Agricultural Bargaining Law: Policy in Flux

by

Donald A. Frederick

Originally published in the ARKANSAS LAW REVIEW
43 ARK. L. REV. 679 (1990)

Agricultural Bargaining Law: Policy in Flux

*Donald A. Frederick**

On April 16, 1968, President Johnson signed the Agricultural Fair Practices Act of 1967 (AFPA) into law.[1] Drafted by the American Farm Bureau Federation and introduced in Congress in 1964, the legislation was designed to shield agricultural bargaining associations from discriminatory activities by processors and other handlers and to give farm bargaining efforts by general farm organizations and other associations limited protection from antitrust policy.[2] After a bitter four-year legislative battle, it emerged "in its final form [as] a creature of conflicting intent and is, as a result, fraught with seemingly inconsistent and paradoxical provisions."[3]

This Article reviews the need for cooperative farm bargaining, the events leading to the enactment of the AFPA, the legislative language of the AFPA and court decisions interpreting that language, the AFPA's strengths and weaknesses, AFPA modification attempts, recent state farm bargaining law initiatives, and options that might improve the AFPA from the producers' perspective.

I. WHY COOPERATIVE FARM BARGAINING IS NECESSARY

Farm bargaining is a rational process used to arrive at price and nonprice terms of a sale of an agricultural commodity. For such a process to operate efficiently, the participants must have comparable ability to influence the outcome of the negotiation. Farmers are large in number but small in size

---

* Attorney, Agricultural Cooperative Service, U.S. Department of Agriculture, Washington, D.C.; B.A. Beloit College; J.D. Duke Law School. None of the policy options nor any other statement(s) in this Article represent official position(s) of the U.S. Department of Agriculture.

1. Agricultural Fair Practices Act of 1967, Pub. L. No. 90-288, §§ 2-6, 82 Stat. 93 (1968) [hereinafter AFPA] (codified at 7 U.S.C. §§ 2301-06 (1988)).

2. H.R. 11146, 88th Cong., 2d Sess., 110 CONG. REC. 10041 (1964); S. 2849, 88th Cong., 2d Sess., 110 CONG. REC. 10872 (1964).

3. Butz v. Lawson Milk Co., 386 F. Supp. 227, 234-35 (N.D. Ohio 1974).

when compared to the firms that buy much of their production. Thus, there is a major difference in economic power between the two groups.

Ralph Bunje, who served for twenty-five years as president and manager of the California Cling Peach Association, has listed five principal weaknesses in the bargaining power of individual farmers and suggested how a producer bargaining association can alleviate some of those weaknesses:

1. *Relative size and assets*

Few farmers who market their production to a commercial processor or handler can match the buyer's economic power and size. A substantial association can approach all potential buyers and negotiate on the combined strength of all producer members.

2. *Control of timing*

A grower of annual crops, anxious for a contract, is easy prey for a buyer who makes an offer at the last moment. An association can influence the timing of negotiations and develop sliding scale prices that reflect changes in total production and thereby reduce the incentive to play games with timing.

3. *Market intelligence*

Few individual farmers have the time to analyze the market for their production. They often rely on the buyer for market intelligence. An association can hire staff to develop accurate, timely market information.

4. *Having a home*

If farmers must have a home for their produce, and there are a limited number of buyers, farmers can be forced to compromise on both the terms and price of a sale. An association can help farmers develop a market plan to move the right amount of produce to market at the right time.

5. *Finalizing a sale*

Buyers can delay payment to make maximum use of grower's resources to finance the crop. A bargaining association can force buyers to pay in a timely manner in order to conserve and protect farmers' resources.[4]

---

4. R. BUNJE, U.S. DEPARTMENT OF AGRICULTURE, COOPERATIVE FARM BARGAINING AND PRICE NEGOTIATIONS 40-42 (1980).

Thus, by banding together into a producer association, farmers can compensate for these market weaknesses and minimize their comparative market disadvantage with buyers.

II. ENACTMENT OF THE AFPA

Dr. Randall Torgerson, in his comprehensive history of the AFPA, reported that the impetus for the Act came from the experiences of various grower groups in the early 1960s.[5] For example, in Arkansas, broiler producers who joined the Northwest Poultry Growers Association were cut off by poultry processors. A complaint filed with the Packers and Stockyards Administration in 1962 finally resulted in a finding, in 1968, of illegal conduct by major processors. However, the intermittent six-year struggle demonstrated the helplessness of the individual farmer in dealing directly with large agribusiness firms.

In addition, California had a long history of agricultural bargaining, often between local producers and locally owned and operated processing facilities. A growing trend of acquisition of these processing facilities by large agribusiness conglomerates was destroying established interpersonal relationships. As a result, processor resistance to grower associations increased.

