

A comparison of California's ALRA and the Federal NLRA

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California's 1975 Agricultural Labor Relations Act (ALRA) granted all farmworkers the right to form or join unions and to bargain collectively with farm employers, or to refrain from union activity, and to make these decisions without interference from employers. The law specified the rights of farmworkers, defined the unfair labor practices that employers and unions can commit, and established an Agricultural Labor Relations Board (ALRB) to supervise representation elections and to rule on unfair-labor-practice charges.

California's ALRA differs from the federal National Labor Relations Act (NLRA) in several important respects. This article reviews the major differences between the federal and state labor relations laws and summarizes the arguments for and against proposed changes in the ALRA.

Farmworkers were excluded from the National Labor Relations Act in 1935 because "agriculture was different." Farmers argued that a strike at harvest time could wipe out crop receipts for an entire year, thus giving transient and seasonal farmworkers enormous bargaining power. Attempts to include farmworkers under the NLRA during the 1940s through the 1960s were defeated by farmers, who argued that if farmworkers were to be granted labor relations rights, a separate labor relations law that could accommodate the seasonal nature of agriculture was needed.

In the late 1960s, the United Farm Workers (UFW) testified in favor of simply extending NLRA rights to farmworkers. The UFW noted that 14 states have "little NLRAs" to cover private nonfarmworkers in small intrastate establishments and that two of these states, Wisconsin and Hawaii, cover farmworkers under these state laws without apparent problems.

Instead of coverage under federal or state NLRAs, four states enacted separate labor relations laws for farmworkers: California, Arizona, Idaho, and Kansas. Since 1979, California farmers have been trying to amend the ALRA "to bring it into conformity with the NLRA." The state and federal laws differ primarily in: the broad "good standing" clause allowed by the ALRA; the make-whole remedy for bad faith bargaining; secondary consumer boycotts; and definitions, bargaining unit issues, and election procedures.

Good standing

A union shop clause is an agreement between an employer and a union that requires all employees to join the union and remain members in good standing to keep their jobs. Under the federal

NLRA, a union can require an employer to discharge a union member under a union shop agreement only if the member fails to pay periodic dues and initiation fees. The NLRA permits a union to discipline members who cross the union's picket line, but if a member resigns from the union by canceling his or her dues checkoff (during an economic strike, the contract with a union shop agreement is not in force) and turning in the membership card, the union cannot discipline the strikebreaker as a union member. Under the NLRA, a union member may be fined, be kicked out of the union, and lose the right to run for union office, but so long as a worker covered by a union shop agreement continues (or resumes) the payment of periodic dues and assessments, the union cannot use the fine or other disciplinary action as the reason to order the employer to fire the worker.

The state ALRA gives the union more latitude to discipline its members. The United Farm Workers argued that the ready availability of strikebreakers to do seasonal farmwork requires the union to maintain strike discipline among union members. Accordingly, Section 1153 (c) of the ALRA permits union shop agreements that require union membership on or after the fifth day of employment, and membership is defined as "the satisfaction of all reasonable terms and conditions uniformly applicable to other [union] members in good standing." A typical UFW union security clause states that:

"Union membership shall be a condition of employment. Each worker shall be required to become a member of the union immediately following five (5) continual days after the beginning of employment . . . and to remain a member of the union in good standing. The union shall be the sole judge of the good standing of its members."

Union members may legally be declared "in bad standing" and the union can require the employer to fire such workers. Such action may be taken for cross-

ing an authorized picket line as a union member (without resigning), for failing to pay union assessments, or for one of 30 other reasons. The UFW constitution spells out the procedures under which a member can be charged with committing a good-standing offense and the mechanism for reaching a decision. UFW members declared not in good standing by the UFW may appeal the union's decision internally and to the ALRB. Other farm labor unions can and do establish different good-standing criteria.

