



[<< back](#)

Making the ALRA / ALRB Effective -- Marcos Camacho

MAKING THE ALRA / ALRB EFFECTIVE

By

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- A. The Unfair Labor Practice Process (1)
- B. The Collective Bargaining Process (5)
- C. Conclusion (6)

In 1975 Governor Edmund G. Brown signed into law the Agricultural Labor Relations Act (ALRA). The intent and policy of the ALRA was clearly stated in the statute:

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

During the 25 years subsequent to the ALRA's passage, the Agricultural Labor Relations Board (ALRB) has failed to come even close to making the intent and policy of the law a reality for the hundreds of thousands of farm workers in the state of California.

Agricultural employers have consistently used delay tactics to undermine and destroy this state policy. For years the ALRB acquiesced to this employer strategy by failing to aggressively confront such delays and not acknowledging that this law is pro-worker, is pro-collective bargaining, and that it was so intended and written. The ALRB's credibility among farm workers is non-existent, making true the adage "Justice delayed is Justice denied."

The recently appointed Board members and General Counsel face a tremendous challenge as well as an opportunity to fulfill the promise made to farm workers of this state 25 years ago when the law was crafted. The ALRB can be instrumental in creating the environment to encourage employers, workers, and their representatives to successfully participate in collective bargaining. This paper suggests various ideas how

the ALRB can accomplish this task.

A. The Unfair Labor Practice Process

Most farm workers work in seasonal jobs and rely on these jobs each year for the support of their family and payment of basic living expenses. Many times the loss of a seasonal job can mean no work for the rest of the year, or finding intermittent work through farm labor contractors that many times pay much lower wages and provide worse working conditions than their usual job. In addition farm labor contractors give little hope of continued employment. It is in this atmosphere that workers must choose whether to risk their jobs if they exercise their rights under the ALRA. Many times it is more practical for workers to ignore a violation, even if it is blatant, than to risk the loss of their job. Couple this with the word of mouth experiences of many farm workers who over the years filed complaints that went nowhere. Thus, telling workers that they have specific rights under the ALRA and that they are protected by the ALRB is often meaningless, unless they see that workers that exercise those rights are clearly and swiftly protected. There are various steps that the ALRB can take to make this work.

1. Injunctive Relief

When a worker is fired for union activity or concerted activity, the ALRB needs to react quickly. This means that the ALRB must seek immediate injunctive relief to reinstate that worker back to his job for the duration of time that his unfair labor practice charge is being processed. For example, if the worker gets fired today the ALRB needs to be in court within the next day or two seeking injunctive relief. This immediately sends three strong messages: to the worker: that his rights will be protected, that he will not be penalized due to the fact that he exercised his rights (his co-workers also receive the message that their rights will be protected if they choose to exercise them), and finally, to the Employer, that the ALRB will deal swiftly with any violations of the ALRA.

2. Swift Investigation

The actual process for investigation of unfair labor practice charges and making a final determination on them must be shortened. Presently workers have to wait years before they receive a final outcome on their charge. This process is made even longer by the fact that in most cases employer liability is determined first. Only after all appeals are done on the issue of employer liability does the Board return to determine the remedies for the violations. Often, it is five to ten years before a final decision is made on the case. This is far from swift justice.

The unfair labor practice charge process itself can be broken down into two stages: pre-complaint and post-complaint. During the pre-complaint, or investigatory stage, the Board determines if a violation of the ALRA has occurred. The ALRA gives the ALRB broad investigatory powers. Section 1151 (a) states:

"The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The members of the board or their designees or their duly authorized agents shall have the right of free access to all places of labor."

In addition, ALRB Regulation Section 20217 provides for investigative subpoenas. However the ALRB has not used its broad investigatory powers. Instead, it has relied until now on employers to voluntarily provide information, at their convenience and on their time schedule. Frequently the information is delayed and when received, it is incomplete. This creates for the ALRB agent a back and forth, letter-writing campaign, with the employer's attorney requesting information ad nauseum. This may go on for several months, if not years. Once again falling into the employer's strategy of delay. The ALRB needs to take an aggressive approach to its investigation of cases. If an employer fails to provide timely information, the ALRB must use the investigative subpoena process.