Ohio growers also meet resistance from processors. Ohio tomato farmers who joined a farm bureau marketing association were confronted by processors who refused to purchase tomatoes from grower association members. A complaint filed with the Federal Trade Commission (FTC) in 1959 was ultimately dismissed in 1964 when the FTC took the position that it only had jurisdiction over conspiracies against growers, not the actions of individual firms. However, Ohio adopted legislation in 1965 that barred processors from refusing to deal with grower association members and set up a procedure for processing complaints by the director of agriculture.[6] This sparked the Ohio Farm Bureau to initiate the drive for national legislation.

While legislation was introduced in Congress as early as

5. R. TORGERSON, PRODUCER POWER AT THE BARGAINING TABLE 3-18 (1970).
6. OHIO REV. CODE ANN. § 1729.181 (Anderson 1985).

1964 to spur agricultural bargaining,[7] the primary focus was on a bill introduced in both the 89th and 90th Congresses as Senate Bill 109 (S. 109) co-sponsored by Senator Aiken, a Republican from Vermont, and Senator Lausche, a Democrat from Ohio.[8] As originally conceived, the legislation promoted agricultural bargaining by prohibiting the unfair practices of non-cooperative handlers from thwarting cooperative bargaining associations and by establishing criminal penalties for violations of the Act.

After an extensive legislative battle during 1966 and 1967, processor interests succeeded in major modifications of S. 109. The modifications applied the unfair practices prohibitions to associations as well as processors, made cooperative handlers subject to the unfair practices provision, added a so-called disclaimer provision stating that the Act was not to be interpreted to prevent handlers from selecting producers for any reason other than association membership or requiring handlers to deal with producer associations, and deleted treble damage and criminal penalty provisions.[9]

While producer groups probably could have killed the legislation at that point, they instead secured a few phrasing changes and pressed for enactment. While it was far less than what proponents had sought, the AFPA as enacted was still viewed as an important sanction of agricultural bargaining.

III. THE AFPA: WHAT IT IS AND WHAT IT IS NOT

There are five substantive sections of the AFPA. However, the AFPA, as set forth in these sections, has only been of limited value to producers.

---

7. *See supra*, note 2.

8. S. 109, 89th Cong., 1st Sess., 111 CONG REC. 169 (1965); S. 109, 89th Cong., 2d Sess., 112 CONG. REC. 23568 (1966) (reintroduced as amendment No. 933 in the form of a substitute); S. 109, 90th Cong., 1st Sess., 113 CONG. REC. 192 (1967); *see also* H.R. 13541, 90th Cong., 1st Sess, 113 CONG. REC. 29138 (1967) (companion legislation).

9. STAFF OF SENATE COMMITTEE ON AGRICULTURE, 90th Cong., 1st Sess., S. 109, (1967); S. REP. NO. 474, 90th Cong., 2d Sess. — (1967), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1867.

A. Section 2: Legislative Findings and Declaration of Policy

After extolling the virtues of production agriculture, the introductory statement concludes:

> Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.
>
> It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products.[10]

This language has been cited as evidence that "the overriding purpose of Congress in enacting [the AFPA] was to protect the individual producer . . . in his right to band together with other producers . . . ."[11]

In view of the unqualified commitment in this preamble to the importance of bargaining associations, it follows that bargaining associations should be able to negotiate meaningfully with their customers if the policy behind the Act is to be achieved. However, the AFPA does not provide the necessary support, such as the authority to compel good faith bargaining by handlers. While the Act encourages and protects the organization of producer associations, Congress has not provided any additional assistance to producers to generate market power and translate group action into higher farm incomes.

B. Section 3: Definitions

Section 3 of the Act contains standard definitions of "producer," "association of producers," and "person."[12] "Agricultural products" is defined only as specifically exclud-

10. AFPA, *supra* note 1, § 2 (codified at 7 U.S.C. § 2301 (1988)).
11. Butz v. Lawson Milk, 386 F. Supp. 227, 235 (N.D. Ohio 1974).
12. AFPA, *supra* note 1, § 3(b)-(d) (codified at 7 U.S.C. § 2302(b)-(d) (1988)).

ing cotton and tobacco.[13] The definition of "handler" is noteworthy because it is defined quite broadly. It includes cooperative marketing associations when they engage in conduct included in the activities defined as those of a handler, such as acquiring agricultural products from producers or associations of producers for processing or sale.[14] Agricultural bargaining associations are also handlers under the Act. The definition includes entities that negotiate contracts "on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product."[15] Thus, any restrictions on conduct of noncooperative processors and other buyers of farm products also apply to farmer-owned marketing and bargaining associations.

