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## **ALRB or NLRB: Where Do We Draw The Line? -- Ronald H. Barsamian**

ALRB OR NLRB:

WHERE DO WE DRAW THE LINE?

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The occasion of the 25th anniversary of California's Agricultural Labor Relations Act ("ALRA") [Calif. Labor Code §§ 1140 et seq.] comes at a time of change regarding the jurisdictional dividing line between the Agricultural Labor Relations Board ("ALRB") and the federal National Labor Relations Board ("NLRB"). Much of the change is certainly the result of changes in the means of agricultural production. However, case law from both agencies, especially during the last decade, has significantly altered the long standing rules.

The effect these changes have had at the workplace is profound. In some instances, employees performing complimentary tasks in an integrated agricultural practice, such as custom harvesting, find themselves working under different laws. In other instances, employees performing the same exact task, but for different employers, find themselves under different laws. Some of these laws may affect their terms and conditions of employment, such as how many hours they work before they earn overtime rates. Other laws may affect their organizational rights and result in some employees being represented by a union, while other employees for the same employer are represented by a different union, or none at all. In other situations, an employee may perform a task under one set of laws, and rotate into another, closely related, job function which is covered by a different set of laws.

While this may appear to be a turf war between agencies, or tactical moves by the several interested parties in organizational battles, the ultimate result is a dysfunctional workplace where employers are frustrated by regulatory traps, and employees end up unsure of what their terms of conditions of employment, and their legal rights, are.

## The Federal Agricultural Exemption

The jurisdictional dividing line between the federal and California labor agencies can be basically stated as: where the NLRB's jurisdiction ends, the ALRB's begins. The National Labor Relations Act ("NLRA") [29 U.S.C. §§ 141 et seq.] covers all employees engaged in interstate commerce except "any individual employed as an agricultural laborer." [NLRA, Section 2(3).] The ALRA applies only to agricultural employees excluded from NLRA coverage. [Cal. Labor Code Sections 1140.4, 1148.] Since 1946, Congress has annually reaffirmed this exclusion of agricultural occupations by attaching a legislative rider to the NLRB's appropriation measure, which provides that no part of the appropriation should be used in connection with bargaining units of "agricultural laborers" as agriculture is defined in the Fair Labor Standards Act ("FLSA") [29 U.S.C. §§ 201 et seq.].

Section 3(f) of the FLSA defines "agriculture" as follows:

'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The FLSA is enforced by the Wage and Hour Division of the Department of Labor ("DOL"), and caselaw reviewing its interpretation of the agricultural exemption obviously has an impact on the same issue for the NLRB and ALRB.

A little over fifty years ago, the United State Supreme Court decided *Farmers Reservoir & Irrigation Co. v. McComb* (1949) 337 U.S. 755, 69 S.Ct. 1274, which examined the FLSA's agricultural exclusion in a wage and hour case involving a Colorado mutual irrigation company owned by the farmers who received water from it. The company did not sell the water, but rather distributed it to the shareholder-farmers who paid an annual assessment to cover the costs of operating the system. The company had not complied with the record keeping or wage and hour provisions of the FLSA, and the DOL was attempting to obtain an injunction to prevent further violations. The company claimed its employees were not subject to the FLSA because they fell within the agricultural exclusion. The company's "field employees" consisted of ditch riders, lake tenders and maintenance employees who controlled and maintained the company's canals, reservoirs, and headgates. The company further claimed its single bookkeeper was also excluded as part of the operation. The district court found that all of the employees were excluded

from the FLSA as agricultural employees. The court of appeals reversed as to the field employees, finding that they were not excluded, but did not rule on whether the bookkeeper was an agricultural employee, finding instead that the bookkeeper fell under the administrative exemption.

The Supreme Court, in reviewing the definition of agriculture under the FLSA, explained that:

[A]s can be readily seen, this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc. are listed as being included in this primary meaning. Second, there is the broader meaning. Agricultural is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently [sic] to or in conjunction with 'such' farming operations. [*Farmers Reservoir & Irrigation Co. v. McComb*, supra 337 U.S. at 762-763].

