

Agricultural Personnel Management Association's 36<sup>th</sup> Annual Forum

Keynote Speaker Speech

Thursday, January 28, 2016 at 8:00 AM

Monterey Plaza Hotel

400 Cannery Row, Monterey, CA 93940

William B. Gould IV, Chairman

Agricultural Labor Relations Board (2014 – \_ \_ \_ \_)

Chairman of the National Labor Relations Board (1994-1998)

It is a pleasure to be here with you this morning and to keynote your 36<sup>th</sup> Annual APMA forum. You have been at this for more than three decades playing a leading role in developing effective personnel management within the Agri-Business Community, advising your members and the public through meetings, workshops, newsletters and bulletins as well as this annual forum.

My work in Sacramento and in Washington before that has had its focus not only on strong labor law enforcement but also on an approach rooted in the idea that dialogue between independent administrative agencies like both the NLRB and the ALRB and private parties who have hands on day to day experience is good policy. We benefit from your thinking about the paths that we will take going forward both because of your familiarity with the issues that are likely to arise and because your experience has given rise to ideas that might not have occurred to us.

So many of the challenges that we face now are ones with which you are extremely familiar. Foremost amongst them at present, of course, is the drought of at least four years which has affected water supply in agriculture, and this has produced surface water shortages and allocations which were approximately twenty five percent lower in 2015 than in 2014. The net water shortage to agriculture according to a University of California Davis report is approximately 67 percent more than it was in 2014 said. Said the report:

“Cropland fallowing due to drought has increased by 33 percent over 2014. The impact on direct farm-gate revenues is expected to decrease by a further 6 percent.

Ground water, pumping costs . . . increased by a further 31 percent compared to 2014, due to increased pumping volumes and increased unit pumping costs as groundwater tables decline.”<sup>1</sup>

Most of the idle land is in the Tulare Basin, producing job losses of nearly 21,000. And those workers lucky enough to have jobs are working harder with fewer hours which often translates into less pay. Some workers have commented that they have never seen the plants they pick so wilted.

The unalterable reality preceding the drought is even more harsh, i.e., desperate circumstances compounded by the fact that California agricultural workers have been living in the midst of poverty even when the industry and the state were considerably more prosperous. The lines of workers at food pantries and other groups offering food aid service are frequently blocks long. In part this reflects the decrease of the past few years in total tonnage of fresh fruits and vegetables from California farms. But it is indicative of so much more.

When Governor Brown first invited me to take this job almost two years ago in early 2014, I had been told that the farmworkers were living in their cars at the time of the harvest in the Coachella Valley. But what I didn’t know - until I saw it with my own eyes – was that in towns like Mecca they are not even able to live in their cars. They must alternate between their cars and mats in the immediate vicinity of their cars

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<sup>1</sup> Richard Howitt, Duncan MacEwan, Jaosué Medellí-Azuara, Jay Lund, and Daniel Sumner, *Economic Analysis of the 2015 Drought for California Agriculture*, August 17, 2015 pp. 11, 12.

since three or four workers often travel in a single car and not all can stretch out in the car to sleep at the same time!

At one time we thought we were doing something about this. Just a little more than forty years ago – and we celebrated the 40<sup>th</sup> anniversary of the ALRB and the ALRA last summer – the average wage rate for direct hire workers was \$2.60 per hour which translates into a little more than \$13.50 per hour in inflation adjusted dollars. In 2014, California’s farmers and ranchers reported an \$11.33 per hour figure – that is more than two dollars per hour below what would have been necessary to keep up with inflation during the last 4 decades.

The fact that this decline or failure to raise real wages in a period of labor shortage caused by the sealing of the border to Mexico is truly remarkable! Some employers are apparently embarking upon harvesting robotization of strawberry plants which, as the Wall Street Journal noted<sup>2</sup>, “...have long required the trained discernment and backbreaking effort of tens of thousands of low-paid workers.”