It is also critical that the ALRB change its staffing policy to employ only field agents that are experienced and competent investigators. This means once a charge is filed, Board agents quickly pursue all evidence that may reasonably establish a violation of the ALRA. Board agents need to interview workers, witnesses, supervisors, and foremen in their homes, work sites or other locations quickly. The objective must be to establish a violation of the ALRA, if there is any evidence to suggest such a violation exists. Just as criminal investigators seeks out all possible evidence to establish a crime, ALRB agents need to have the same mentality. If workers see that ALRB agents are aggressively investigating their charges and seeking to determine whether or not a violation of law occurred, then they will believe that their rights are being protected. To date this has not occurred. ALRB agents simply sit in the office and receive information from the workers. Most ALRB agents refuse to do more and expect the workers to deliver to the office all the evidence and witnesses needed for the charge. Many times this attitude and conduct by ALRB agents discourages workers from filing charges with the ALRB. The ALRB currently has almost no credibility with workers. Nothing speaks louder and sets the image of the ALRB with workers than the actions or inactions of ALRB agents. Workers are customers, and like any other customer they must see that the service to them is competent, experienced and timely, or they will not seek such service.

The Board needs to set a defined time frame for concluding its investigations. Given the seasonality and mobility of farm workers a relatively short timeframe - 30 days in most cases should be the norm. This way, a worker that files a charge will know in 30 days whether or not he has a case that will be going forward. One of the most frustrating things for workers is to file a charge and then wait months before they are told if they have a case that the agency will be pursuing. This is another major reason why many workers do not bother to file charges with the agency.

3. Prompt Adjudication

As a general rule, the Board should issue complaints that include the litigation of both liability and compliance issues in the same hearing. Before the hearing begins, the ALRB should have calculate the exact remedies workers are entitled to receive, if the employer's liability is proven at the hearing. This will encourage settlements that are based on accurate information instead of guesses. If a case is litigated, it will cut in half for the entire process, since the need to return to another hearing to determine remedy issues would be eliminated.

At the post-complaint stage the Board also needs to set a short time frame in which Administrative Law Judge (ALJ) and Board decisions are issued. This time frame should not extent beyond 90 days. In the past twenty-five years, ALRB case law has been developed and is well documented. Therefore, in most cases, ALJ and Board decisions can be short decisions that focus on the evidence. There really is no need for the ALJ or Board to develop legal treatises in an area of law that is already developed. The objective must be a quick resolution of the charge, so both the worker and the employer have speedy outcomes.

4. Worker Education

Due to years of ill repute with workers and to a lack of any meaningful worker education until now, the ALRB needs to engage in a comprehensive and aggressive worker education program. Such a program should take place in areas where farm workers are concentrated due to harvest operations or other peak job operations. ALRB agents must go out to employment sites and talk to workers about their rights under the law. This can be done without interfering with employer operations during workers' lunch period, as well as before and after work. Seminars on worker rights under the ALRA should be conducted at community centers, union halls, employment sites and worker homes. The Board should develop both radio and television infomercials talking about rights workers have under the ALRA that are played during prime time on Spanish radio and television stations. Copies of these should be available on cassettes and CDs and on the ALRB website as they should be available in needed languages to reach new immigrant workers. An outreach program for organizations that provide support services to new immigrant workers who speak languages other than Spanish or English must be developed. These service-based organizations are the best venue to provide ALRB charge assistance in specific languages (i.e., Mixtec, Punjabi, Portuguese, Tagalog, etc.) , as they already serve these farm-working communities in their languages.

Workers must be encouraged to come to the ALRB field offices to talk about any employment issues they have. ALRB field offices (like public libraries) should be open beyond 5pm so farm-working people can have better use and access to the services of the agency. The ALRB should train its agents to determine if the violation that a worker

alleges is within the ALRB's jurisdiction, if not, the Board agent should refer workers to proper agencies that may be able to assist the worker. For example, if a worker comes into an ALRB office with a potential wage claim outside of ALRB jurisdiction, instead of turning away the worker, as has been past practice, Board agents can refer the worker to the local labor commissioner. This can be accomplished at a negligible cost.

The message that workers in the fields have received for far too long, is that the choice they have is between the union and their job. The ALRB must develop an effective publicity campaign with a theme that combats this, such as: if you are fired for union or concerted activity, the ALRB can get your job back. A regulation must also be passed that allows agents to do field education during critical times of possible intimidation such as when charges are under investigation about other workers at that company, or when workers are fired for union and/or concerted activity, and after a union files a notice of intent to take access. The ALRB needs to publicize sanctions they impose on labor consultants who violate the law more, as well as successful prosecutions.