Most UFW contracts include a paid Citizenship Participation Day (CPD), usually the first Sunday in July. UFW members receive eight hours pay, which, if authorized by the farmworker, the employer sends to the UFW. The UFW uses these funds to cover collective bargaining costs and to fund political activities. Union members must authorize the remittance of the entire \$50 to \$100 to the UFW, but farmworkers may go individually to their local UFW office and request a refund of that portion of the contribution that is used for political activities.

California farmers generally oppose the broad "good standing" provisions of the ALRA and the CPD checkoff. Even though farmers are not required to sign union shop agreements or contracts that include a CPD checkoff, they argue that the UFW makes the union shop and CPD such bargaining priorities that the law must be amended to narrow the union's right to define the good standing of its members. Some farmers argue that the ALRB's Administrative Law Judges are prone to find them guilty of bad-faith bargaining if they refuse to concede to the UFW's institutional demands — traditional dues checkoff and union security demands — as well as ALRA good standing. Administrative Law Judge Wolpman's May 1982 decision on Bruce Church, Inc. (BCI) found that the firm's "unrelenting position on each of the UFW's institutional needs . . . taken together . . . can support an inference that BCI was bargaining to

ward a contract which would delegate the UFW to a secondary role inconsistent with its right to act as the exclusive bargaining representative of workers" (p. 65).

Since 1975, about 20 union members have filed charges against a farmworkers' union after being found "in bad standing" and discharged at union request by an employer. Some farmers allege, however, that the threat of being found in bad standing and then denied employment on high-wage unionized ranches keeps most farmworkers from filing charges against a union.

The major policy question raised by good standing is whether California should depend on farmworker complaints and ALRB investigations to guide the conduct of internal union affairs or whether California should prescribe the rules and procedures that determine good standing in law. Good standing can give the union a great deal of influence over its members.

The argument against the ALRA's broad good-standing provision is that farmworker unions can and do abuse their members. The argument for such a broad clause is that farmworker unions need internal cohesion, because the ready availability of (alien) strikebreakers and labor-displacing machinery limit their economic power. If union members believe that good standing is abused, they can work to change the union constitution or union leadership. Under the good-standing clause, the ALRB acts as lawyer and investigator for an aggrieved worker, while the federal NLRA merely permits an aggrieved worker to hire his or her own lawyer and sue the union in federal court.

Make-whole remedy

The ALRA gives the ALRB considerable discretion to fashion remedies after an employer or a union is determined to have committed an unfair labor practice. However, Section 1160.3 specifically suggests that employers should make their workers whole if the employers refuse to bargain "in good faith" by sending negotiators to scheduled meetings and discussing union demands with the intent to reach agreement. The ALRA does not require an employer or union to make any specific concessions, but both sides' actions must reflect a bona fide attempt to reach agreement on all matters affecting wages and employment. An employer who does not bargain in good faith may be required to make employees whole by paying them the difference between the wage that would have been negotiated if the employer had bargained in good faith and the wage that was actually paid. For example, an employer who paid 100 workers \$5 hourly for 1,000 hours while

bargaining in bad faith, when the good-faith wage was \$6 hourly, might be ordered to pay each employee \$1,000 plus interest.

Under the federal law, the National Labor Relations Board (NLRB) may have the authority to order a make-whole remedy, but it has never taken such action for refusal to bargain in good faith. The NLRB may order a discharged worker to be reinstated with back pay, but it does not order that back wages be paid to employees who worked while the employer bargained in bad faith.

The argument against a make-whole remedy is that it imposes the wages and fringe benefits agreed to by other employers on an employer who is not required by law to agree and that the ALRB, in ordering such a remedy, is "intruding" into the bargaining process. However, without the make-whole remedy, employers may bargain in bad faith for several years, paying their workers less than the going wage, and profiting from unlawful bad-faith bargaining.

Secondary consumer boycotts

Both the California ALRA and the federal NLRA prohibit "classic" secondary boycotts: for example, if the union gets employees of a supermarket chain to stop handling a winery's products in order to put indirect pressure on the winery to settle with the union. However, the California law permits the union to urge a consumer boycott of the supermarket chain, if the union is the certified bargaining representative for the winery's farmworkers. The federal NLRA would permit the union to picket the supermarket chain and advise consumers that it had a dispute with the winery but the union would not be allowed to urge consumers to boycott the supermarket because it handled the winery's products.