The Supreme Court analyzed the work performed by the company's field employees and concluded they were not engaged in primary agricultural occupations. The Court found it important that the company itself owned no farms and raised no crops. The field employees were not engaged in irrigation because they handled only delivery of the water through the headgates, which the farmers and their employees were forbidden from operating, and not the actual distribution to the growing plants. The Court also concluded that the term "production," as it was used in the FLSA's definition of agriculture, could not extend to include the work performed by the irrigation company's field employees.

The Supreme Court then turned to whether the company's field employees were engaged in work which constitutes a practice performed incidental to or in conjunction with farming. Finding that it was, the Court explained that such practices were exempt only if they are performed by a farmer or on a farm. Congress had been very specific when it adopted the secondary agricultural exemption provision. Originally, the exemption covered such practices only if performed by the farmer. The Senate debated this issue because it would exclude such practices as the threshing of wheat, where the function was necessary to the farmer, but was not performed by the farmer or his employees. It was decided that wheat threshing companies, even though separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm. Thus, the legislation was amended to provide that the secondary agricultural exemption included practices incidental to farming only when performed by the farmer or on the farm. The Court concluded that the irrigation company's field employees were not engaged in a secondary agricultural practice performed by the farmer (remember, the Court noted that the company did not own any farms or raise any crops), or on the farm (the practice performed by the company stopped at the headgate). The Court found that

while the irrigation company was owned by the farmers it served, it was a separate business which controlled its own employment practices, noting that legislative debate had concluded that agricultural cooperatives owned by farmers were not automatically exempt. Therefore, the irrigation company's employees were covered by the FLSA.

The analysis used by the Supreme Court in 1946 is the same basic approach used today by the NLRB and ALRB, as well as by the DOL and California's Labor Commissioner, in determining whether they have jurisdiction over particular employees. Issues arise under both the primary and the secondary aspects of the federal agricultural exclusion as to where the dividing line falls in given situations.

### Primary Agricultural Occupations

Most of the time, determining whether employees are engaged in primary agricultural occupations is not a difficult problem. Typically, employees employed directly by the farmer, or secured through farm labor contractors, to perform such activities as tractor driving, irrigation, pruning, transplanting, weeding, harvesting, herding, milking, etc., are clearly primary agricultural employees and under the jurisdiction of the ALRB. As the following sample of cases illustrate, issues generally arise when the activities are performed by independent providers of services.

In *Produce Magic, Inc.* (1993) 311 NLRB No. 173, 144 LRRM 1001, the NLRB was faced with an opportunity to determine whether it had jurisdiction over an independent custom harvester. As with many agricultural commodities, lettuce used to be packed (in ice), handled and prepared for shipment in packinghouses, i.e., away from the fields. It was a simple matter to determine that the packinghouse operation was a secondary activity, with NLRB jurisdiction dependent upon whether the packinghouse handled produce owned by another farmer. However, the packing of lettuce moved to the fields in the 1950's with the development of vacuum cooling (other commodities, such as broccoli and melons, have also moved to field packing due to similar changes). For decades, such field packing operations were treated as primary agricultural practices.

The employer in *Produce Magic, Inc.* was a custom harvester of lettuce and other vegetables. The United Farm Workers of America, AFL-CIO ("UFW") had petitioned the ALRB for an election to represent all of the employees engaged in the operation, including cutters, packers, loaders, box persons, etc. The employer then filed a petition with the NLRB asking that its employees be determined to be under the NLRA, except for the actual cutting work, because the employer performed the secondary practice on a commercial basis. The Regional Director ruled that the loaders, water persons, staplers, drivers, carton persons - everyone involved in the process after the lettuce was cut and packed into the cartons - were all under the NLRB's jurisdiction. The NLRB upheld the Regional Director's decision, and the UFW withdrew its demand for recognition. What had been a commonly recognized cohesive agricultural operation was now split up

between two laws, two agencies, and the interests of competing unions.

In an earlier case, *Mario Saikhon, Inc.* (1986) 278 NLRB No. 166, 122 LRRM 1361, the NLRB examined the use of so-called field packing "machines." As with lettuce and other commodities, the packing of melons (cantaloupes, honeydews, mixed melons) had been performed in packinghouses where they were originally packed in ice using wooden crates. With the development of forced air cooling, melons could be packed in much lighter and easily transportable (when broken down) cardboard cartons. Changes in transportation, from train cars to over-the-road containers, brought a change from hand loading to palletization and forklift loading. Despite the changes this caused in the work performed in the melon packinghouses, an even more monumental change was in store for the industry.

