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Mixed Bargaining Unit Work -- Mike Johnston

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I have been involved in the organizing and representation of agricultural and food processing workers for the last thirty years, as an organizer and union representative with both the UFW and the Teamsters for twenty years and as a farm worker and cannery worker for ten years. Ron Barsamian is speaking as an attorney who has been deeply involved with these questions from a legal perspective. I would like to speak as a practitioner who has been involved from a practical and organizing perspective.

I want to spend some time on the practical impact of the current state of the law regarding mixed units on workers, unions and employers in the California fresh vegetable industry. I am going to speak from my personal experience working with three sets of cases that involve workers represented by Local 890. The employers in question are Bud Antle, AKA Dole Fresh Vegetables, Produce Magic, and Associated Tag Line. I would then like to conclude by talking about some possible measures to address this situation.

By definition, the ALRA covers California workers who are exempt from the NLRA under the agricultural exemption. One of the most significant changes that we have seen since the time that the ALRA was enacted twenty-five years ago is the development of a body of case law regarding "mixed units." For the purposes of our discussion I am using the term "mixed unit" to describe a crew or a workforce which is a cohesive enough group that under normal standards it would not automatically be considered to be multiple bargaining units on its face, but which contains either a combination of NLRA exempt and non-exempt workers or individual workers who during the course of the work week move back and forth between exempt to non exempt positions. I realize that this is a somewhat inexact definition, but it will serve our purpose.

From my perspective as a worker representative and advocate, this new body of law is acting to deny up to a hundred thousand workers in California any realistic access to their rights to collectively organize to deal with their employers under either the ALRA or the NLRA. In essence, the NLRB has incrementally expanded their jurisdiction over farm workers in general, and in the process has both limited the jurisdiction of the ALRB and has created these mixed units that I wish to discuss.

The organizational structure of California agriculture is and has been for the entire life of the Act (and for many years before that) in a constant state of change. I see two changes that are particularly relevant to this discussion. The first is the move from large growers who do their own harvesting and shipping or who ship cooperatively to shippers who often harvest by generally do little or no growing and are often either part of multinational food conglomerates or are at least heavily involved in food processing as well as growing. The second is the growth of the labor contractor system as an alternative to growers an/or shippers doing the harvesting.

Bud Antle is a good illustration of the changes that the industry has seen. The workers there are represented by the oldest collective bargaining agreement covering farm workers anywhere in California. In fact, to the best of my knowledge it is the oldest such agreement in the country. The agreement was signed in 1961. The way that I have the story, Bud Antle (who was a real individual, one of the largest Salinas lettuce growers) had put real money into the development of the vacuum cooling process, which was to revolutionize the methodology of production. It was an innovation with consequences as far reaching as the introduction of icing of produce in packing sheds had been decades earlier. (Anyone who has read Steinbeck's *East of Eden* or who saw the classic film of the same name with James Dean understands that earlier revolution. If you haven't, shame on you, pick it up on the way home.) The new process would enable the replacement of packing sheds, to which the product was brought from the fields and where it was iced for shipment, with field packing and vacuum coolers. Bud needed money to build his new facilities and to purchase a fleet of refrigerated trailers, and the Teamsters, who already represented his truck drivers, gave him a loan from their pension funds (it couldn't happen today under ERISA, and yes, it was repaid.) In exchange, the Teamsters got a contract covering Bud's field hands.

One of the most important impacts of the new process, besides the displacement of literally thousands of packing shed workers, was that work which had been performed in

the sheds, and which had been organized under the NLRA, was suddenly moved to the fields, where the cutting and packing processes were integrated into a single process. At the time, no one really bothered to consider the question of whether the placing of celery or heads of lettuce into boxes by members of Bud Antle's harvesting crews was primary or secondary agricultural work. It was being done for a farmer, on a farm, it was exempt from the ALRA, and when the ALRA was enacted, the ALRB set up a wall-to-wall unit that carved out only the cooler workers, who were already represented by the Fresh Fruit and Vegetable Workers Union. All the rest of Bud Antle's primary and secondary agricultural employees, including the truck drivers, were included in the ALRB unit, in which Teamsters Local 890 won a certification election in 1975. At about the same time, the FFVW won an ALRB election for the cooler.