Professor Don Villarejo has pointed out<sup>3</sup> that in ten of the communities in Tulare County, the per capita income is below that of Mexico – and in these areas, private sector employment is dominated by agriculture.

How we got from there to here is a complicated story and it does not lend itself to a short discussion this morning. Yet we can see that the fact that approximately 60 to 70

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<sup>2</sup> Ilan Brat, *Goodbye Field Hand, Hello Fruit Packing Robot*, Wall Street Journal, April 24, 2015 at B6

<sup>3</sup> Don Villarejo, *A New Paradigm is Needed for Labor Relations in Agriculture: California Agriculture and Farm Labor, 1975-2014*, June 24, 2015.

percent of agricultural workers are undocumented and that the Department of Labor financial assistance for dislocated workers only goes to those who are “legal” is an important part of the backdrop. So long as the immigration issue cannot be resolved, this phenomenon, which Supreme Court Justice Sandra Day O’Connor recognized more than 30 years ago<sup>4</sup> would create an incentive for employers to employ the undocumented, will depress wages and working conditions and this remains unchanged to this very day.

All of this was just beginning to unfold after the first blush of activity under our statute in the earlier Brown administration. Since then, union organizing has diminished to the point of non-existence! Indeed during these past two years while I have been Chairman there has not been one single representation petition filed under a statute which requires certification through a petition in order for a union to be recognized! (There are quite a few decertification petitions which have been with us, some of them well publicized.) Union organizational activity in California agriculture at this moment is completely moribund, notwithstanding the passage of more reform in the Davis and Brown administrations which allowed a collective bargaining agreement to be imposed through arbitration under some circumstances when the parties were not able to negotiate a first contract. (Amongst other issues, the constitutionality of this form of dispute resolution is now before the Supreme Court of California.)

What is the role of the Board under such circumstances and what is the work that is confronting me and my colleagues in 2016? How is it relevant to your work? First,

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<sup>4</sup> Sure Tan Inc. v. NLRB, 467 U.S. 883 (1984).

while union activity has completely disappeared, we continue to be confronted with a wide variety of cases involving concerted activity arising out of spontaneous protest by employees who view their wages, hours and other conditions of employment to be unfair. And, as the New York Times reported recently in setting forth what was called the “Nightmare of Sexual Violence” in the fields,<sup>5</sup> harassment, including violence against women in the fields is a major problem. In 2014, our Board held that workers protests of sexual harassment or violence is protected by the Act and can lead to appropriate remedies, including backpay until harassment ends.<sup>6</sup>

You may know that employers are prohibited under our statute from retaliating against such concerted activity through warnings, suspensions and dismissals. These cases constitute the bulk of our work today. You and the public need to know that issues like sexual harassment may involve the ALRA as well as the fair employment practice statutes.

Thus, the ALRA, like the NLRA upon which it is based, affects not only union organizing but the increasingly important worker protests about employment conditions including wages and sexual harassment to which I have just referred.

Now I think that we have addressed these new cases once they come to the judicial side of the Board with dispatch. But problems remain. First, because justice delayed is always justice denied, we are trying to expedite our procedures so that workers, unions

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<sup>5</sup> Jose R. Padilla and David Bacon, *Protect Female Farmworkers*, The New York Times, January 19, 2016 at A23

<sup>6</sup> Sandhu Brothers 40 ALRB No. 12 (November 13, 2014)

and growers are able to have their differences resolved without waiting for years as has happened in some celebrated cases in recent times. Last summer, we adopted a proposed rule which will expedite our cases where there are alleged unfair labor practice charges engaged in during secret ballot box elections. Five years ago, near the beginning of Governor Brown's first term this time around, legislation was enacted which mandated expedited treatment of elections whether they be for certification or decertification. But that significant reform has been undercut where unfair labor practice charges were filed simultaneously and the two issues, i.e., election objections and ULP's, are consolidated. These cases drag on endlessly. Thus, last summer we devised time mandates to address the processing of these cases and we hope to be able to finalize this rule change early in the New Year.