One area that had concerned many melon shippers, especially for cantaloupe shippers had been wasted yields. Melons were being harvested and put into trailers several feet deep, and then transported to the packinghouses. Long hauls and heat caused a great deal of waste - the melons at the bottom of the trailers had a difficult time arriving in good shape. In addition, a packinghouse is an expensive facility to operate, and melons were left in the fields when the yield from additional harvesting passes became too low to cover the cost of operating the packinghouse.

An alternative was found in the development of field packing machines, originally for broccoli, and later specifically for melons. These "machines" are basically packing platforms which are pulled through the fields. The produce is cut and placed on conveyor belts which move them up to the platform where they are packed into cartons. The cartons are then palletized and transported to the cooling and shipping facility. Because of the much lower cost of operating these machines, versus a packinghouse, more "passes" can be made, and only packed melons are transported, increasing yield and decreasing costs respectively.

The question presented to the NLRB in *Saikhon* involved the interests of two competing unions. The UFW had long represented all of the employer's agricultural employees, under the ALRA, while the Fresh Fruit and Vegetable Workers ("FFVW") had long represented the employer's packinghouse employees under the NLRA. In simple terms, the UFW argued that the work of the field packing operations was conducted in the field, and therefore, should be deemed agricultural work within the jurisdiction of the ALRB, and the UFW's certification. The FFVW argued that regardless of where the process occurred, it was still a packing operation akin to what occurred in a packinghouse and, because the employer packed for other farmers, fall under the jurisdiction of the NLRB, and part of the FFVW's previous bargaining relationship with the employer.

The NLRB reviewed the work that was being performed. The cutting of the produce, the severing of the melon or broccoli from the plant, was obviously a primary agricultural operation. However, the NLRB ruled that from that point forward, the packing, loading,

etc., the field packing operation function was the same as it had been performed in the packinghouse, and therefore was a secondary agricultural (commercial in this case) operation under the jurisdiction of the NLRB.

There are many such field packing operations which involve rotation among employees. The employees may pick the produce one day, and pack or perform another function on another. Obviously, splitting up such cohesive operations between the two laws, and two unions, creates difficulties for employees, unions and employers alike.

The ALRB recently issued a decision in *Associated-Tagline, Inc.* (1999) 25 ALRB No. 6, which reviewed work performed by a custom provider of specialized services to farmers. The employer blends fertilizer components and sells them directly to farmers or through retail outlets. The employer also employs individuals that it dispatches to farmer-customers to spread soil amendments, engage in cultivation, create furrows, build up beds and apply fertilizer. Many of the employees performed work in the employer's facility at times, while being dispatched to perform the listed functions at other times. It was the work of these dispatched employees that was the subject of an ALRB representation petition by Teamsters, Local 890.

The Teamsters had won an NLRB election for the employees when they performed "non-agricultural" work. The Teamsters' petition before the ALRB concerned the employees when they performed alleged "agricultural" work. The ALRB, looking back to the analysis in *Farmers Reservoir & Irrig. Co. v. McComb*, supra, concluded that the work performed when the employees were dispatched to the farmer-customers was a primary agricultural operation.

There should be no dispute that when spreading amenities on bare ground, plowing the fields, creating planting beds, carving out furrows, and applying fertilizer to growing plants, the application employees are engaged in actual and direct farming activities - functions that are an established part of agriculture and necessary to the proper growth and development of the agricultural commodities produced by the grower-customer. [Associated-Tagline, Inc. 25 ALRB No. 6 at p. 7.]

In finding that the application work was a primary agricultural operation, the ALRB found that while Associated-Tagline was a commercial enterprise, it was "immaterial" whether the employer was a "farmer" under the FLSA definition. Pursuant to a bargaining unit clarification petition filed by the employer, the NLRB's Regional Director reached a consistent decision.

Comparing the Supreme Court's analysis in *Farmers Reservoir & Irrigation Co. v. McComb*, supra, with the ALRB's ruling in *Associated-Tagline, Inc.*, it is evident that a very fine line is being drawn, one that is difficult to see. The Supreme Court stated the question as follows:

Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. [Farmers Reservoir & Irrigation Co. v. McComb, supra 337 U.S. at 761-762, emphasis added.]