In the next decade and a half, Bud Antle grew to be the nation's largest shipper of lettuce, cauliflower, Celery, and a leading shipper of broccoli. They were sold to Dole Foods, and by the late 1980's had completed a process of moving from being a grower/shipper, to being a shipper that did some growing and contracted with some growers, to being a shipper that contracted out all of the growing work while retaining control of the harvesting, cooling and shipping.

In 1989, Local 890 won a second election, held as a result of a rival union petition, and the ALRB once again certified basically the same wall-to-wall unit. Later that same year, both the Fresh Fruit and Vegetable Workers Union, representing Bud's employees in the coolers, and Local 890, representing virtually all of Bud Antle's other employees, struck the company. Local 890's strike lasted 18 days. The Fresh Fruit and Vegetable Workers' strike started earlier and lasted longer. I think that they are still technically on strike. They certainly never settled the dispute. At one point, some time after the strike was converted into a lockout and the FFVW filed ULP charges with the ALRB, Bud Antle began to assert that the charges were moot, as the NLRB had jurisdiction over the unit, because Bud Antle was no longer a farmer and the work was secondary agriculture. Despite the fact that early in negotiations Bud had confirmed in writing the parties' agreement that this was an ALRB unit, Bud found an NLRB region to take the case, successfully arguing that the parties did not have authority to decide jurisdiction. In a contentious dispute that saw Bud Antle sue the individual members of the ALRB, Bud ultimately prevailed, effectively nullifying the ULP charges against them, as those charges were filed under the ALRA and it was by then untimely to file new charges under the NLRA.

During the course of this dispute, in order to bolster their case on the cooler workers,

Bud filed a Unit Clarification petition with the NLRB asserting that substantial portions of the Local 890 unit were also subject to the NLRB's jurisdiction. The ultimate result was that the NLRB ruled that truck drivers, mechanics, carton yard workers, machine operators, salad plant workers, and those individuals who actually packed the produce in cartons in the field were under NLRB jurisdiction, while transplant crews, the individuals who cut the produce from the ground, and crews in the nurseries were exempt from the NLRA and, to the extent that they worked in California, subject to the jurisdiction of the ALRB.

This left us representing a group that was under one collective bargaining agreement, but had individuals working under the National Labor Relations Act, the Agricultural Labor Relations Act, and the Arizona Labor Relations Act. Fortunately, we were well based in the work force, and in the next contract negotiations, we inserted contract language that continued to cover all of the workers subject to the three different laws under a single agreement. While the workers whom we represent at Bud survived that challenge with their union intact, it was obvious to us that to take a single integrated work force and draw arbitrary lines through it that divided the employees into three separate jurisdictions had very negative implications for any similarly situated workers who were not organized but who wished to organize.

We saw that negative potential realized and even taken a step further in Produce Magic. Produce Magic is a Salinas-based company that harvests and ships lettuce, but does not grow lettuce. Local 890 represents the truck drivers and machine operators. Produce Magic has about 90 employees in three crews. Each crew has 20-23 individuals who cut the lettuce from the ground or pack the cut lettuce into boxes. The employer maintained that the cutters and the packers switched functions each day at lunch. There are about another 8 individuals on each crew who perform tasks such as spreading boxes on the ground ahead of the crew, spraying water into the packed boxes, stapling the packed boxes closed and loading the packed boxes onto trucks. The entire crew works as an integrated unit. They arrive at the field in one bus. If one crewmember is absent, another is assigned to perform their function. They have one supervisor, and the crew is paid a piece rate based upon the production of the entire crew.

In 1993 the UFW filed an ALRB petition to represent the harvest workers. They won the election, but Produce Magic went to the NLRB and asserted that Produce Magic was not a farmer, and that the cutters (who they asserted were engaged in primary agriculture) and the packers (whom they asserted were engaged in secondary agriculture) changed places each day at lunch time. They said that since a part of each worker's day was spent

in non-exempt work, the NLRB should assert jurisdiction over the entire unit. The NLRB ruled that they would assert jurisdiction over the secondary agricultural work, but they refused to assert any jurisdiction over any employee for any time spent doing primary agricultural work. This decision was upheld by the full board, and was not appealed in the federal courts.

