees. The NLRA is very similar to the ALRB on this issue; however, under the NLRA, the employer can also petition for an election to decertify the union.

Despite the differences between the ALRA and the NLRA, the ALRB uses the “where applicable” terminology to allow it the freedom to protect the agricultural employee because of the unique employment process and conditions in this particular field.

¹¹² *Id.* at 373.

¹¹³ *Id.* at 374.

¹¹⁴ *Id.* at 373-75.

¹¹⁵ *Id.* at 375.

¹¹⁶ CAL. LAB. CODE § 1156 (1996).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

III. THE PETE WILSON ERA — ITS EFFECT ON THE ALRB

How effective the ALRB is considered today depends on how you analyze the disbursement in awards to agricultural employees, election activity, the budget cuts that have continually been imposed on the ALRB, and the actual types of decisions handed down. Why have election petitions and cases decreased so significantly? Since Pete Wilson assumed the position of governor of California, some would argue that the activity of the ALRB has come to a crashing halt, due primarily to appointment of a conservative Board and drastic budget reductions.¹¹⁹

Others argue that the Governor's role and impact on the ALRB is very limited. According to Lawrence Alderete, regional director of the Visalia Regional Office, "the ALRB's role is akin to that of a prosecutor."¹²⁰ The Board evaluates evidence, investigates allegations, determines the existence of prima facie evidence, and as a tribunal does what it feels is fair.¹²¹ There is no doubt that the budget and staffing have been significantly reduced over the past 20 years. Based upon the 1992-1993, 1993-1994 Annual Report to Legislature by the ALRB, the current staff of the ALRB is 20 percent of what it was in 1979.¹²² However, from 1992 to 1994, the ALRB saw "disbursements making aggrieved parties whole" increase nearly tenfold.¹²³ These disbursements are greater today than at any other time in the Board's history. For the first time, monetary relief to aggrieved parties actually exceeds the amount of the Board's budget.¹²⁴ In fiscal year 1993-1994, the Board issued \$4,378,734 in disbursements to agricultural employees.¹²⁵ This is approximately \$3.8 million more than was distributed in the 1989-1990 fiscal year.¹²⁶

¹¹⁹ Interview with Barry Bennett, *supra* note 27.

¹²⁰ Interview with Lawrence Alderete, *supra* note 28.

¹²¹ *Id.*

¹²² 17,18 ALRB ANN. REP. 1992-1993, 1993-1994, at 7 (1994).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 22. From 1989 to 1990, \$500,000 was disbursed to agricultural employees. From 1990 to 1991, approximately \$1.5 million was disbursed, from 1991 to 1992, approximately \$1.5 million was disbursed, and from 1992 to 1993, \$717,869 was disbursed.

A. Decrease In Number Of Decisions

There has been a significant decrease in the number of decisions made since 1975.¹²⁷ ALRB members argue this is primarily because the need for more decisions was much greater in the earlier years when the ALRB was first established.¹²⁸ Similar NLRB cases gave guidance, but they were not specifically on point, hence the Board was forced to provide guidance for the interpretation of the Act.¹²⁹ The Board reported a record low in the number of Board decisions from 1983 to 1991.¹³⁰ The ALRB made 71 decisions in fiscal year of 1978-1979 and a high of 83 decisions in 1982-1983.¹³¹ By 1991, the Board made only 17 decisions, a decrease of almost 80 percent.¹³² Yet, the ALRB contends this should be attributed to the inactivity of the unions.¹³³ The ALRB acknowledges Governor Wilson's effect on its activity is questionable, and if it is to be categorized as positive or negative, it would be positive.¹³⁴ Although the current Board members are all Wilson appointees, they are still bound by precedent. The fact that most of this legal precedent was established by a more liberal board from 1975 to 1980 helps balance out the varying political views. The decrease in litigation is due largely to the fact that fewer disputes are proceeding to the litigation phase.¹³⁵ Most parties want to settle informally early in the litigation process, even before filing an action with the ALRB.¹³⁶ Another reason for the decrease in litigation is the age of

¹²⁷ Joseph R. Grodin, *California Agricultural Labor Act: Early Experience*, INDUS. RELATIONS, Vol. 15, No. 3., at 1, n.4 (Oct., 1976). During its first five months of operation, the ALRB received 873 unfair labor practice charges. Complaints were issued in 250 cases, and 62 hearings were held or begun.