In reviewing the work being performed by the ditch riders, lake tenders and maintenance men, the Supreme Court concluded that:

[I]t is clear, first, that the occupation in which the company's employees are engaged in is not farming. The Company owns no farms and raises no crops. Irrigation, strictly defined - that is the actual watering of the soil - may no doubt be called farming. And the work of the farmers in seeing to it that the water released from the company's ditches is properly distributed to the growing plants undoubtedly is included in farming as being part of the process of cultivating and tilling the soil. But the significant fact in this case is that this work is not done by the company's employees. There is a clear and definite division of function. [Farmers Reservoir & Irrigation Co. v. McComb, supra 337 U.S. at 763, emphasis added].

It appears that the Supreme Court was considering the end product of the activity, and whose employees were performing it, regardless of whether the activity itself was traditionally regarded as primary agricultural. With the changing technologies in the agricultural industry, work performed by farmers is increasingly being performed by custom outside providers of specific services. The work itself may be identical and necessary to the overall production of the agricultural commodity. The ditch riders in Colorado who work for a separate irrigation company perform the same functions as irrigators working for farmers. The fertilizer company's employees in Associated-Tagline, Inc., supra are dispatched to farmers to prepare the fields and apply the end product, fertilizer. They perform the same function as the employees of the farmer may have performed, but they have no direct interest in the production of the agricultural commodity.

Thus, one might argue that the Supreme Court did introduce an issue of "commercialibility" into the primary agricultural analysis, downplaying the nature of the actual work being performed. The ALRB and the NLRB, as the cases set forth above illustrate, appear to have followed an approach which ignores the question of whose employees perform the work if the work is traditionally a primary agricultural

occupation. One might argue that if the ALRB/NLRB approach was followed, the ditch riders in Colorado should have been excluded from coverage under the NLRA as being engaged in a primary agricultural occupation, while, if the Supreme Court's analysis was followed, the California fertilizer applicators should have been included within the coverage of the NLRA. Finally, one might argue that it all depends upon which side of the headgate one stands.

### Secondary Agricultural Occupations

If a subject employee is found to be engaged in a secondary agricultural occupation, the question is whether the activity is "performed by a farmer or on a farm. If it is not, the activity is said to be a "commercial" secondary agricultural occupation in that one company is performing it for another under a business relationship. Because the previous section examined whether the subject activity is either a primary or secondary agricultural occupation, the following reviews whether the secondary agricultural occupation is commercial or non-commercial.

While earlier cases dealt with the issue, the NLRB's decision in *Employer Members of Grower-Shipper Vegetable Assn. of Central California* (1977) 230 NLRB 1011, 96 LRRM 1054 was definitely the high point for attempting to define commerciality based upon the amount of ownership of the agricultural commodity. The case arose when several Teamster locals petitioned the NLRB for a ruling that the drivers, driver-stitchers, stitchers and folders employed by the Association's membership were within the NLRB's jurisdiction. The UFW intervened and argued that the employees were agricultural employees within a broad interpretation of the agricultural exemption. The Association and the Teamsters wanted an industry-wide determination based upon a multi-employer bargaining group, rather than on an individual basis.

The NLRB first determined that the field hauling operation that the employees were engaged in was not a primary agricultural operation, and that whether the employees fell within the agricultural exemption depended upon the commerciality of the operation. The Board relied on its then 20 year old decision in *Olaa Sugar Co., LTD* (1957) 118 NLRB 1442, 40 LRRM 1400, which held that "employees who perform any regular amount of non-agricultural work are covered by the [NLRA] with respect to that portion of the work which is non-agricultural." [*Olaa Sugar Co., LTD*, 40 LRRM at 1400, emphasis added.] In *Olaa Sugar*, the driver spent 50% of his time hauling sugar cane of independent growers to his employer's processing plant, and was found not to be exempt from coverage. In a later case cited by the NLRB, packinghouse employees who spent a substantial part of their time (15%) processing the crop of an independent grower were also found not to be exempt. [*The Garin Co.* (1964) 148 NLRB 1499, 57 LRRM 1175.] Based upon these decisions, the NLRB rejected the Association's and the Teamsters' arguments that a determination be made on an industry-wide basis, and concluded that it needed to determine whether each employer's employees performed a substantial and

regular portion of non-agricultural work.