As a result, the UFW has a certification covering the field workers at Produce Magic, but only during the portion of their day during which they are working as cutters, and not during the part of their day when they are packing. They have not succeeded in negotiating a contract in this situation, and it is not clear even if a contract is possible. They could file an NLRB petition for the remainder of the group, but have chosen not to do so, perhaps because of the potential loss of their right to secondary boycott should they represent an NLRB unit, perhaps because of the inherent problems of organizing seasonal farm workers under the NLRA.

The obstacles that confront them in representing the ALRB unit as currently constituted at Produce Magic are mind-boggling. The crew is paid on a piece rate based on the entire crew's production. How would the UFW negotiate a piece rate for the crew if they only have jurisdiction over a portion of the crew at any given time? If an employee was fired and an arbitrator or the ALRB ordered reinstatement, would they only be owed back pay for the portion of their time when they would have been cutting?

What if Local 890, which already represents the truck drivers, were to file for and win an election in the NLRB harvesting unit at Produce Magic, while the UFW continued to represent the cutters. Could they negotiate a joint contract? What if one union struck and the other did not? What if Produce Magic opened up a new operation? Under the NLRA they could voluntarily agree with the Teamsters that it was in or out of the unit, or they could negotiate contract language that regulated such matters in advance. Under the ALRA that is a matter for the Board to decide and you could easily get divergent results.

When I was first writing this I had a list of another dozen questions for this situation, each as difficult as those that I just listed. Suffice it to say that situations such as Produce Magic create a thicket of barriers to workers obtaining their rights under either act.

How many workers are employed in "Produce Magic" types of operations? Both the

California fresh vegetable and melon industries are dominated overwhelmingly by similar field pack operations. Growers who directly employ their harvest crews make up a small portion of the industry. In those cases their harvesting operations would be subject to the ALRA. However, it is relatively easy for a grower to do a little harvesting for someone else and become a “commercial” operation, so Produce Magic affects even the harvest employees of these operations. There are in the California fresh vegetable and melon industries about 53,000 Full Time Equivalent jobs. Each FTE translates into about two workers over the course of an annual cycle, so we are talking about a little over 100,000 workers who find themselves entangled in the impact of the Produce Magic decision.

Over the last three years, Local 890 was involved in organizing Associated Tagline. This is a Salinas-based distributor and custom applicator of agricultural chemicals. In a unit of approximately 50 workers, the majority work handling, packaging and shipping agricultural chemicals at the company’s facility. However, 18 of those employees regularly start their day at the facility, load their tractors with chemicals, load the tractors on to trucks, drive the trucks to farmers’ fields, and then spend several hours applying the chemicals to the fields with the tractors before returning to the facility. They work for different farmer customers all of the time.

It appeared clear to us that these 18 individuals were employees engaged in both secondary and primary agriculture for a non-farmer. Therefore, we tried to organize in a way that was consistent with Produce Magic. We filed an NLRB petition covering all 50 employees. One week before the election, we filed an ALRB petition covering the 18 employees for the portion of their time that was spent doing primary agricultural work (i.e. applying chemicals directly to the ground or crops.) We won the NLRB election by a decent margin. The ALRB’s Salinas Regional Director initially refused to conduct the election, citing preemptive jurisdiction by the ALRB. Ultimately the ALRB held an election. Then Associated Tagline went to the NLRB to seek to block the counting of the ballots and certification of the ALRB unit. Consistent with Produce Magic, the NLRB refused to assert any jurisdiction over the agricultural portion of the unit and the votes were ultimately counted.

We won the ALRB election as well. However, during the time that the matter was before the ALRB and then the NLRB and before the election was held and the certification was issued for the ALRB unit, we negotiated and ratified a collective bargaining agreement covering all fifty employees for all of their work time. This raises the question of whether the employer was placed in a true double bind. If they refuse to negotiate with

us over all of the terms and conditions of employment of their “mixed unit” employees, they might have been guilty of bad faith bargaining under the NLRA. On the other hand, if they negotiated with us over any of the terms and conditions of employment that bore upon the exempt work of applying chemicals to the fields, they might be guilty of illegal voluntary recognition under the ALRA. Obviously, had we won one election and lost the other, we would have faced all of the same questions that I raised in regard to Produce Magic.