¹²⁸ Interview with Lawrence Alderete, *supra* note 28.

¹²⁹ *Id.*

¹³⁰ 8 ALRB ANN. REP. 1983-1984, at 61 (1984) (49 board decisions); 9 ALRB ANN. REP. 1984-1985, at 74 (1985) (31 board decisions); 10 ALRB ANN. REP. 1985-1986, at 75 (1986) (32 board decisions); 11 ALRB ANN. REP. 1986-1987, at 82 (1987) (25 board decisions); 12 ALRB ANN. REP. 1987-1988, at 7 (1988) (21 board decisions); 13 ALRB ANN. REP. 1988-1989, at 7 (1989) (16 board decisions); 14 ALRB ANN. REP. 1989-1990, at 12 (1990) (26 board decisions); and 15 ALRB ANN. REP. 1990-1991, at 13 (1991) (17 board decisions).

¹³¹ 3 ALRB ANN. REP. 1978-1979, at 48 (1979) and 7 ALRB ANN. REP. 1982-1983, at 66 (1983).

¹³² 15 ALRB ANN. REP. 1990-1991, at 13 (1991).

¹³³ Interview with Lawrence Alderete, *supra* note 28.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

labor law.¹³⁷ Having a new law on the books and a new administrative board caused an enormous amount of litigation to be initiated on both sides. Lastly, on a national level, there has been a decrease in the role of the union organization.¹³⁸ Growers contend that employees have become smarter, and realize that the unions have not met their expectations.¹³⁹ Employers further contend that based on the law of economics, it just does not pay for the employees to belong to a union. Thus, the smaller number of unions soliciting employees causes the number of election petitions and unfair labor practice complaints to decline.

B. Decline In Significant Decision Making By The Board

The ALRB has also been criticized because of the subject matter dealt with in its decisions. Many argue that the level of significant decisions made by the ALRB has declined. Procedurally, petitions to review decisions made by the ALRB are governed by section 1160.8 of the ALRA.¹⁴⁰ These petitions are made to the court of appeals in that jurisdiction and, if necessary, the California Supreme Court. When the ALRB was first created, the Board was required to make many substantive decisions that have had lasting effects on the rights of employers and employees in the agricultural industry. Recently the number of cases decided by the appellate courts has decreased. This is demonstrated by the number of decisions petitioned to the courts of appeal and the Supreme Court, and the number of cases actually decided and published. Additionally, it can be argued that recent decisions are based mainly on procedural problems and not substantive issues. Decisions made by the Board in the early 1980s, especially those

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Telephone Interview with Thomas Campagne, *supra* note 30.

¹⁴⁰ CAL. LAB. CODE § 1160.8 (1996), states:

Any person aggrieved by the final order of the board gaining or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

brought up before the California Supreme Court, covered important legal areas. (See *infra* pp. 164-67.) In contrast, recent decisions on appeal indicate a decline in significant decision-making by the Board.

In fiscal year 1980-1981, there were two California Supreme Court decisions dealing with the ALRB.¹⁴¹ The two cases involving review of Board decisions were *Vista Verde Farms v. ALRB* and *Andrews v. ALRB*.¹⁴² In *Vista Verde Farms*, the California Supreme Court upheld the Board's determination that an employer may be held liable for the conduct of his labor contractors, similar to that of an employee, if the labor contractor may reasonably believe he is engaged in conduct on the employer's behalf or reflects the employer's policy.¹⁴³ This is essentially an issue of the applicability of respondeat superior to contract workers within the agricultural industry.

In *Andrews v. ALRB*, the high court held a judicial officer's political or legal views could create an appearance of bias; however, a mere appearance of bias is not sufficient to require disqualification. Therefore the judicial officer did not err when he refused to disqualify himself from the unfair labor practice order.¹⁴⁴ Both of these decisions were based upon important substantive legal issues.