More visibility by the ALRB with workers, along with more outreach will develop a sense of security in workers that the agency exists to protect their rights and that they should use these rights afforded them under the ALRA.

B. The Collective Bargaining Process

The ALRA was set up to provide quick elections to select a collective bargaining representative of workers' choice. Except in few cases, all ALRB elections are conducted within the seven-day requirement found in the statute. However, the intent behind a speedy election was that parties could immediately negotiate a collective bargaining agreement and that workers and employers realize the benefits of union representation and stability in labor relations. Because the majority of agricultural employers have been so opposed to the concept of negotiating with representatives of workers, after an election they use now familiar tactics of delay to discourage and prevent workers from exercising their bargaining rights. Employers with legal resources simply refuse to bargain and it is standard for an employer to challenge the ALRB election certification. What ensues has, unfortunately also become standard.

Challenging an ALRB certification requires the certified union to file an unfair labor practice charge and an ALJ then either hears these charges or the record is stipulated to the Board for decision. After the Board issues its decision to uphold the certification, the employer appeals to the Court of Appeals and then the California Supreme Court. This creates a delay of anywhere from two to five years. After the election certification is upheld by all the courts, the employer sends its representatives (usually attorneys) to negotiations meetings. Too often, however, employers again delay by surface bargaining-going through the motions of negotiating, while never seriously trying to resolve issues and reach agreement on the terms of a contract with workers' representatives. One of the

largest employers in the vegetable industry has to date still not negotiated a contract after workers voted for UFW representation in September of 1975. This is not uncommon and must change.

It is imperative that the Board also emphasize that the right to a speedy election and to freely select a collective bargaining representative is coupled with workers' rights to obtain a collective bargaining agreement. All the rights under the ALRA are hollow if workers cannot achieve under the act the right to a collective bargaining agreement. The ALRA cannot be read to simply mean that all it provides is the right of workers to sit at a bargaining table and have an endless debate with their employer's attorney. If an employer bargains in good faith, the logical result is a collective bargaining agreement.

Under the ALRA, a "make whole" remedy was enacted for workers to be "made whole" for any economic losses suffered as a result of violations of the ALRA by their employers. When an employer fails to bargain in good faith, the make whole remedy is available to compensate workers at an amount equal to what they would have earned under union contract if the employer had negotiated in good faith. In *William Dal Porto and Sons, Inc*, 191 Cal. App. 3rd 1195, 237 Cal. Rptr. 206 (1987) the court recognized that there is a rebuttable presumption that parties would have consummated a collective bargaining agreement had the employer bargained exclusively in good faith. In the past decade, however, the ALRB has failed to impose the make whole remedy in bad faith bargaining cases. As long as the employer argued that they would not have reached an agreement had they bargained in good faith, no matter how ridiculous and unsupported by facts it was, employers have been allowed up until now to use this speculative argument.

It is in this area of make whole remedies, more than any other, that the Board needs to look at new ways of dealing with employers that bargain in bad faith and needs to look at how to develop new remedies that truly make employees whole when they are deprived of their right to have a collective bargaining agreement. Fashioning such remedies, the Board must start from the premise that an employer who bargains in good faith will reach a collective bargaining agreement with the employees' certified representative. The end result of any remedy must be a collective bargaining agreement between an employer and its employees, as the ALRA intended.

The ALRA gives the Board broad remedial powers. Section 1160.3 set forth the Board remedial powers as follows:

"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 backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part."

One potential remedy fashioned against an employer who is found to have bargained in bad faith is for the Board to order the employer to bargain and reach an agreement with the certified representative within 60 days. If no agreement is reached during that time the parties can submit their contract proposals to the Board and the Board can fashion a contract for the parties. This assures that employees are truly made whole, since they receive an agreement, which is the reason for electing a collective bargaining representative. Assuredly, employers will attack such a remedy, but this is the type of bold and new thinking that is needed in this area.

C. Conclusion

Reestablishing the credibility of the ALRB with workers will not be an easy task. However, it is a task that can be accomplished, if the Board is willing to dedicate the energy and resources to rebuilding the agency and its image. The Board's commitment, focus and purpose must be the strict enforcement of the ALRA. Once the Board's actions reflect this purpose, workers will see the agency as a true protector of their right to organize and their right to obtain a collective bargaining agreement.

[<< back](#)