The argument against secondary consumer boycotts is that they have been prohibited under the NLRA since 1947 and that California farmers who produce several commodities may have all of their commodity sales tainted by secondary activity directed at only one commodity. The argument for secondary consumer boycotts is that they were legal under the NLRA between 1935 and 1947, so secondary consumer boycotts should be permitted until labor relations in agriculture become mature and stable.

The NLRA prohibits most "hot cargo agreements" — clauses in collective bargaining contracts that say the union and the employer agree not to deal with the products of another employer. Under the ALRA, a hot cargo clause in, for example, an agreement between a grape grower and a union could prohibit the grower from buying vines from a par-

ticular nursery if the union were certified as the bargaining representative for the employees of both the grower and the nursery.

Definitions, other issues

The ALRA generally makes the grower or landowner the employer and therefore responsible for unfair labor practices committed by foremen and supervisors as well as by farm labor contractors who do not supply equipment or make independent harvesting judgments. The NLRA defines an employer as anyone who employs workers, so that NLRA language would require the ALRB to decide, case by case, whether a farm labor contractor was an independent business or the employer's agent. If contractors were considered employers as under the NLRA, a typical California ranch could have at least two bargaining units, one for the more or less permanent employees hired directly by the grower and landowner and another for the seasonal harvest workers supplied by a contractor.

The argument for considering labor contractors to be employers is that they often recruit, supervise, and pay farmworkers, even if the grower tells the contractors when and where to harvest crops. Growers may not know or understand what labor contractors say to the work crews, so employers argue that they should not be responsible for the unfair labor practices committed by contractors. One argument against treating labor contractors as employers is that the ALRA was designed to bring stability to labor relations in agriculture and that growers and landowners are more stable employers than itinerant contractors. If labor contractors were employers, the argument runs, the growers could rely on them to shield growers from the ALRA. Workers whose rights were violated would be unlikely to recover back wages from transient farm labor contractors. (cont'd.)

California farmworker unions

Dairy Employees Union #17
Chino, CA 91710

Fresh Fruit and Vegetable Workers
El Centro, CA 92243

IBT, Local 63
Los Angeles, CA 90015

Independent Union of Agricultural Workers
Salinas, CA 93905

International Union of Agricultural Workers
Oceano, CA 93445

Teamsters Local 890
Salinas, CA 93905

United Farm Workers
Keene, CA 93531

The ALRA normally requires that all of an employer's workers be placed in one "wall-to-wall" bargaining unit. Under the national law, the labor relations board decides on the appropriate bargaining unit by considering factors such as the community of interest among workers, similarities and differences in wages and working conditions among different groups of workers, and the history of bargaining at similar establishments. NLRA language could permit seasonal and year-round farmworkers to decide that two bargaining units were justified.

The argument for separate bargaining units is that seasonal and year-round farmworkers may have different bargaining and employment priorities. For example, year-round workers may be interested in pensions and other fringe benefits whose value increases with one employer, while seasonals may be more interested in cash wages and health insurance that provides coverage throughout the state.

One argument against separate bargaining units is that even seasonal workers may be employed on one farm for different periods, justifying three, four, or even five bargaining units on one farm. Seasonal farmworkers are overwhelmingly ethnic minorities, so separate bargaining units may reinforce the traditional powerlessness of minority farmworkers.

The ALRA requires a secret ballot election before a union can be certified as the exclusive bargaining representative for a group of farmworkers. Under the NLRA, an employer may voluntarily recognize and bargain with a union, if the employer believes that a majority of the employees favor the union. The argument against voluntary recognition is that an employer can collude with a union and sign a "sweetheart contract" that benefits the employer and union leaders but not the workers.