Again in 1981, an important decision was handed down by the Fifth District Court of Appeal. In *Montebello Rose Company v. ALRB*, the court dealt with the following issues: relitigation of good-faith bargaining; the duty to bargain with the certified employee representative; and the six-month limitation period for issuing an unfair labor practice complaint under section 1160.2 of the Labor Code, which is tolled until the complaining party should have reasonably discovered bad-faith bargaining of another party.¹⁴⁵ In 1985, the California Supreme Court decided *Harry Carian Sales v. ALRB*. The Court determined that the ALRB had the authority to certify a union by bargaining order as a remedy for an employer's egregiously unfair labor practices even though the union had not won a secret ballot election.¹⁴⁶ Both of these cases dealt with very important, substantive labor-relation issues.

From 1986 to the present, the number of petitions for review has significantly declined. During the 1991-92 fiscal year, six petitions for

¹⁴¹ 5 ALRB ANN. REP. 1980-1981, at 50 (1981).

¹⁴² *Id.* See also *Vista Verde v. ALRB*, 625 P.2d 263 (Cal. 1981); *Andrews v. ALRB*, 623 P.2d 151 (Cal. 1981).

¹⁴³ 5 ALRB ANN. REP. 1980-1981, at 51 (1981).

¹⁴⁴ *Id.* at 51-52.

¹⁴⁵ *Montebello Rose Co. v. ALRB*, 119 Cal.App.3d 1 (1981).

¹⁴⁶ *Harry Carian Sales v. ALRB*, 703 P.2d 27, 42 (Cal. 1985).

review were filed.¹⁴⁷ Of the ten petitions that were acted upon by the Courts of Appeal, only two cases resulted in published decisions.¹⁴⁸ *Michael Hat Farming Co. v. ALRB* focused on joint employers and their obligation to bargain with a union that represented the employees of its predecessor.¹⁴⁹ As the new owners of the land, Heublein and Michael Hat had succeeded to the bargaining obligation of their predecessors.¹⁵⁰ In the second published decision, *Phillip D. Bertelsen, Inc. v. ALRB*, the court remanded the case to the Board to allow the workers an opportunity to rebut the presumption that they were authorized to work in the United States.¹⁵¹ Successorship liability in *Michael Hat Farming Co.* is a substantive legal issue of importance, but *Bertelsen* dealt with procedural issues of rebutting presumptions.

From 1992 to 1993, the court of appeal acted upon seven petitions for review and two compliance cases.¹⁵² The Board had two decisions published. In *ALRB v. Superior Court*, the court held that it had authority to seek derivative liability as part of enforcing compliance with its orders.¹⁵³ In *United Farm Workers v. ALRB*, the court settled issues on requirements for granting make-whole remedies, finding they were inappropriate where the employer's refusal to bargain had not caused the cognizable loss of pay to the employees.¹⁵⁴ The issue in *United Farm Workers* is arguably substantive, because it deals with make-whole relief, but *ALRB v. Superior Court* is another prime example of merely procedural issues focusing on the Board's authority.

During the 1993-1994 fiscal year, the courts of appeal acted upon nine petitions, and two decisions were published.¹⁵⁵ In *Scheid Vineyards and Management Co. v. ALRB*,¹⁵⁶ the court affirmed the Board's decision regarding three issues. First, the examination of peak employment was determined.¹⁵⁷ Secondly, Scheid Vineyards failed to make a

¹⁴⁷ 16 ALRB ANN. REP. 1991-1992, at 22-23 (1992).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* See also *Michael Hat Farming Co. v. ALRB*, 4 Cal.App.4th 1037 (1992).

¹⁵⁰ 16 ALRB ANN. REP. 1991-1992, at 22-23 (1992).

¹⁵¹ *Id.* at 23-24. See also *Phillip D. Bertelsen, Inc. v. ALRB*, 2 Cal.App.4th 506 (1992).

¹⁵² 17, 18 ALRB ANN. REP. 1992-1993, 1993-1994, at 26 (1994).

¹⁵³ *Id.* at 27-28. See also *ALRB v. Super. Ct. (Mario Saikhon)*, 15 Cal.App.4th 749 (1993).

¹⁵⁴ 17, 18 ALRB ANN. REP. 1992-1993, 1993-1994, at 28. See also *United Farm Workers v. ALRB* (Paul Bertuccio), 16 Cal.App.4th 1629 (1993).