The NLRB acknowledged the long-standing business relationships that had been forged in California's fresh vegetable industry: joint deals, contract harvesting, pack outs, etc., but concluded that in none of those types of arrangements where the employer only handled the crops grown by others, could the employer be found to be a "farmer." The hauling operations were part of the employer's shipping and marketing operations, which were incidental to farming. The employers who only engaged in shipping and marketing were found to be engaged in commercial secondary operations, and their employees were not exempt from NLRB jurisdiction. On the other hand, the employers who shipped and marketed only for themselves, utilizing their own employees to haul the produce, were found to have secondary agricultural operations performed by the "farmer," and their employees were all exempt from the NLRB's jurisdiction.

The final group of employers grew some of their produce, and, through business relationships, hauled the produce grown by other growers. The NLRB reviewed each of these employers' practices to determine whether their employees performed a regular and substantial amount of hauling of crops of independent growers. Essentially, the NLRB determined what percentage of the overall crop shipped and marketed by these employers were grown by other growers under contract with each of the employers.

In deciding what was "regular and substantial," the NLRB found that each employer varied in its use of outside crops for its overall production. For example, the Jack T. Baille Co. contracted for 50% of its crop, J.J. Crosetti Co. estimated that 60% of its employees' work hours were spent hauling other growers' crops; J.R. Norton Co. farmed 40-50% of its crop; etc. Other employers grew 90% or more of the total crop they hauled. The NLRB's dividing line? All of the employers who grew less than 90% of the crop they hauled were found to be within the NLRB's jurisdiction, the remaining employers' (90% or more) employees were found to be exempt.

This detailed approach was used in California for over a decade, with the ALRB, the NLRB, employers, and unions all reviewing growing "deals" to determine what percentage of a secondary agricultural operation's process was used for crops grown by someone other than the employer. As everyone in agriculture knows, such "deals" change from year to year (sometimes during the season), and they bring into question the form of the business relationship and who the parties are. Litigation involving such cases became extraordinarily length and complex. This all changed (somewhat) with the NLRB's decision in Camsco Produce Co. (1990) 297 NLRB No. 157, 133 LRRM 1228.

The case presented to the NLRB in Camsco Produce provided the NLRB with the opportunity to review the conflicting decisions it had reached in the Grower-Shipper case, and one year earlier in DeCoster Egg Farms (1976) 223 NLRB 884, 92 LRRM 1120, where the NLRB determined that the handling of any farm product not grown by

the employer will result in the loss of exempt status. The employer in Camsco Produce was a subsidiary of Campbell's Soup Company involved in the growing, harvesting and packaging of mushrooms throughout the country at various farms. The particular farm in question was located in Michigan.

In reviewing the mushroom farm's operation pursuant to the approach in Grower-Shipper, the Regional Director concluded that the work the employees performed, sorting, grading, quick cooling, was exempt secondary agricultural activity, based on a little over 4% of the employer's total production coming from other growers. The NLRB, on review, considered its previous conflicting decisions as well as the DOL's regulation interpreting the FLSA agricultural exemption:

No practice performed with respect to farm commodities is within the [agricultural exemption] by reason of its performance on a farm unless all of such commodities are the products of that farm. [29 C.F.R. 780.141 (1974), emphasis added.]

The NLRB found that its decision in Grower-Shipper, emphasizing the quantity of outside products, was a misapplication of the DOL's regulation, and overruled it to the extent it was inconsistent with DeCoster Egg Farms. However, as the NLRB noted, its inquiry did not end there.

The NLRB found that while DeCoster Egg Farms more accurately reflected the DOL's strict interpretation of the FLSA's agricultural exemption, it was not comfortable with the approach that its jurisdiction should always automatically follow what the DOL's interpretation was. The NLRB announced that the proper rule to apply in the context of the NLRA should rest on the regularity with which subject employees handled outside produce. The NLRB based this approach on what it saw as the differences in purposes and framework between the NLRA and FLSA. Essentially, the NLRB found that NLRA is concerned with longer periods of time in the regulation of labor relations and collective bargaining relationships, whereas the FLSA focuses on work standards for particular payroll periods. As the Board explained, it made little sense for the agricultural exemption to apply, and then be found not to apply, because of freak events (weather, crop failures), noting, for example, that its bargaining certifications were issued for a year.

