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Differences Between the ALRA and NLRA With Suggestions How to Make the ALRA/ALRB More Effective -- Robert P. Roy

THE ALRA AT 25 YEARS
DIFFERENCES BETWEEN THE ALRA AND NLRA
WITH SUGGESTIONS HOW TO MAKE THE ALRA/ALRB MORE EFFECTIVE

(October 4, 2000)

Robert P. Roy
General Counsel
VENTURA COUNTY

AGRICULTURAL ASSOCIATION
916 W. Ventura Boulevard
Camarillo, CA 93010
Telephone: (805) 388-2727
Fax: (805) 388-2767

A. HISTORICAL BACKGROUND OF ALRA

The Agricultural Labor Relations Act, (hereinafter referred to as "ALRA" or "Act") is found at California Labor Code § 1140, et. seq. The Act was promoted by the United Farm Workers of America, AFL-CIO ("UFW"), and its leader, Cesar Chavez. The Act was marshalled through the legislature during the Jerry Brown administration with the assistance of then Director of the California Department of Food and Agriculture, Rose Bird, who also became Chief Justice of the California Supreme Court.

Although the Act was premised upon the federal National Labor Relations Act (29 USC § 151, et. seq.), the ALRA contains significant statutory changes which the UFW believed were necessary to permit it to organize farm workers, conduct secret ballot elections and, ultimately, obtain collective bargaining agreements on behalf of agricultural workers.

California Labor Code § 1148 was also included to require the ALRB to follow applicable NLRA precedents in the interpretation of the ALRA. It was believed by the

authors of the Act that this provision would assist the ALRB during its initial years by relying upon applicable precedents of the federal labor act so as to ensure stability and uniformity in decision-making.

Quite apart from the ALRB's proper application of NLRA precedents, there exist significant textual differences between the ALRA and the NLRA which make the ALRA the most progressive labor relations law in the United States. Some of these significant differences include:

Conducting secret ballot elections within 7 days following the filing of an election petition;

Conducting 48-hour elections during strike circumstances;

No voluntary recognition of labor organizations by employers;

"Make-whole" remedy for an employer's bad faith refusal to bargain;

Recognition of secondary boycotts prohibited under the NLRA;

Petitions for extension of certification of labor organizations;

Permitting access to an employer's business premises by non-employee labor representatives.

Comprehensive bargaining units.

B. SPECIFIC STATUTORY DIFFERENCES

1. Elections - Unlike the National Labor Relations Act, which gives broad discretion to the ALRB Regional Director in deciding the timing of elections based upon a number of factors, the ALRA requires that elections be conducted within 7 days following the filing of either a representation petition for certification or a decertification petition.

[California Labor Code § 1156.3(a)(4); Kawano Farms, Inc., 3 ALRB No. 25 (1997)]

The Board has, however, allowed minor variances in this time period. where there is no showing of prejudice. [See, e.g., Jake J. Cesare & Sons, 2 ALRB No. 20 (1976) (election held 9 days after petition was filed); TMY Farms, 2 ALRB No. 58 (1976)]. The Board has held that the word "shall" in Section 1156.3(a)(4) of the Act is meant to be "directory" not mandatory.

The authors of the ALRA also took the unusual step of allowing representation elections to be held within 48 hours of the filing of a representation election during a labor dispute (i.e., strike). While the wisdom of this statutory provision is somewhat questionable, there have been only a limited number of 48-hour strike elections conducted under the Act. [See, e.g., Melco Vineyards, 1 ALRB No. 4 (1975); Verde Produce Co., Inc., 6 ALRB No. 24 (1980); Seabreeze Berry Farms, 7 ALRB No. 40 (1981); Muranaka Farms, 9 ALRB No. 20 (1983); Perez Packing Co., Inc., 15 ALRB No. 19 (1989); VCNM, 21 ALRB No. 9 (1995)].