¹⁵⁵ 17, 18 ALRB ANN. REP. 1992-1993, 1993-1994, at 27.

¹⁵⁶ *Scheid Vineyards and Management Co. v. ALRB*, 22 Cal.App.4th 139 (1994).

¹⁵⁷ 17, 18 ALRB ANN. REP. 1992-1993, 1993-1994, at 28-29. See also *Scheid Vineyards and Management Co. v. ALRB*, 22 Cal.App.4th 139 (1994).

prima facie showing of evidence to support his claim, therefore his objection was properly dismissed without a hearing by the court.¹⁵⁸ Lastly, the Board's award of make-whole relief was appropriate because none of the issues raised by *Scheid* was novel.¹⁵⁹ In *Phillip D. Bertelsen v. ALRB*, the court upheld the decision of the Board to grant make-whole remedies to undocumented workers notwithstanding their immigration status.¹⁶⁰ Both of these cases raised procedural issues dealing with prima facie evidence to support a claim, dismissal without a hearing, and affirmation of a decision that was not novel.

The most recent case arising out of the courts of appeal dealt with a procedural issue. In *ALRB v. Superior Court*, the Fifth District Court of Appeal held the trial court lacked jurisdiction to review the ALRB's certification of a union as the exclusive collective bargaining representative of agricultural employees of a vineyard.¹⁶¹

Consistently throughout the early 1980s, several ALRB issues came before the California Supreme Court each year.¹⁶² In fiscal year 1984-1985, the California Supreme Court heard 20 cases regarding the ALRB, while the California Courts of Appeal heard 144 cases on ALRB board decisions.¹⁶³ In fiscal year 1985-1986, California's highest court heard 23 cases based upon ALRB decisions and the California Courts of Appeal heard 269.¹⁶⁴ Since then, there has been a significant decrease in the amount of litigation reaching the state appellate courts. In 1986-1987 fiscal year, the California Supreme Court heard one case on the ALRB.¹⁶⁵ There was no activity by the California Supreme Court in 1987 to 1988, and only one ALRB case was handed down by the California Supreme Court in 1988 to 1989.¹⁶⁶ There has been scant new litigation concerning the ALRB, and what has been recently decided is arguably of limited substantive legal value. Even

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 29. See also *Phillip D. Bertelsen v. ALRB*, 23 Cal.App.4th 759 (1994).

¹⁶¹ *ALRB v. The Super. Ct. of Stanislaus County*, 96 Daily Journal D.A.R. 10512 (1996).

¹⁶² 6 ALRB ANN. REP. 1981-1982, at 115 (1982) (4 cases were heard by the Supreme Court); 7 ALRB ANN. REP. 1982-1983, at 82 (1983) (1 case was heard by the Supreme Court); and 8 ALRB ANN. REP. 1983-1984, at 69 (3 cases were heard by the Supreme Court).

¹⁶³ 9 ALRB ANN. REP. 1984-1985, at 90 (1985).

¹⁶⁴ 10 ALRB ANN. REP. 1985-1986, at 83 (1986).

¹⁶⁵ 11 ALRB ANN. REP. 1986-1987, at 100 (1987).

¹⁶⁶ 13 ALRB ANN. REP. 1988-1989, at 41 (1989).

with the decrease in litigation, the ALRB's importance to farm workers remains strong.

IV. THE UNIONS' IMPACT ON THE ALRB'S IMPORTANCE TODAY

When the Board was first created in 1975, there were 604 election petitions and 423 actual elections.¹⁶⁷ The number of elections decreased to 188 from 1977 to 1978.¹⁶⁸ From 1978 to 1979, there were 97 election petitions, and 67 elections were actually held.¹⁶⁹ The statistics show that from 1987 to 1988, there were 43 election petitions, of which 37 were certification requests and six were decertification requests.¹⁷⁰ From 1993 to 1994, there were 17 petitions for elections, of which 12 were certification requests, and five were decertification requests.¹⁷¹ Overall, there has been a decrease in the number of election petitions by more than 50 percent for the past eight years. What has caused the decrease in petitions for elections? More importantly, why has the need for the union decreased? Before his death in 1993, Cesar Chavez blamed the United Farm Workers' (UFW) decline partly on the changing political climate in Sacramento, including two successive Republican administrations that crippled the ALRB.¹⁷² Chavez believed the ALRB, as established under Democratic Governor Jerry Brown, was an arbiter for farm worker grievances until the Republicans took over in 1983.¹⁷³ By the time Chavez died on April 23, 1993, only about 21,000 laborers remained under the UFW contracts, which is fewer than 3 percent of the state's one million farm workers.¹⁷⁴ This

¹⁶⁷ 1 ALRB ANN. REP. 1975-1976, at 75 (1977).