Thus, the rule for determining whether a secondary agricultural operation's employees are exempt or not now depends upon whether outside agricultural produce, "however small the quantity may be," is handled on a regular basis. Long-standing business relationships between outside growers and the subject employers, rather than the amount of outside produce in a given year or season, became the critical aspect in determining whether secondary employees are exempt from coverage under the NLRA.

Who Makes The Decision?

While the ALRB and NLRB issued decisions about their respective jurisdictions which generally seemed to compliment each other, a battle royale was beginning which involved not only an employer and a union, but both agencies, two federal district courts and the Ninth Circuit Court of Appeals. While the federal agricultural exemption was at the heart of the case, the significance of this case's twists and turns was determining who makes the decision.

The events which gave rise to *Bud Antle Inc. v. Barbosa* (9th Cir. 1994) 35 F.3d 1355, 147 LRRM 2285 seemed "normal" enough from a labor relations standpoint. A labor dispute arose after negotiations between the employer and the FFVW; for a new contract covering the employer's cooling facilities employees, broke down in 1989. The FFVW had represented the secondary agricultural employees pursuant to an ALRB certification issued in 1976. The employees went on strike, and the employer responded to by implementing its "last and final" offer, locking out the striking employees, and hiring replacements. Both parties filed unfair labor practice charges concerning the events with the ALRB.

Bud Antle's operations had changed significantly since 1976. At one time, it was a fully integrated operation growing, harvesting, hauling, handling and cooling, transporting, and marketing its own crops. Beginning in 1981, however, the company began evolving into a marketing shipper which, by 1990, no longer grew any of the crops it shipped. Instead, the company used business relationships with independent growers who generally bore the risk of any crop failures up to the time of harvest. Near the end of 1989, and after it had submitted its own version of the labor dispute to the ALRB, Bud Antle realized that its operational changes brought into question whether its secondary agricultural employees were under the jurisdiction of the ALRB.

The company filed charges with the NLRB which were basically identical to the charges it had previously filed with the ALRB. The FFVW responded by alleging that the NLRB lacked jurisdiction. Several months later, the company made its formal position known to the ALRB in a letter; namely, that its cooling employees were commercial secondary agricultural employees because they only handled produce grown by outside growers, and therefore, fall under the jurisdiction of the NLRB. The ALRB, nevertheless, continued its investigation and prosecution of the union's charges against the employer.

The company filed a bargaining unit clarification petition with the NLRB, which was initially dismissed by the Regional Director. The NLRB ordered the petition reinstated and granted the ALRB's request for amicus curiae status. The company requested the ALRB to hold its proceedings in abeyance, but the ALRB declined to do so.

Bud Antle then proceeded to federal district court (for the first time), seeking injunctive relief against the ALRB. Soon thereafter, the NLRB's Regional Director issued a decision finding that the subject employees were not currently agricultural laborers, but

refused to make a ruling concerning their status prior to that time, which status, it was noted, was before the ALRB. The District Court for the Southern District of California refused to grant the company injunctive relief against the ALRB because:

Where the NLRB does not act to protect its own jurisdiction, this court will not interfere with the proper activity of a competent state tribunal. [*Bud Antle, Inc. v. Barbosa*, supra, 147 LRRM at 2289.]

Then, curiously, the FFVW filed an unfair labor practice charge with the NLRB.

The ALRB proceedings against the company continued, with the Administrative Law Judge finding that the subject employees were exempt from NLRB coverage as agricultural laborers. The ALRB affirmed, and the state court of appeal denied review.

Bud Antle proceeded to federal district court a second time, but this time in the Northern District of California. The company again sought injunctive relief, as well as damages, against the ALRB. The Northern District granted the ALRB's motion to dismiss,

and the case was appealed to the Ninth Circuit. All the while, the employees who first went out on strike in 1989 waited to find out whether or not they were under the jurisdiction of the ALRB and represented by the FFVW pursuant to the ALRB's 1976 certification. It was now 1994.

