

I have been asked to speak briefly about a few topics of major concern to the Agricultural Labor Relations Board in 2016.

The Agricultural Labor Relations Act has a provision known as Mandatory Mediation and Conciliation. Despite its name, it is really an interest arbitration provision under which, if a certified union and an employer cannot agree on the terms of a first time contract, one would be written for them. It was added to the ALRA in 2002 as a goad to creating collective bargaining relationships. For present purposes, it is enough to know that the Legislature permitted unions certified before 2003 to take advantage of it if they could show, among other things, that they had not reached agreement within a year after their certification. It is also important to know that this MMC process, as it is known, overlaid the Board's longstanding and judicially approved rule that, once a union was certified, an employer's obligation to bargain continue unless the union ceases to exist or expressly disclaims interest in representing the employees in that unit.

In 2003, the first year after the MMC process was in place, the Board ordered two contracts into effect, but (and I can only assume this) because the question of constitutionality had not been settled, there was no MMC activity in 2004, 2005, and 2006, when a Court of Appeal upheld the constitutionality of the statute. Since then, by my quick count, fewer than a dozen contracts have been ordered into effect. Most of these involved certifications issued many years before 2003, and the employers in these cases challenged the application of the Board's "certified until decertified rule", claiming that the election results upon which the certifications were based should not bind their

present employees because the certified union, the United Farm Workers, had not been active among their employees for many years. The employers contended they should be given a chance to prove that the union had “abandoned” the unit even though the union had neither ceased to exist nor disclaimed interest.

These issues reached a Court of Appeal last year and the court ruled, contrary to the Court of Appeal decision earlier referred to, that the MMC statute was unconstitutional, but that even if it were not unconstitutional, the Board’s “certified until decertified” doctrine could not be applied in the context of a renewed demand to bargain under MMC unless the employer were given the chance to prove the union had abandoned the unit. The Supreme Court granted review. If the Supreme Court upholds the decision striking down MMC, a mechanism the Legislature thought was necessary to spur collective bargaining will disappear, and if the Court disallows the Board’s use of the “certified until decertified” rule in the MMC context (as the Court of Appeal did), employers will have an affirmative defense to a union’s renewed demand for bargaining with respect to “old certifications.”

I do not know to what extent the “old certifications” were chosen as candidates for the MMC process because the United Farm Workers wanted, so to speak, to clear up “old business”, the way one tries to finish an old project before starting another, or because there was little or no new “business” to which MMC could be applied. Perhaps it was both, but to the extent it was the latter, it had to have been shaped, at least in part, by problems Phil Martin identified years ago in his book, *Promise Unfulfilled*, in which he

argued that changes in the farm labor market, specifically, the increased use of intermediary suppliers of labor and changes in immigration, had undercut the possibilities for successful union organizing and, therefore, for collective bargaining in California.

In 2004, before I knew that the main focus of MMC would be on the old certifications, I wrote:

If Phil is right that changes in the farm labor market have undercut the possibility of successful union organizing, interest arbitration may be just one more promise. If the law be upheld, it should increase the ratio of collective bargaining agreements to certifications, at least in initial bargaining situations and, perhaps by accustoming the parties to operate under contracts, lead to subsequent ones. I am inclined to doubt that the dynamic will work that way. Rather, it seems to me that parties forced to accept contracts written for them will push their own interests with a vengeance when the opportunity to do so arises. Be that as it may, since the bottom line will always remain the number of certifications, and except for the force of example that a contract at one farm may exert on the employees of another farm to encourage them to seek a collective bargaining representative of their own, the production of first time contracts does not address the larger problem of keeping up with employment patterns that make it so difficult to organize farm workers. As a result, I am not sure that interest arbitration greatly alters the balance of power between employers and employees.

Even if the constitutionality of MMC is settled in favor of the statute and the issue of abandonment is settled in favor of current Board doctrine, if the union persists in applying it to “old certifications”, in view of the resistance to bargaining under these certifications that we have already seen take place, it is not clear to me that the Legislature’s hope for MMC will be fulfilled. Without new elections and new certifications, we will never know how interest arbitration might work when it is disentangled from the kind of resentment to its use that it has so far generated. As a result, like the makewhole remedy before it, one more powerful element of the Agricultural Labor Relations Act, will have fallen short of fulfilling its purpose.

I now want to shift my attention to a different kind of problem we might see in the future; this time in connection with medical marijuana. The Legislature has just passed comprehensive legislation to deal with, among other things, the production, quality, and distribution of medical marijuana and since marijuana is an agricultural product, the ALRB has been given state jurisdiction over representation and unfair labor practice issues. I want to briefly examine some issues that might arise in connection with this grant of jurisdiction.

Business and Professions Code Section 19322(a)(9) *provides that any applicant for a “cultivation license” must declare that the applicant is an “agricultural employer”, as defined by the ALRA “to the extent not prohibited by law.”* “Cultivation” is defined in Business and Professions Code Section 19300.5(1) as *“any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.”*

For my purposes, I would like to look at that definition of “cultivation” in light of the limitation contained in the declaration required for a license – that an applicant is an agricultural employer “*as defined in the ALRA to the extent not prohibited by law.*” There are two critical elements here: one is that the definition of agriculture under our Act is the definition contained in the agricultural exemption of the FLSA, and the second is that the licensee can only be an agricultural employer to the extent not prohibited by law, which must mean “not covered by the National Labor Relations Act.” The problem for this Board is that, in construing what is or is not within the coverage of the NLRA, so long as the national Board’s interpretation of the agricultural exemption in the FLSA is reasonable, the NLRB’s interpretation of its jurisdiction prevails over how this Board might interpret the same exemption.

This FLSA definition of agriculture that is at the heart this problem has been interpreted by the United States Supreme Court as having two components. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are considered “primary” or non-contingently “agricultural.” But there are also what are denominated “secondary” practices and these include “any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with such farming operation.”

As noted, above, the specifically listed, primary practices are few: the “cultivation and tillage of soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities, . . . the raising of livestock, bees, furbearing

animals and poultry,” which means that the definition of “cultivation” in 19300.5 includes some things that are not listed as among these primary activities, namely, the “drying, curing, and grading and trimming” of marijuana. It follows, then, that if these activities in connection with marijuana production for sale are to be considered “agricultural” at all, it must be because they are “performed by a farmer or on a farm, incidentally to or in conjunction with such farming operations.” It is here that Section 19300.5(l) meets section 19322(a)(9) since a great literature has built up over what is and what is not included in so-called secondary agriculture. Some of it concerns the meaning of the phrase “performed by a farmer or on a farm incidentally to or in conjunction with such farming operation,” and some of it concerns whether or not the eventual product remains, so to speak, a product of nature.

I happen to think that the NLRB has interpreted the agricultural exemption under the FLSA too narrowly and in so doing has expanded its jurisdiction over activities that ought to be considered “agricultural” under the secondary definition, but that is tilting at windmills at this point because the national Board’s interpretation has been upheld by the Supreme Court. Since what is covered by the NLRA is excluded from the ALRA, and what is covered by the ALRA is excluded from the NLRA, to the extent particular “cultivation” practices are not primary agriculture, this Board’s jurisdiction can essentially be cabined by the national Board and by the way marijuana cultivators set up their operations. By way of example, I will note that the Division of Advice of the Office of the General Counsel recently issued a Memo that workers who “process” marijuana

after it has been cultivated and harvested under Maine's Medical Marijuana statute are covered by the NLRA because the non-growing and non-harvesting operations transform the cannabis plants from their raw and natural state and are thus more akin to manufacturing and are not, therefore, secondary agriculture.