¹⁶⁸ *Id.* at 82.

¹⁶⁹ 3 ALRB ANN. REP. 1978-1979, at 41 (1979).

¹⁷⁰ 16 ALRB ANN. REP. 1991-1992, at 16 (1992).

¹⁷¹ 17, 18 ALRB ANN. REP. 1992-1993, 1993-1994, at 17 (1994). The following is a representation of the election petitions from 1987 to 1994. From 1987 to 1988, there were 43 election petitions, 37 certification requests and 6 decertification requests. From 1988 to 1989, there were 30 election petitions, 22 certification requests and 8 decertification requests. From 1989 to 1990, there were 27 election petitions, 15 certification requests, and 12 decertification requests. From 1990 to 1991, there were 23 election petitions, 13 certification requests and 10 decertification requests. From 1991 to 1992, there were 27 election petitions, 12 certification requests and 15 decertification requests. From 1992 to 1993, there were 20 election petitions, 16 certification requests and 4 decertification requests. From 1993 to 1994, there were 17 election petitions, 12 certification requests, and 5 decertification requests.

¹⁷² Edgar Sanchez, *Farm Union Picks a Big Fight*, SACRAMENTO BEE, Sep. 1, 1996, at A1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

represents a reduction of about 75 percent compared with the 80,000 UFW members in 1970.¹⁷⁵

The unions blame their reduced clout in Sacramento for the decline in ALRB action, while the growers feel the workers just do not need the UFW anymore.¹⁷⁶ Most big growers are reluctant to comment on the UFW's organizational push, but Michael Saqui, an attorney representing the Watsonville-based Gargiulo LP,¹⁷⁷ stated in the *Sacramento Bee*, "We respect our employees' right to freedom of choice . . . and our employees have made a resounding showing against unionization."¹⁷⁸ One employee commented in the *Sacramento Bee*, "We have no problems here. I'm treated well here. I don't think we need a union."¹⁷⁹

Secondly, growers argue that the Teamsters Union has significantly impacted the membership draw of the UFW.¹⁸⁰ The UFW requires growers to adopt a hiring hall policy, where the UFW or its representative chooses the employees for the grower instead of allowing the grower to select employees from a group of workers belonging to the union.¹⁸¹ There were talks about merging the UFW and the Teamsters Union, but Chavez refused to drop the hiring hall. Therefore, the merger failed.¹⁸² The Teamsters Union would have provided a significant source of money and professional organizational training, which would have benefitted the UFW tremendously. Instead, the UFW chose not to merge with the Teamsters Union, and has been competing for members ever since.¹⁸³

There is no doubt the UFW is alive and well today. Although there has been a decrease in membership, the numbers are once again on the rise.¹⁸⁴ Since 1993, Arturo Rodriguez¹⁸⁵ has been the president of the UFW.¹⁸⁶ The UFW has boosted its membership from 21,000 to 26,000,

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* Gargiulo Limited Partnership is a major strawberry grower in Watsonville, Cal. The company leads the industry in terms of wages and benefits, and employs about 1,200 strawberry workers.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Telephone Interview with Thomas Campagne, *supra* note 30.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Sanchez, *supra* note 172.

¹⁸⁵ *Id.* Arturo Rodriguez is the son-in-law of the late Cesar Chavez.