After addressing the myriad of procedural issues, the Ninth Circuit concluded that the question of whether the subject employees were arguably under the jurisdiction of the NLRB was not exclusively before the ALRB because the NLRB had not clearly ceded jurisdiction over the issue. The Court found, after a complete ALRB unfair labor practice charge prosecution and review, trips to two different federal district courts, and numerous other procedural actions, that the NLRB's Regional Director had not found (nor could she) that the ALRB was the exclusive forum for deciding the jurisdictional issue in this case. The Court believed there was ample evidence concerning the company's operations in 1989 to at least raise the question of whether the subject employees were arguably under the jurisdiction of the NLRB. The Ninth Circuit ruled that under the federal preemption standard set forth in *San Diego Building Trades Council v. Garman* (1959) 359 U.S. 236, 43 LRRM 2838, it was up to "the NLRB to make the determination in the first instance." [*Bud Antle, Inc. v. Barbosa*, supra, 147 LRRM at 2297.] It did not, however, set forth a procedural approach to follow in such cases.

*Bud Antle, Inc. v. Barbosa* illustrates several significant aspects of federal agricultural exemption litigation. First, regardless of the inherent difficulty in interpreting the provisions of the exemption, it pales in comparison to the problems created when more than one agency is concerned with how it applies to a particular case. Second, agriculture is constantly changing as an industry. Any theory that processing methods, business

relationships and means of production will stay the same over time, is just as unreliable as any theory that market prices and the weather will be constant. Third, from Bud Antle's perspective, "it ain't over 'til its over." Finally, from the FFVW's and the employees' perspective, "anybody get the license of that truck?"

### Now What?

This review has not attempted to explore any difficulties arising from DOL or California Labor Commissioner rulings on the federal agricultural exemption as it applies to their areas of concern. Inconsistencies between their rulings, on the one hand (assuming that they agree), and the ALRB and NLRB, on the other hand, can lead to severe disruption in the agricultural workplace. There are already significant portions of the industry where wage and hour enforcement differs from labor relations interpretations of the exemption. The NLRB opined, in *Camsco Produce*, that, though they share the exemption provisions, the labor relations laws and the wage and hour laws exist for different purposes. Does that mean that inconsistencies should not only be expected, but accepted?

One obvious proposal, attempted in the past, is to simply do away with the federal agricultural exemption, at least as it applies to the NLRA. If that is the answer, California taxpayers can be thankful for the money saved, and the parties involved in California agricultural labor relations can fondly remember the last 25 years as a grand experiment.

Another concept is to recognize the differences between the ALRB and the NLRB when they are faced with such issues. The ALRB is justly concerned only with California agriculture, and how it can best regulate that industry's labor relations under the ALRA. The NLRB is concerned with its ability to regulate the labor relations of a multitude of agriculturally-related industries without being concerned whether certain individuals in some states are left without recourse to a labor relations law, or have access to a comprehensive state agricultural labor law. The Ninth Circuit's decision in *Bud Antle, Inc. v. Barbosa*, has reminded the parties to submit such matters to the NLRB "in the first instance." Are such cases so rare that the current situation involving the two agencies, where their decisions generally compliment each other, is workable in the future? Is a formal ALRB policy to defer such issues to the NLRB for determination necessary? Would such a policy include a formal petition to the NLRB by the ALRB, or by the interested parties? In an election situation, how long will it delay the ALRB's mandate to move quickly, compared to the NLRB's more relaxed approach, in resolving questions of representation?

It has also been suggested that the NLRB formally cede such issues to the ALRB, with no precedential effect outside of California. The ALRA is a comprehensive labor relations law, and the ALRB certainly has experience in such matters. What tribunal or

governing body will decide whether Hawaii or Arizona, for example, should be given the same ability? What about states that do not have a comprehensive agricultural labor law - should they be excluded from making such decisions within their borders?

There may not be any great desire to find solutions to the issues raised in this review. Many hold the view that no real problems exist; that the instances where there are inconsistent interpretations are relatively inconsequential. It is doubtful that all of the parties in *Bud Antle, Inc. v. Barbosa* would agree with that conclusion. As agricultural practices continue to evolve, situations involving both the ALRB and the NLRB will necessarily become more likely. The question remains, "Where do we draw the line?"

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