The California ALRA normally allows representation elections only when at least some seasonal workers are employed. Under the ALRA, at least 50 percent of normal peak employees must be at work and an election must be held within seven days after the Agricultural Labor Relations Board receives a valid petition from a union requesting an election. The election is held, and objections are resolved after the election. Under the NLRA, elections may be held anytime and election issues are decided before an election is held, meaning that objections can delay an election for weeks or months.

The argument for the peak employment requirement and quick election procedure under the ALRA is that farmwork is seasonal and some farmworkers are migratory, so NLRA language would

allow an employer to delay an election and defeat the union. The argument against ALRA election procedures is that NLRA procedures apparently work well in other seasonal industries without statutory peak employment and quick election language.

Under the state farm labor relations law, union members may petition the board to hold a decertification election if at least 30 percent of the employees sign a petition when employment is at least 50 percent of its normal peak and the petition is filed during the last year of a valid collective bargaining agreement. Under the NLRA, the decertification "window" opens whenever 30 percent of the employees sign a decertification petition.

The argument for the state rule is that seasonal workers should not be deprived of their collective bargaining coverage by year-round employees who might vote for decertification during the off season. The argument against the ALRA limitation of decertification to the last year of the collective bargaining agreement is that this rule does not allow farmworkers to decertify a union that cannot obtain or will not sign a collective bargaining agreement.

The ALRA establishes no procedure to end strikes or lockouts during emergency farm labor disputes. California farmers argue that the governor should have the power to order a "cooling off" period if a strike or threatened strike involves a substantial part of California agriculture and threatens public health and safety. California farmers have proposed an 80-day cooling off period with the provision that, after 60 days, the ALRB must hold a secret ballot election among affected workers to see if they want to accept the employer's last offer. The argument for a cooling off period is that strikes and strike losses are minimized. The argument against it is that the government could intervene in legitimate labor disputes to destroy a union's bargaining power, especially given the short harvest seasons of most commodities.

The ALRA allows the state farm labor relations board to depart from NLRB precedent whenever necessary to carry out state mandate to bring peace and stability to agricultural labor relations. The ALRB believes that migrancy, language barriers, and seasonality prevent automatic adoption of NLRB rules and procedures, so the ALRB has prescribed, for example, rules governing access to employees on employer property in advance instead of issuing access orders on a case-by-case basis. Similarly, the NLRB is quick to order a new representation election if "laboratory standards" for conducting an election are violated. The ALRB, in contrast, orders a new

election only if improper conduct has affected the previous outcome, arguing that workers frequently move on after the harvest and are thus disenfranchised. Another election during the next harvest could include new workers and yield inconsistent results.

The national board has ruled that an employer who buys a business with a valid union contract must bargain with the union and respect that contract if the new employer retains a majority of the current workforce. The state farm labor board in contrast, looks to (1) the continuity of the agricultural operation (does the new owner grow the same crop?), (2) how much of the old workforce was retained, and (3) "other factors" to determine whether the new employer must bargain with the union or respect the existing contract. The state board does not place as much emphasis on workforce continuity, because it assumes that there is a great deal of turnover from season to season.

Both state and federal labor relations laws are nonpunitive: neither fines or jails employers, but both may require employers to pay back wages or rehire or reassign aggrieved workers. Under the federal law, a typical remedy for an employer unfair labor practice is that the employer must agree to cease and desist from the unlawful conduct, post a notice informing the workers that an unfair labor practice was committed, and reinstate improperly fired workers with back pay and interest.

The state farm labor relations board usually orders an employer to read an ALRB notice to the assembled workers that explains that an unfair labor practice was committed and that the employer will not commit such practices in the future. In addition, the employer usually must mail a copy of this notice to workers who have moved on and post the notice in the languages spoken and written by workers. The ALRA also orders reinstatement of improperly discharged workers with back pay and interest.

Conclusion

The major question raised by differences between the federal and state labor relations laws is whether agriculture truly is "unique." If it is, must labor relations laws be sensitive to the differences between farmwork and nonfarm employment?

The ALRA is California's recognition that farmworkers should have labor relations rights and that the unique features of farmwork justify a statute and administrative agency for agriculture.

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