2. Prohibition on Voluntary Recognition

California Labor Code § 1153, subdivision (f), states in relevant part:

"It shall be an unfair labor practice charge for an agricultural employer to do any of the following:

(f) To recognize, bargain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the

provisions of this part.%o

Inclusion of this specific statutory language at the behest of the UFW was the product of the UFW,s fear that agricultural employers would engage in voluntary recognition and signing of "sweetheart contracts%o with the Teamsters Union. Indeed, the history preceding the ALRA demonstrates that many agricultural employers voluntarily recognized the Teamsters and signed collective bargaining contracts so as to avoid dealing with the UFW. Enactment of this statutory provision made such conduct an unfair labor practice.

3. Bargaining Units - The California Labor Code § 1156.2 which sets forth the requirements under the ALRA for employee bargaining units, states in relevant part:

Unlike the NLRA which allows for bargaining units to be predicated upon certain crafts or classes of employees, the ALRA sought to avoid such divisions within the bargaining unit by requiring comprehensive, "wall-to-wall%o bargaining units. As a result, all "agricultural employees%o as that term is defined in Labor Code § 1140.4, subdivision (b), are included in the same bargaining unit. Thus, tractor drivers, irrigation employees, harvest employees, truck drivers, thin & hoe workers, mechanics, maintenance employees, and other ag-related job classifications are required to be in the same bargaining unit subject to the same collective bargaining contract.

4. "Make-Whole Remedy%o - Labor Code § 1160.3, states in pertinent part:

"...If, upon the preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action,

including reinstatement of employees with or without back pay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer,s refusal to bargain, and to provide such other relief as will effectuate the policies of this part...%o (Emphasis added)

The above language is commonly referred to as the "make-whole%o remedy.

This remedy is used in those instances where an employer has been adjudicated by the ALRB to have bargained in bad faith with a duly certified labor organization (both as a result of refusing to bargain in good faith, as well as in a technical refusal to bargain context) [See, e.g., *J.R. Norton Company v. ALRB*, 26 Cal.3d, (1979) (technical refusal to bargain); *Holtville Farms, Inc.*, 10 ALRB No. 13 (1984) (calculation of "make-whole" for employer's refusal to bargain in good faith)]

The NLRB does not have a similar statutory provision, nor has its statute been interpreted to permit the NLRB such an "extraordinary" remedy. [See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108-109, 73 LRRM 2561, which interpreted § 8(c) of the NLRA to preclude the imposition of specific contract terms upon an employer); see also, *Ex-Cell-O Corporation*, 185 NLRB 107, 74 LRRM 1740 (1970) (NLRB held it did not have authority to award damages for employer's refusal to bargain.)]

The framers of the ALRA, including the UFW, believed that imposition of the "make-whole" remedy was warranted as a progressive step to compel agricultural employers to bargain in good faith so as to not render nugatory the results of representation elections.

Proper application of the "make-whole" remedy has been the subject of numerous Board, as well as appellate challenges, especially with regard to employer challenges to ALRB certifications of elections. [See, e.g., *D,Arrigo Bros. of California*, 4 ALRB No. 45 (1978); *Waller Flowerseed Company*, 4 ALRB No. 49 (1978); *High & Mighty Farms*, 4 ALRB No. 51 (1978); *Charles Krug Winery*, 4 ALRB No. 52 (1978); *George Arakelian Farms, Inc.*, 4 ALRB No. 53 (1978)]

The issue was resolved in the case of *J.R. Norton Company v. ALRB*, 26 ALRB No. 1 (1979) which finally and authoritatively set forth the appropriate test for determining the application of the Board's "make-whole" remedy in the context of technical refusal to bargain cases. Under this test, in determining whether the grant "make-whole" in technical refusal bargaining cases, the Board considers whether the employer's litigation posture was reasonable at the time of the refusal to bargain and whether the employer acted in good faith in seeking judiciary review of the certification.