C. Section 4: Prohibited Practices

Various provisions of section 4 of the AFPA make it unlawful for any handler to knowingly engage in, or to permit any employee or agent to engage in, numerous practices. For example, it is unlawful: (a) to coerce a producer to join or refrain from joining an association of producers or to refuse to deal with a producer because the producer joins an association; (b) to discriminate against a producer with respect to price, quantity, quality, or other terms of purchasing and handling agricultural products because the producer joins an association; (c) to coerce a producer into signing, or breaching, a contract with an association or another handler; (d) to pay or loan money to induce a producer not to join, or to cease belonging to, an association; (e) to make false statements about the finances, management, or activities of a producer or handler; or, (f) to conspire with others to do any of the above.[16] This section incorporates the voluntariness theme established in the policy provision. All handlers are barred from using undue influence to convince a producer to join or not join a producer association.

---

13. *Id.* § 3(e) (codified at 7 U.S.C. § 2302(e) (1988)) .

14. *Id.* § 3(a)(1)-(2) (codified at 7 U.S.C. § 2302(a)(1)-(2) (1988)). *See* Marketing Assistance Plan, Inc. v. AMPI, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972).

15. AFPA, *supra* note 1, § 3(a)(3) (codified at 7 U.S.C. § 2302(a)(3) (1988)). *See* Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 464-65 (1984).

16. AFPA, *supra* note 1, § 4(a)-(f) (codified at 7 U.S.C. § 2303 (a)-(f)(1988)).

This has both favorable and unfavorable consequences for bargaining associations. For example, the court in *Butz v. Lawson Milk*, held that section 4(a) prevents a handler from refusing to deal with a producer simply because the producer informed the handler he had joined a bargaining association. Also, a clause in a handler's contract giving him the right to cease doing business with a producer who joins an association is a *per se* violation of the Act.[17]

On the other hand, in *Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, the United States Supreme Court invalidated portions of the Michigan Agricultural Marketing and Bargaining Act.[18] The Court found that language obligating a producer to pay fees to an association, while at the same time precluding him from marketing his goods as he saw fit, resulted in a *de facto* forcing of the producer to join an association in violation of section 4(a) of the AFPA. Additionally, the Court found that a provision authorizing an association to bind nonmembers, without their consent, to its marketing contracts with processors amounted to coercing nonmembers to sign association contracts in conflict with section 4(c).[19]

D. Section 5: Disclaimer Clause

Section 5 of the Act, the so-called disclaimer clause, has proven to be the biggest obstacle to effective producer bargaining. It provides: "Nothing in this Act . . . shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers."[20]

This language gives Congressional approval for processors to use any pretext other than association membership to refuse to deal with an association member. It also gives a processor grounds to legally refuse to bargain. This provision greatly limits the producer protections in section 4.

17. Butz v. Lawson Milk, 386 F. Supp. 227, 238-40 (N.D. Ohio 1974).
18. MICH. COMP. LAWS ANN. § 290.701-.727 (West 1984).
19. *Michigan Canners & Freezers*, 467 U.S. at 478.
20. AFPA, *supra* note 1, § 5 (codified at 7 U.S.C. § 2304 (1988)).

As the court stated in *Lawson Milk*:

> [T]he thrust of this section is to protect the right of a handler . . . to continue to deal with one of its producers even though he may become a member of an association. And, it would appear that § 2304 should be interpreted to protect the handler's right to deal directly with the producer even though the producer in joining the cooperative may have assigned exclusive agency rights to the association for the sale of its [product].[21]

The court went on to say "a handler could lawfully state in its marketing agreement that should the producer exercise his right to join a cooperative, the handler will exercise its right not to deal with that association."[22] Thus, while a processor cannot refuse to deal with a producer simply because the producer joins a bargaining association, once that producer signs an agreement with an association, the processor can refuse to deal with the producer by simply refusing to deal with the association.

The statement, by the *Lawson Milk* court noting that a handler could deal directly with a producer who had assigned exclusive agency rights to an association, ought to be limited to the factual pattern found in that case. Under the facts of *Lawson Milk*, the producer had a full production marketing agreement in effect with a handler, but he also signed an agreement with an association. Once a producer has properly terminated any pre-existing individual marketing contract, handlers who want the producer's production should be required to deal through the association.