¹⁸⁶ *Id.*

due in large part to a change in strategy.¹⁸⁷ In the later part of the Chavez years, the UFW's primary activity was boycotting. Now the union has returned to field organization as its primary activity.¹⁸⁸ According to Rodriguez, "The lifeblood of this organization has always been organizing."¹⁸⁹ The change in tactics by the UFW has increased the organization's popularity. The ALRB has seen less activity because of the Teamsters Union and the UFW's concentration on boycotts and employment contracts, but petitions for unionization and elections are on the rise, a direct reflection of the UFW's renewed focus on field organization.¹⁹⁰

V. MERGING ALRB INTO THE PUBLIC EMPLOYMENT RELATIONS BOARD

It has been rumored over the past several years that the ALRB might merge into the Public Employment Relations Board (PERB).¹⁹¹ These rumors were bolstered by an article published in the *Sacramento Bee* on April 24, 1995, discussing the elimination of the Board.¹⁹² A complete statutory comparison of the ALRA and the various labor-relations statutes governing public employees in California is beyond the scope of this comment; however, the two Boards may find themselves in a disfavorable position if the merger does occur. Fortunately, both PERB and the reviewing courts turn for guidance to the precedents established under similar provisions found under the NLRA and ALRA.¹⁹³

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Interview with Lawrence Alderete, *supra* note 28.

¹⁹¹ *Id.*

¹⁹² Dan Bernstein, *Agencies That Escape Cuts Despite Loud, Long Criticism*, SACRAMENTO BEE, Apr. 24, 1995, at A11, which read in part:

Agricultural Labor Relations Board. The nonpartisan Legislative Analyst's Office has recommended that the ALRB be eliminated, citing its 'persistently light workload.' The analyst's office says the functions of the board — certifying farm worker elections, resolving labor disputes and enforcing collective bargaining laws — could be handled by the Public Employment Relations Board. But defenders of the ALRB say the PERB lacks the expertise to address farm worker issues, and argue that the agricultural board's light workload is due partly to the low priority assigned it by Wilson. Annual cost: \$1.9 million.

¹⁹³ KIRSTEN L. ZERGER, PETER A. JANIAC, JANICE E. JOHNSON, WILLIAM F. KAY & FRED D'ORAZIO, CALIFORNIA PUBLIC SECTOR LABOR RELATIONS § 2.02, at 2-4 (7th ed. 1996).

Unlike the ALRB, which is controlled mainly by the ALRA, there are currently seven labor-relations statutes governing the California public sector employees.¹⁹⁴ PERB is an independent state agency established to administer and enforce the Educational Employment Relations Act, State Employer-Employee Relations Act, and Higher Education Employment Relations Act.¹⁹⁵ It is possible that the two Boards could merge to reduce costs. The PERB and ALRB decide similar issues, and typically rely on the same NLRB precedent. Yet, it is more realistic that the two organizations combine their regional or district offices and share investigators and administrative staff to reduce costs.¹⁹⁶

It is unlikely that California will merge the two Boards any time soon. However, if there is a merger, the agencies would need to conduct a statutory analysis of the ALRA and those acts that guide PERB to reconcile any significant differences.

CONCLUSION AND RECOMMENDATIONS

The ALRB, in some form, is here to stay. There are too many economic, political, and social issues that face the agricultural industry, which are addressed by the Board. These issues need to be resolved in a uniform manner. The ALRB plays a significant role in bringing the employers and employees together on neutral ground. Yet, for the Board to be more effective, both sides must work toward common goals. The ALRB could play a significant role in arbitrating the two groups. Instead of being the "prosecutor," the ALRB should establish a mission geared toward reconciliation. Proactive steps should be implemented, instead of always adjudicating in hindsight. The Board could accomplish this by requiring mandatory mediation hearings or sponsoring "round table" discussions between growers and laborers. Furthermore, the Board could push for legislation that reduces the division between these two groups and supports reconciliation. This would also help bolster the Board's public image and decrease the likelihood that its existence would be threatened by budget cuts. In this light, the ALRB would not only be the legislative and adjudicatory agency, but also serve a far greater purpose: resolving the problems before they get started.

¹⁹⁴ *Id.* at 2-6.

¹⁹⁵ *Id.* at 3-2. See also GOV'T. CODE § 3513(g), 3540, 3541, 3541.3, 3563 (1996).

¹⁹⁶ Interview with Lawrence Alderete, *supra* note 28.

Union membership is again on the rise, and if the numbers continue to increase, so too will the activity of the ALRB. Regardless of the increase in union members, farmers need workers and workers need farmers, and as long as this holds true, there will always be a need for an agency to mediate the two.

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