In non-technical refusal to bargain cases, § 1160.3 grants the ALRB authority to apply "make-whole" when loss of pay and fringe benefits result from the employer's refusal to bargain in good faith in violation of Labor Code § 1153(e). [See, e.g., *Adam Dairy*, 4 ALRB No. 24 (1978); *Perry Farms, Inc.*, 4 ALRB No. 25 (1978)]

Notwithstanding the existence of the "make-whole" remedy, awards of "make-whole" have not had a significant adverse economic impact upon the agricultural industry as a whole in California. This is due to a variety of factors, including appellate Court

decisions limiting the application of the "make-whole" remedy; a significant backlog of "make-whole" cases in the back-pay specification mode; voluntary settlement of such cases between labor organizations and agricultural employers during the collective bargaining process and subsequent business closures. Nevertheless, the presence of the "make-whole" remedy still remains a viable threat by the NLRB as a means of ensuring compliant bargaining by recalcitrant agricultural employers.

5. Secondary Boycotts - In enacting the ALRA, the California legislature also took the unusual step of permitting picketing in the context of secondary boycotts under the ALRA. Secondary boycott picketing is limited under the National Labor Relations Act to only the struck product(s). [See, e.g., 29 U.S.C. § 158(b)(4); *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 670, et. al.*, 377 U.S. 58, 59 LRRM 2961 (1964) (commonly referred to as the "Tree Fruit" case.)]

Under the provisos to Labor Code § 1154, subd. (d), the Legislature allows a certified labor organization to conduct secondary boycotting activities, including picketing, at the site of retail or other establishments which sell the struck product(s). For example, an egg producer which sold eggs to a number of retail supermarkets, as well as restaurants, was the subject of unlawful secondary boycotting activities in the case of *The Careau Group dba Egg City*, 15 ALRB 10 (1989). Although the Board specifically recognized the right of a certified labor organization to engage in secondary boycotting and picketing activities, such activities must be conducted in a "truthful" manner and consistent with the law. [Labor Code § 1154, subd.(d)]

The first proviso to Section 1154(d) also provides that if the labor organization is "currently certified", i.e., within the first 12 months following Board certification, the certified labor organization representatives may lawfully picket a secondary employer and ask that consumers cease patronizing the secondary employer altogether. This is to be contrasted with "product boycotts" which are allowed both under the ALRA and NLRA, as well as under the First Amendment. The first proviso to Section 1154(d) was included to permit certified labor organizations during their first 12 months of certification to put extra economic pressure on recalcitrant employers, apart from traditional economic or unfair labor practice strikes, to obtain a contract.

With the exception of a handful of Board decisions, the secondary boycott provisions of the ALRA have not been consistently utilized by certified labor organizations. Indeed, from the cited cases before the ALRA, only the UFW has resorted to such secondary boycott activities. [See, e.g., *The Careau Group dba Egg City*, supra; *UFW v. ALRB (California Table Grape Commission)*, 19 ALRB No. 15, rev,d. 41 Cal.App.4th 303, 48 Cal.Rptr. 2d 696 (2d Dist. 1995), and more recently *Pictsweet Mushrooms Farms (Ventura, California)*]. Notwithstanding its limited use, this economic weapon in organized labor's arsenal still represents a significant threat to agricultural employers.

6. Petitions for Extension of Certification - Unlike the NLRA, the ALRA also provides that certified labor organizations may petition for an extension of their original 12-month certification from the ALRB upon a showing that an employer has not bargained in good faith as required by Labor Code § 1155.2(a) of the Act. The application of this provision under the ALRA has received very little attention by the Board over the years. During the incipient stages of the ALRB, this provision of the Act was utilized by labor organizations during collective bargaining negotiations as a means to providing a preliminary finding of bad faith refusal to bargain.

The undersigned believes that this statutory provision was also added for the purpose of allowing certified labor organizations to extend their original "certification" beyond the initial 12-month period in the Act in order to take advantage of the first proviso pursuant to Labor Code § 1154(d). This proviso is limited to "currently certified" labor organizations. This contention, however, was not reached by the Board in *The Careau Group dba Egg City*, 15 ALRB No. 10. More importantly, since the duty to bargain in good faith continues past the one-year certification period. [*Kaplan, s Fruit & Produce Co.*, 3 ALRB No. 28 (1977)], the continued necessity of this statutory provision seems to have little impact upon the remaining framework of the ALRA.