E. Section 6: Enforcement

The AFPA may be enforced by civil action initiated by either an aggrieved party or by the Attorney General upon the request of the Secretary of Agriculture. The penalty in a government suit is limited to an injunction against further illegal conduct. In a private litigation, the court may award damages and attorney's fees to the prevailing party.[23]

Section 6 also contains a limited preemption clause which

21. *Lawson Milk*, 386 F. Supp. at 237.
22. *Id.* at 240.
23. AFPA, *supra* note 1, § 6(a)-(c) (codified at 7 U.S.C. § 2305(a)-(c) (1988)).

provides that the AFPA shall not be construed to change or modify existing state law.[24] In *Old Orchard Brands, Inc. v. Department of Agriculture*, the court relied on this language to uphold a Michigan law enacted before the AFPA that required all producers of a commodity to pay assessments for market information, promotion, and research programs involving that commodity.[25]

Enactment of the AFPA stimulated a number of complaints alleging unfair practices. From August 1968 until September 1970, the Farmer Cooperative Service (FCS), a part of the United States Department of Agriculture (USDA), and a predecessor agency to the present Agricultural Cooperative Service, was responsible for enforcing the Act. During that period the FCS received fourteen complaints. Eight of these complaints were considered substantial enough to request the Office of Inspector General of the USDA to investigate the complaint. However, no violation was found in any of these instances. The FCS dismissed five of the remaining complaints without referral, also on the basis that an investigation failed to find grounds for action.[26] The final complaint was filed late in the FCS administrative period. After referral to the Department of Justice for prosecution, it resulted in the *Lawson Milk* decision.[27]

Nine additional complaints were filed with the USDA between late 1970 and 1976. Six were dismissed by the Department after an investigation found insufficient grounds for action. The three remaining complaints, all of which involved alleged violations of the Packers and Stockyards Act,[28] led to lawsuits filed by the Department of Justice. In each instance, the case was settled after the processor agreed not to engage in any unfair practices in the future.[29] In addition, two

---

24. *Id.* § 6(d) (codified at 7 U.S.C. § 2305(d) (1988)).

25. Old Orchard Brands, Inc. v. Department of Agric., 152 Mich. App. 274, 393 N.W.2d 608 (1986), *cert. denied*, 480 U.S. 933 (1987).

26. J. Samuels, *Administration of the Agricultural Fair Practices Act of 1967, by the Farmer Cooperative Service, USDA, August 27, 1968 to September 1970*, PROCEEDINGS OF THE FIFTEENTH NATIONAL CONFERERNCE OF BARGAINING COOPERATIVES, U.S. DEP'T OF AGRICULTURE 21 (1971).

27. Butz v. Lawson Milk Co., 386 F. Supp. 227 (N.D. Ohio 1974).

28. Packers and Stockyards Act (codified as amended and supplemented at 7 U.S.C. §§ 181-229 (1988)).

29. Secretary of Agriculture v. Lane Broiler Farms, No. FS-71-C-78 (W.D. Ark.

private cases filed in the 1970s also resulted in court orders favorable to the complaining bargaining association.[30]

Until recently, only two complaints had been filed with the Department during the 1980s. The first, by Colorado sugar beet growers, was filed in 1982. The USDA referred the case to the Justice Department for prosecution. The National Office of the Department of Justice referred it to the U.S. Attorney's Office in Denver, where the request for action was rejected because the same facts were before the appropriate court in private litigation. The second complaint, filed in 1987 on behalf of sweet corn growers in Washington, was dismissed by the USDA for lack of evidence to support a violation.

On December 15, 1989, the Justice Department filed a complaint under the AFPA and the Packers and Stockyards Act against Cargill, a major poultry processor, and two of its officers for terminating a contract with the president of a local growers' association without economic justification "because of his affiliation with and active leadership in the Association . . . ."[31] The press release announcing the complaint paraphrased the Assistant Attorney General for the Civil Division of the Justice Department as indicating that the complaint "represents the Justice Department's determination to protect the nation's farmers and ranchers from unfair business practices."[32]

If this does signal a pro-activist position on the part of the Justice Department, then it is a very positive development for producers. However, of twenty-five previous complaints filed with the USDA, only four have resulted in any satisfac-

---

Apr. 2, 1973) (order entering consent decree); Butz v. Maplewood Poultry Co., No. 1922 (D. Me. May 15, 1973) (stipulation); Butz v. Showell Poultry, Inc., No. DCA-74-106 (N.D. Fla. Aug. 18, 1975) (stipulation).

30. Lajti v. Hunt Wesson, No. C72-104 (D.C. Ohio 1972) (order granting preliminary injunction); Eastern Milk Producers Coop. v. Lehigh Valley Coop. Farmers, No. 78-91 (E.D. Pa. January 31, 1978) (order granting preliminary injunction).