These questions take on further wrinkles when we look at the question of organizing the employees of labor contractors in the vegetable industry. As Dr. Villarejo pointed out in his presentation this morning, labor contractors today employ over half of all farm workers in California. If we go to organize a labor contractor providing harvesting workers to a farmer, the NLRB will generally regard the farmer as the employer (although there have been recent decisions which may affect this) and the ALRB will regard the farmer as the employer. If Produce Magic had been getting some of their crews from a labor contractor, it would have required one ALRB election and two NLRB elections involving two separate employers to organize them, and three sets of negotiations with two different entities to get a contract for what in reality functions as a single integrated operation.

Both the NLRA and the ALRA are firmly based on a recognized public policy interest in workers having the opportunity to be collectively represented should they freely choose to do so, and in giving workers practical means to make that free choice. It is ironic that the NLRB’s gradual limiting of the agricultural exemption, which is arguably beneficial to farm workers in 48 or 49 of the states, has the effect of severely limiting California farm workers’ ability to exercise their rights to choose unions and to be effectively represented by them.

The current situation makes it extraordinarily difficult for 100,000 workers in the melon and fresh vegetable industry to organize, it subjects their employers to great uncertainty as to how to proceed without liability, and it has tremendous potential for litigation and duplicative processes involving both the NLRB and the ALRB, as we saw in each of the above three cases.

It is my view that the current situation is untenable and flies in the face of the proclaimed public policy interests of both laws. How then can this conundrum be resolved? I see several options, each with its problems.

First, the NLRB could revisit Produce Magic and essentially take a step back from their recent tendency to narrow the agricultural exemption, leaving the field clear for the ALRB, which has never acknowledged Produce Magic as valid. This has two immediately apparent drawbacks. The first is that the NLRB's expansion of jurisdiction is not necessarily a bad thing in all of the states except California (and possibly Hawaii.) The second is that such a move would inevitably lead to court challenge by an agricultural employer who wished to exercise their right to have the case decided in the federal courts, leading to years of litigation and uncertainty while farm workers go unorganized.

Second, the NLRB could assert jurisdiction over all employees who perform a regular amount of non-exempt work, as is done with wage and hour questions under the FLSA. This would deal with the Produce Magic situation, although one could very effectively argue that those workers would have more effective access to their rights under the ALRA than under the NLRA. However, it would be no help at all in such situations as Bud Antle, where the workers perform discrete functions, but are artificially divided into two jurisdictions, and it would only exacerbate the problems of organizing where labor contractors are involved, which is now the rule, rather than the exception.

Finally, the NLRB could cede jurisdiction over California farm workers involved in "mixed units" to the ALRB. This would allow those workers to be organized in single and logical units, and in my view, holds the most promise as a solution to this problem. This approach is not without difficulties. First, although the language of the NLRA provides for such cession agreements with state labor agencies that have comparable protections for workers, there is not a single example in the history of the NLRA of such an agreement. Nations don't generally give up territory and agencies don't generally do so either. Second, the ALRA restricts the ALRB to jurisdiction over agricultural employees who are exempt from the NLRA. This would not appear to include agricultural employees who are subject to the NLRA but over whom the NLRB has ceded jurisdiction to the NLRB. The ALRA would have to be amended to give the Board jurisdiction over agricultural employees over whom the NLRB has ceded jurisdiction to the ALRB.

The advantage of a cession agreement is that it can only be enacted between the NLRA and states that have comparable labor laws. This is similar to OSHA, which allows states

to assume enforcement jurisdiction only if they have equal or better state laws. This would prevent farm workers in other states without comparable agricultural labor laws from being unfairly denied what limited protection they may have under the NLRA.

These are complicated questions, and I have spent years discussing them within the Teamsters, with other unions, with the ALRB and with management attorneys. None of the options that I can see is as simple, effective or elegant as I would like. We must, however, recognize that in the interest of expanding the rights of farm workers, the NLRB has, ironically, created a situation in California, the agricultural heart of this country, which is tremendously detrimental to the ability of farm workers to exercise those very rights. We must recognize this, come to terms with it, and find a solution to it, or I believe that the ALRA will only grow more and more irrelevant to the fresh vegetable and melon industries, and more important, that over 100,000 workers will continue to be denied the rights to collective representation which both the ALRA and the NLRA seek to encourage.

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