7. Access Under the ALRA - Although the ALRA does not specifically grant access by non-employee labor organizers as part of its statutory framework, the Board adopted 8 California Code of Regulations § 20900, et. seq., in late 1976, to permit access by such organizers during three distinct periods during the workday. Under the regulation, a specified number of non-employee union organizers may enter the agricultural employer's premises for one hour prior to the start of work, one hour at the end of the workday, and one hour which shall encompass the employee's lunch period. The regulation specifies the number of organizers permitted on the premises at any given time, identification of organizers by wearing badges, limitations on the type of activities of organizers on the premises, and permitting agricultural employers to file motions to deny access for violations of the access regulation.

Interestingly, the NLRA does not have an analogous statutory reference or administrative regulation providing for access. Rather, NLRB decisions, as interpreted by the U.S. Supreme Court, only allow non-employee labor organizers access to an employer's premises when there are no reasonable alternative means of communicating with the employees. [See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 139 LRRM 2225 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 58 LRRM 2001 (1956)].

As a result, labor organizers under the NLRA are delegated to traditional means of communicating with workers such as home visitations, public meetings, distribution of literature, utilization of radio and television.

Although the ALRB's access regulation was upheld on a 5 to 4 decision before the

California Supreme Court [ALRB v. Superior Court, 16 Cal.3d 392 (1976)] , many observers have questioned its continued viability in the agricultural context.

Indeed, under the Wilson administration, the ALRB conducted public hearings throughout the State of California as to whether the Board should continue its access regulation in its current form, repeal it entirely, or make specific modifications consistent with existing necessity within the agricultural community. Evidence garnered at these public hearings clearly demonstrated that the access regulation was not necessary in the agricultural context. In fact, some union organizers testified that the access rule made it "easier%o to organize agricultural workers. Indeed, public hearings conducted by the Board in 1998, clearly demonstrated that the UFW had no problems with communicating to workers offsite. The record clearly demonstrated that the farm worker population routinely listens to Spanish radio, reads the Spanish newspapers, and watches Spanish television.

The Board,s 1975-1976 hearings regarding the access rule clearly established the Board promulgated the rule to offset for the lack of resources the UFW had at the time! The hearings also suggested that once the UFW had the same resources as other traditional unions had, there would be no reason for this special treatment. The UFW today has more resources than its non- agricultural counterparts. They also have their own radio station and periodical.

From a legal perspective, there is a strong issue regarding the constitutionality of the access rule. The California Supreme Court upheld the rule but only on the basis of a due process claim. No party has ever tested the rule on the basis of violating California,s constitutional right to privacy. Considering the California Supreme Court,s recent decision striking down California,s parental consent law on the basis that it would violate a minor,s constitutional right to privacy, the Supreme Court has demonstrated a strong commitment to protect any person,s right to privacy. A challenge by a farm worker claimed he/she has a right to privacy on an employer,s private property has never been tested.

Furthermore, from a practical standpoint, why should agricultural employers be treated any differently than any other employer in the United States by allowing union representatives to take access for organizing purposes? Ironically, a strong argument can be made that a union would be more successful if it were forced to organize agriculture in the same way unions do in all other industries, as it would force a union to make worker contacts in a less offensive way, i.e., town hall meetings, home visitations, radio, etc., as opposed to being able to go on site, and interfere with workers at a time when they are trying to enjoy their lunch break and want to be left alone. This last point was strongly established during the public hearings conducted by the Board in 1998.

In reviewing many of the recent elections conducted during the last 5 to 7 years, most, if

not all, of these elections have been conducted under circumstances where the union has not taken direct access to the employers, premises. Labor organizations have astutely observed that taking direct access to an employer,s premises merely facilitates a responsive anti-union campaign. Under such circumstances, labor organizations have utilized home visitations, town hall meetings, radio, newspapers, and other means of communicating with workers as a more effective means of organizing agricultural workers without the knowledge of their employers.

C. RECOMMENDATIONS ON HOW TO MAKE THE ALRA/ALRB MORE EFFECTIVE

The undersigned makes the following recommendations as a means of highlighting specific statutory or regulatory provisions which may not continue to have efficacy after 25 years under the ALRA. These recommendations are not intended to diminish the primary reasoning for their inclusion in the Act, in the first instance. Rather, after 25 years of the Act, as well as numerous changes which have occurred within and without the agricultural industry affecting labor and employment relations, the undersigned believes that the Board may wish to take a second look at these issues during the next 25 years.