31. Complaint at 5-7, United States v. Cargill, Inc., No. 89-213 (M.D. Fla. Dec. 15, 1989).

32. U.S. Department of Justice, Press Release No. 89-413 (Dec. 15, 1989). On April 30, 1990, a Federal District Court Judge issued a preliminary injunction in the *Cargill* case, ordering Cargill to reinstate the suspended grower association president and to cease discriminatory conduct toward association members. Baldree v. Cargill, Inc., No. 89-213-Civ.-J-16 (M.D. Fla. April 30, 1990) (order granting preliminary injunction).

tion for the growers, and none in a reprimand for the handler beyond a promise not to violate the Act in the future. The only remedy sought in this case is an order that the processor renew dealing with the producer. Thus, it is easy to understand why the initial stream of complaints has slowed to a trickle and why the AFPA is considered ineffective by producers.

F. Federal Pre-emption

The Supreme Court's invalidation of parts of the Michigan Agricultural Marketing and Bargaining Act has importance beyond the specific rulings in *Michigan Canners and Freezers*. The Court relied on the supremacy clause of the Constitution to justify overturning the state statute.[33] The Court found that because the Michigan Act authorizes producer associations to engage in conduct that the federal act forbids, the Michigan Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[34]

The Court held that to the extent that the Michigan law conflicted with the AFPA, the federal statute preempted the state law on agricultural bargaining. By invoking the supremacy clause in this case, the Court limited the ability of state legislatures to promote bargaining.[35]

IV. STRENGTHS AND WEAKNESSES OF THE AFPA

A. Strengths

Enactment of the AFPA was a congressional reaffirmation of the value of cooperative bargaining and marketing by agricultural producers. It showed that Congress recognized that important changes had occurred in the food industry since the enactment of the basic cooperative legislation early in the century, but that the disparity in market power between individual producers and large corporate buyers remained.

---

33. U.S. CONST. art. VI, § 2.

34. Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 478 (1984).

35. *See* Bayside Enter. v. Maine Agric. Bargaining Bd., 513 A.2d 1355 (Maine 1986).

Without the right to bargain and market collectively, producers are greatly disadvantaged in their attempt to negotiate a fair price for their production.

The AFPA also seemed to limit unfair trade practices of processors and other handlers. Dr. Mahlon Lang, while an assistant professor of agricultural economics at Purdue University, conducted a series of interviews with bargaining association executives during the late 1970s. He reported:

> While the responses were mixed, most managers indicated that the occurrence of unfair practices had been reduced with the passage of the Agricultural Fair Practices Act. The range of experiences extended from those managers who felt "unfair practices are not a serious problem" to those who claimed that such practices were "common, but hard to prove."[36]

B. Weaknesses

While the AFPA has limited blatantly unfair conduct, it has done little to induce negotiated contracts. The weaknesses keep the Act from accomplishing its policy objective of giving producers access to enough market power to deal on a somewhat equal basis with processors.

For example, a major weakness of the AFPA is the disclaimer clause. The phrase stating processors and other handlers are not required to deal with associations of producers gives processors justification to totally disregard a producer association or to go through the motions of bargaining and then, as planting time, harvest, or some other critical period nears when the producers are under the greatest pressure, walk away from the table and offer growers take-it-or-leave-it contracts.

Efforts to develop effective producer bargaining associations are also undermined by the language permitting handlers to refuse to do business with a producer for any reason other than membership in an association. The threat of reprisals against elected leaders, disguised as legitimate reasons to

36. M. Lang, *Issues in the Design of Farm Bargaining Legislation*, STA. BULL. NO. 277, PURDUE U. (1980).

refuse to deal, can be a forceful weapon for someone who wishes to discourage association activity.

Another weakness is the lack of any positive inducements to promote bargaining. There is no requirement that handlers sit down and bargain in good faith with producer associations. Nor is there any mechanism to resolve disputes during negotiation. Thus, even if honest bargaining occurs, there is no guarantee of a contract in time for orderly planting, harvesting, and marketing of a crop.

A fourth weakness is the modest penalty for violation of the AFPA. Proving a violation is difficult. When a grower receives favored treatment for not joining an association, the grower has no inducement to reveal that the conduct has occurred. The only penalty that can be assessed in a suit by the government is an order against further illegal conduct. As a result, there is little motivation for government prosecutors to accept AFPA cases or for handlers to fear meaningful sanctions if the government does bring a lawsuit. The most a private litigator can realize is damages and attorney's fees. If a violater pays only damages when discovered, there is little incentive to follow the law.

A fifth weakness of the AFPA is its failure to address the "free rider" problem. Non-members almost always receive prices and other terms of trade at least as favorable as those of association members. Yet, they pay no fees to support negotiation. This serves as a disincentive for producers to join the association, reducing the association's power at the bargaining table.

V. ATTEMPTS TO AMEND THE AFPA

Proponents of agricultural bargaining were well aware of the AFPA's weaknesses before it was signed into law. Beginning in 1969, legislation was introduced in several successive sessions of Congress to establish stronger producer rights in dealing with food processors and other buyers of farm products, primarily by requiring processors to engage in good faith bargaining with producer associations.[37]

37. *See, e.g.*, S. 812, 91st Cong., 1st Sess., 115 CONG. REC. 2340 (1969); S. 2225. 91st Cong., 1st Sess., 115 CONG. REC. 13631 (1969); H.R. 18706, 91st Cong., 2d Sess.,

In 1979, Congressman Panetta, a Democrat from California, introduced legislation that would have replaced the AFPA with a new law that included the requirement of good faith bargaining.[38] It also: (1) Authorized the Secretary of Agriculture to establish mediation and arbitration services to assist in breaking bargaining impasses; (2) required handlers, at grower request, to deduct marketing fees from payments to growers and remit those fees to the association designated by the grower; and (3) adopted civil monetary and criminal penalties for violation of the act.

All of these initiatives failed for essentially the same reasons; vigorous processor opposition, lack of positive interest in a large part of the agricultural community, and lack of a large number of cases of abuse to arouse public sympathy.[39]

VI. RECENT STATE LEGISLATIVE INITIATIVES

Several important agricultural states have recently passed laws to facilitate farm bargaining. The most ambitious is Maine, which amended its Agricultural Marketing and Bargaining Act in 1987 to require good faith bargaining and to provide for binding final offer arbitration.[40] The State of Washington amended its law in the spring of 1989 to require processors of sweet corn and potatoes to bargain with accredited producer associations.[41]

In 1983, just before the *Michigan Canners & Freezers* decision, California adopted legislation that required processors "to negotiate or bargain at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious attempt to resolve differences."[42] This created a

---

116 CONG. REC. 26450 (1970); H.R. 14987, 92d Cong., 1st Sess., 118 CONG. REC. 17343 (1972); H.R. 3723, 93d Cong., 1st Sess., 119 CONG. REC. 3253 (1973); H.R. 6372, 94th Cong., 1st Sess., 121 CONG. REC. 11836 (1975); H.R. 3792, 95th Cong., 1st Sess., 123 CONG. REC. 4974 (1977).

38. H.R. 3535, 96th Cong., 1st Sess., 125 CONG. REC. 7828 (1979).

39. Hampton, *Viewpoint of the National Council of Farmer Cooperatives*, PROCEEDINGS, 24TH NATIONAL CONFERENCE OF BARGAINING AND MARKETING COOPERATIVES, U.S. DEP'T OF AGRICULTURE 61 (Jan. 10, 1980).

40. ME. REV. STAT. ANN. tit. 13, §§ 1953-1965 (West 1981 & Supp. 1989).

41. Agricultural Marketing and Fair Practices Act, ch. 355 (1989 Wash. Legis. Serv. 1268 (West)).

42. CAL. AGRIC. CODE § 54431(e) (West 1986).

standard of good faith bargaining without using the term, which had become controversial during the legislative process. This legislation also established detailed complaint processing and hearing procedures to set the stage for the Director of Food and Agriculture to obtain a court order compelling a processor to bargain. When these changes still did not result in serious bargaining by some processors, California amended its law again in 1989 to empower the Director of Food and Agriculture to use the services of the American Arbitration Association to conduct conciliation between producers and processors.[43]

These developments indicate strong public support for effective bargaining. However, while the states may want to provide assistance to their producers, *Michigan Canners and Freezers* restricts their authority. If bargaining is to receive additional legal encouragement, some action at the federal level will probably be necessary.

VII. POLICY OPTIONS FOR PRODUCERS

To date, only a limited number of producer associations have developed the market power to compel serious negotiation with food processors. Organizing a new bargaining association, in the face of serious processor resistance, is very difficult. Thus, agricultural producers would benefit from a more supportive public policy toward farm bargaining. Several possible modifications of the AFPA would improve the Act from the producer perspective. If enacted as a group, the modifications could cure all the weaknesses of the AFPA as perceived by producer groups.

A. Repeal of the Disclaimer Clause

The repeal of the disclaimer clause in section 5 of the AFPA[44] would remove many of the negative aspects of the AFPA for producers. It would eliminate the statement that handlers are not required to deal with associations. It would also abolish the connotation that handlers can refuse to deal

43. *Id.* §§ 54451-54458 (West Supp. 1990).
44. *See supra* note 20.

with an association member for any reason whatsoever other than membership in an association.