Access Regulation - Recent developments over the last few years demonstrate the lack of necessity of the access regulation. The Board may wish to revisit the necessity of maintaining the regulation in its current form and analyze whether it should be repealed or modified to apply to only specified crop industries.

In light of a potential farm worker challenge claiming to have a right of privacy on an employers, private property, the Board may be well advised to avoid a constitutional challenge by limiting access to pre-work and post-work situations, and acknowledge a worker,s right to enjoy his/her lunch in the way he/she desires. If a challenge is made and upheld, it could strike down the access regulation in its entirety.

"Make-Whole" Remedy - The Board may wish to revisit the method for making a reasonable determination of damages in the context of applying the "make- whole" remedy for traditional refusals to bargain in the collective bargaining process, as well as technical refusals to bargain.

The problem with "make-whole" and back pay is that the calculations are labor intensive (attempting to locate and interview potential discriminatees) and there are often no comparable contracts for working out the specifications. To help resolve the first issue, regional offices should expand outreach so that all workers are informed of their potential recovery and suggest that they inform the office of their whereabouts every six months. All potential discriminatees could be provided with pre-paid forms, including postage, so that they could "check in" by mail.

With regard to "make-whole" as it applies in the collective bargaining context, the

availability of comparable wage and fringe benefit data to assess an appropriate "make-whole" remedy is imperative. Thus, the Board should endeavor to obtain a data bank of current collective bargaining contracts within the industry. Lastly, the Board should streamline the administrative procedures for achieving prompt remedial action in the application of the "make-whole" remedy. This process should include, apart from existing procedures, the use of mandatory settlement mechanisms at an early date to expedite reasonable settlements, avoid costly and protracted litigation, and reduce agency backlogs. The purposes of the Act would be better served by swifter, albeit lesser make-whole awards, than to delay for years on end a complete remedy or, in some cases, no award at all!

Secondary Boycotts - The Board should harmonize the secondary boycott provisions of the Act consistent with the NLRA and applicable NLRA precedents. There is simply no need to allow a certified union to picket a secondary employer with the ability to request customers to cease patronizing the secondary employer altogether. Such picketing should only be directed at the struck product or products. Otherwise, the secondary employer who is threatened with ruin or substantial loss is likely to be economically coerced into joining a battle not of its own making on the side of the union to bring pressure upon the primary employer in order to save itself. Because of the very limited use of this statute over the last 25 years, such a change would not have a significant impact upon the collective bargaining rights of labor organizations.

Elimination of 48-hour Strike Elections - The undersigned believes that there is no continued need to have 48-hour strike elections under the statute. As noted above, such elections have been utilized by organized labor in only a handful of occasions during the last 25 years. Most importantly, employees are subject to manipulation during these heated labor disputes and may not make sound decisions with regard to deciding whether to elect a labor organization to represent their interests. Besides, one has to question the wisdom as to why there was such a necessity to have a 48-hour election when the ALRA already provides for expedited elections within 7 days following filing of the election petition.

Statutory Language re: Loss of Majority Status of Union - Labor Code § 1152 provides in pertinent part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities..."

Also, Labor Code § 1156.7(c) allows workers to file a petition to decertify their labor organization during the last year of a collective bargaining contract. [See, e.g., Cadiz v.

ALRB, 92 Cal.App.3d 365 (1979)]. This right has been extended by Board decision to allow workers to file a decertification petition pursuant to Labor Code § 1156.3(a) even when there is no contract in effect. [See, Cattle Valley Farms, 8 ALRB No. 24 (1982)].

Over the last 15 years of the Act, there have been a number of decertification elections initiated by employees who were dissatisfied with their certified bargaining representative. During the early years of the Act, there were many abusive situations whereby workers who came to ALRB offices were turned away when they inquired about the decertification process. In some cases, union representatives were contacted by apathetic Board agents advising them of a possible decertification attempt. Under such circumstances, the will of the employees to express their rights under § 1152 were immediately thwarted.