B. Limit Federal Pre-emption

The Supreme Court's reliance on the supremacy clause in *Michigan Canners and Freezers*[45] makes it difficult for states to feel secure in enacting any producer protection not specifically provided for in the federal statute. The existing preemption language in section 6(d) of the AFPA[46] protects any state law in effect at the time the federal law was enacted. If that language were modified to make it clear that states could provide greater support of producer bargaining than that accorded at the national level, states would have the flexibility to meet the needs of their producers that may presently be unavailable.

C. Require Good Faith Bargaining

Making failure to bargain in good faith a prohibited practice under section 4 of the AFPA[47] would compel all parties to meet and discuss problems. In order to avoid self-contradiction, any amendment requiring good faith bargaining would have to be combined with repeal of the disclaimer clause language which states that handlers do not have to deal with producer associations.

These amendments would insure that some discussion occurs. Once the parties are talking there is reason to hope for a negotiated contract. It would also arm producers with the threat of legal action and sanctions if a processor was stonewalling rather than engaging in honest negotiations.

However, "good faith" is a vague and subjective term and lack of good faith is difficult to establish. Therefore, as the California experience indicates, some additional means of resolving impasses might be appropriate.

D. Dispute Resolution Mechanisms

Any dispute settling mechanism will involve participa-

45. 467 U.S. 461 (1984).
46. *See supra* note 24.
47. AFPA, *supra* note 1, § 4(a)-(f) (codified at 7 U.S.C. § 2303(a)-(f) (1988).

tion by a disinterested third party in the negotiation process. It may also provide for the third party to impose a settlement. If the outside party is authorized to impose a settlement, as in binding final offer arbitration, all parties have a strong incentive to bargain and, if some issues cannot be resolved, to make a realistic proposal to the arbitrator.

If less restrictive measures such as mediation and conciliation are used instead of arbitration, the producers' assurance of a timely contract is reduced. While a trained and disinterested person can often facilitate an agreement among the parties, a recalcitrant processor could draw out discussions indefinitely. While a mere facilitating role for the third party might not always produce a timely contract, it would have the advantage, over binding arbitration, of not interfering with the marketplace by forcing the parties to accept sales terms against their will.

A good model for a national dispute resolution mechanism might be the conciliation procedure in the new California legislation.[48] Under the California approach, either an agricultural bargaining association or a processor involved in contract negotiation could request the Secretary of Agriculture to determine if conciliation will materially assist the parties in negotiating an agreement. If the Secretary orders conciliation, the American Arbitration Association would provide the conciliator and conduct the conciliation process in accordance with its Commerial Mediation Rules. If the dispute is unresolved after a set period of time the conciliator could recommend a settlement, but the parties would be free to ignore the recommendation.

E. Processor Collection of Fees

One proposal to strengthen the financial base of bargaining associations would compel handlers to honor producer requests that the handler deduct an amount stated by the producer from checks for farm products sold to the handler and pay those funds directly to the association. This eliminates the time consuming chore for association management of collecting fees from the association's own members.

48. CAL. AGRIC. CODE §§ 54451-54458 (West Supp. 1990).

California, Idaho, and New Jersey have this requirement at the state level.[49] Experience in these states indicates such a rule works well. Some handlers force producers to submit new requests each year, creating interest in a legislative requirement that requests be effective until they are revoked by the producer or if the producer fails to do business with the handler for a year.

F. Mandatory Fees

The only way to eliminate the free rider problem is federal adoption of the provision of the Michigan law struck down by the Supreme Court under the supremacy clause in *Michigan Canners and Freezers* which allowed bargaining associations to require all producers of a given crop within a given geographic area to pay fees to the accredited bargaining association for that area, even if they choose not to join the association.[50] This would not obligate a non-member to affiliate with an association or to turn over control of any aspect of the non-member's marketing of his crop to such an association. Rather, it is a recognition that all producers benefit from bargaining and, thus, would spread the cost of that bargaining equitably among all producers.

G. Agency Shop

Another option would be adoption of the entire "agency shop" language enacted by the Michigan legislature that authorized associations to bargain for all producers of a commodity in a given area.[51] Again, this amendment would not compel a producer to join an association. It would, however, prevent non-members from competing with the association in setting price and other terms of sale. This would increase the market power of the association because it would be the only representative for all production in a given area. Assuming rational and effective bargaining by the accredited association, this option would likely have the greatest positive influence on producer income.

---

49. *Id.* § 58451 (West 1986); IDAHO CODE §§ 22-3901 to 22-3906 (1977); N.J. STAT. ANN. § 4:13-26.1 (West Supp. 1989).