During the first 10 years of the ALRA, virtually hundreds of elections were conducted by the ALRB. Yet, during that entire period of time, labor organizations obtained somewhere between 150 to 200 collective bargaining agreements. There exist virtually hundreds of agricultural operations where workers voted for union representation which never resulted in collective bargaining contracts. In many instances, the lack of a collective bargaining contract was the result of union "abandonment" of the employees. [See, e.g., F & P Growers Association, 9 ALRB No. 28 (1988)].

Unfortunately, because of the specific statutory provisions of the ALRA, workers can only use the secret ballot election provisions of the Act to decertify their collective bargaining representative which has all but abandoned them. Under the National Labor Relations Act, the NLRA recognizes that an agricultural employer may refuse to bargain with a labor organization where the employer has reasonable good-faith doubt as to the loss of majority status of the incumbent union based upon objective considerations. [See, e.g., Terrell Machine Co., 173 NLRB 1480, 1480-81, 70 LRRM 1049 (1969), enforced 427 F.2d 1088 73 LRRM 2381 (4th Cir. 1970)] Although this matter has been consistently raised by the agricultural community during the last two rounds of public hearings to modify the Board's regulations, the Board has steadfastly maintained its position that the only way to change this would be through the legislative process because of the statutory language of the Act. [See, e.g., F & P Growers Association, 168 Cal. App. 3d 667 (1985)].

The undersigned believes that agricultural employees should be granted the fullest expression of their rights guaranteed under § 1152, especially in those instances where a certified labor organization has abandoned their interests. The ALRB should seek a legislative change in the Act to allow employers to petition the ALRB in such circumstances. The status quo consigns both the agricultural employer and its workers into a non-competitive situation whereby wages and benefits of employees cannot be adjusted for years. Otherwise, the agricultural employer would be guilty of an unlawful unilateral changes in wages, hours and other terms and conditions of employment. [See,

e.g., Dole Fresh Fruit Co., 22 ALRB No. 4 (1996)]

Back Pay Proceedings - Over the last few years, the Board has developed a significant backlog in the number of back pay proceedings. Assignment of an administrative law judge for settlement purposes in a mandatory settlement conference-type hearing may greatly enhance the ability of the Board to resolve many of these unresolved cases. Secondly, the unavailability of many discriminatees due to their undocumented immigration status promotes further instability in the existing process. The existence of this factor requires that the Board expedite resolution of back pay specification proceedings so as to maximize the remedy to available discriminatees, at a time when agricultural businesses are still viable. [See comments, supra, at page 8 regarding "Make-whole Remedy%o.].]

Eliminate Extension of Certification Language in Statute

Labor Code § 1155.2(b) regarding petition for extension of certification remains a virtual obsolete statute which has not been utilized in over 20 years. Furthermore, since an employer,s duty to bargain in good-faith continues beyond the initial certification year, its continued necessity in the Act should be questioned.

Mixtec Worker Population - A recent development within the last ten (10) years under the Act is the growing presence of Mixtec (Indian) workers from Mexico in the agricultural fields of California. These workers are an indigenous group of Mexicans who speak their own dialect. The ALRB may soon be confronted with issues pertaining to unfair labor practice investigations and conducting elections under circumstances where it is ill-equipped to properly deal with such language barriers. To become a more effective agency, the ALRB should strive to employ either Board agents or translators proficient in the Mixtec dialects. The Board should also produce its educational video in Mixtec for distribution to the Mixtec farmworker community.

D. CONCLUSION

After 25 years, the ALRA has brought about a certain amount of stability and fair play to the agricultural fields of California. The Board now has a significant body of case law developed during that period to rely upon during the next 25 years. Further knowledge and insight may continue to be garnered from applicable NLRA precedents required to be applied by the Board under Labor Code § 1148. The Board may also wish to take the progressive step of adopting some of the above recommendations which will greatly enhance the application of the Act and promote further credibility within the agricultural community, as well as with the employees whose rights depend upon a just and expedient application of the Act.

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