50. MICH. COMP. LAWS § 290.701-290.726 (1984).

51. *Id.* §§ 290.710(1), 290.713(1).

H. Coverage of Aquaculture

One of the emerging areas of agricultural bargaining involves catfish production in Arkansas and in the southeast. It is unclear whether aquaculturists are eligible for the protections of the AFPA. Apparently their status was never considered at the time the AFPA was developed. This is not surprising because freshwater cultivation of catfish for commercial sale was just emerging as a viable business at the time the Act was debated and enacted.

The term "producer" as defined in section 3(b) refers to any person engaged in production of agricultural products as a "farmer, planter, rancher, dairymen, fruit, vegetable, or nut grower."[52]"Agricultural products" is defined in section 3(e) only in terms of what it does not include, cotton or tobacco.[53] Thus aquaculture is neither specifically included nor excluded from the AFPA. A clarification of section 3(b) to include aquatic fish producers would remove ambiguity and insure these producers AFPA protection.

I. Advisory Committee

As part of the 1983 amendments to its state law, California established an advisory committee, composed of an equal number of representatives of bargaining associations and processors, to study and report to the Director of Food and Agriculture on all aspects of farm bargaining within the state.[54] This committee has kept agricultural bargaining in the mainstream of public policy debate in California.

Creation of such a committee at the national level could serve as a focal point for producer-handler discussions on improved bargaining and marketing of farm products. It could also stimulate research on better negotiation techniques to reach agreements more efficiently and with less acrimony.

J. Enforcement

The addition of some penalty for engaging in a prohibited practice beyond a restraining order and restitution would

52. AFPA, *supra* note 1, § 3(b) (codified at 7 U.S.C. § 2302(b) (1988)).
53. *Id.* § 3(e) (codified at 7 U.S.C. § 2302(e) (1988)).
54. CAL. AGRIC. CODE §§ 54441-54446 (West 1986).

limit the economic incentive to consciously violate the Act. The new Maine and Washington laws provide for a civil penalty of up to $5000 for each violation,[55] in California the maximum is $10,000.[56]

Government enforcement activity might be more efficiently applied by authorizing civil administrative penalties for AFPA violations. Several recently enacted federal laws to promote orderly marketing of individual commodities empower the Secretary of Agriculture to assess civil penalties of not less than $500 or more than $5000 for each violation.[57] This places the initial responsibility for enforcing the law in the hands of those persons most familiar with its intent, who also possess the expertise to evaluate whether punitive action is appropriate.

VIII. CONCLUSION

Effective farm bargaining has been an important factor in improving farm income for producers of numerous commodities in several states. Bargaining associations would likely be a valuable means of producer self-help for other crops and areas if some additional public promotion and support of farm bargaining was adopted. One approach is to simply repeal the disclaimer clause and free the states to experiment.

The other is to amend the AFPA to permit producers to bargain in a better legal environment. A strengthened AFPA would establish fairly uniform national rules for bargaining so producers and processors in different parts of the country would not be placed at a comparative disadvantage.

Most of the major farm organizations are on record in support of stronger farm bargaining legislation. So are national and state agricultural organizations representing cooperatives. Many supporters prefer nationwide application of a

55. ME. REV. STAT. ANN. tit. 13, § 1959(5) (West Supp. 1989); Agricultural Marketing and Fair Practices Act, ch. 355, § 9 (1989 Wash. Legis. Serv. 1271 (West)).

56. CAL. AGRIC. CODE §§ 54461-54462 (West 1986); *Id.* § 54458 (West Supp. 1990).

57. *See, e.g.*, Egg Research and Consumer Information Act (codified as amended at 7 U.S.C. § 2714(b) (1988)) (enacted in 1974 and amended in 1980); Potato Research and Promotion Act (codified as amended at 7 U.S.C. § 2621(b) (1988)) (enacted in 1971 and amended in 1982); Honey Research, Promotion, and Consumer Information Act (codified at 7 U.S.C. § 4610(b) (1988)) (enacted in 1984).

true dispute resolution procedure that insures timely determination of prices and terms of sale. Recognizing that this may spark intense political debate, proponents would, at a minimum, seek repeal of the disclaimer clause and clear authority for the states to enact legislation tailored to each jurisdiction's needs.

While some elements of the food processing industry can be expected to oppose any government policy that might improve prices paid to growers, the willingness of California food processors not to oppose that state's new legislation indicates that a modest proposal might not face the level of political opposition likely to surface if restrictive provisions, such as binding arbitration or an agency shop, are sought. A responsible proposal, if enacted, might provide agricultural producers with valuable assistance in improving their incomes at minimal cost to the government and with negligible impact on consumer food costs.