Just three months ago, Governor Brown, in vetoing Assembly Bill 561 which would have imposed mandated time periods for the Board to resolve so-called "makewhole" cases, at least one of which has lasted for two decades – something that Charles Dickens wrote about a couple of centuries ago – expressed his concern. Said Governor Brown, "I am directing the Board to examine the current process and make the necessary internal forms to provide for more timely orders."

In response to this, I convened a meeting of my Labor-Management Ad Hoc Committee- it has already met to consider this issue on January 14 – and before that I convened an internal Expediting Committee to address Governor Brown's charge.

To date some of the ideas which we are considering involve so called bench decisions along the lines that were adopted in Washington when I was Chairman of the NLRB. This provides for decisions from the bench itself or on the basis of oral argument without the filing of brief with a decision forthcoming within 72 hours of the close of the hearing. We are also looking at ways of having expedited oral arguments or briefs prior to the completion of the transcripts under some circumstances. In the same vein, we will review the feasibility of explicit timetables for the processing of cases. And most important of all, we are looking at the scheduling of early pre-hearing conferences which will promote more information about what divides the parties as well as the possible prospect of settlement itself in some circumstances. It is our experience that the best time for parties to resolve their differences is immediately following the issuance of a complaint when the amount of backpay may be limited and the machinery of litigation has not yet commenced.

These measures which will be considered by the Board shortly are designed to produce decisions more promptly, particularly where the issues largely involve credibility and the hearing is relatively short i.e. one or two days.

Of course, the bench approach must be used cautiously, judiciously and sparingly – especially because credibility issues are different. They are not easy for our administrative law judges based (as they are), upon the demeanor of the witness and whether his or her story jibes. (I am often reminded in these cases of my father's admonition to me to look someone in the eye when I met them because that way, he said,



that person would have more confidence in me. And yet as soon that lesson was instilled, he told me that I was going to meet many people in the course of a lifetime who would be looking me right in the eye and who would be lying through their teeth – this then is the challenge for administrative law judges.)

Notwithstanding the difficulties, such judgments are better made while the witnesses' testimony and demeanor are fresh in the mind of the decision maker rather than weeks or months later in a dry transcript when one tries to recall who that person was, let alone determine whether his or her story rings true.

It may be that early pre-hearing conferences are even more important inasmuch as they clarify and narrow issues producing a better prospect of resolution through settlement. Settlements are almost always preferable to lengthy litigation.

Finally, I want to tell you about another initiative that has been undertaken by the Board – this too was considered by our Ad Hoc Committee. It relates to the promotion of worker education regarding aspects of the statute by the Board agents during working time when the employees are at the work place.

This initiative resulted from a series of hearings which the Board conducted in September in Fresno, Salinas and Santa Maria. After the completion of the hearings, Board staff, requested by the Board to consider the agency's authority to enter employer premises to conduct an onsite worker education program recommended the creation of

such a worker education program in an extensive document which I commend to all of you.<sup>7</sup>

The starting point is our statute which provides that “applicable precedent” of the NLRA is to be followed by our Board. Within the first year of the ALRA, the Supreme Court of California held that employer property rights in the agricultural fields are not paramount to employees’ rights to effective access to information.<sup>8</sup> In so doing the Court concluded that, “the Legislature intended [the Board] to select and follow only those precedents which are relevant to the particular problems of labor relations on the California agricultural scene.”<sup>9</sup>

Equally important, the United States Supreme Court has made it clear that under the NLRA “..the place of work is a place uniquely appropriate for dissemination of views ...and the various options open to the employees”.<sup>10</sup> Subsequently the Court again noted that the place of work was “the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.”<sup>11</sup>

We learned a great deal about the obstacles that stand in the way of most agricultural workers and their ability to learn about our statute and our procedures during the above-referenced informational hearings. Particularly important in our view, was the

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<sup>7</sup> Thomas Sobel, Administrative Law Judge, Eduardo Blanco, Special Legal Advisor, *Staff Proposal for Education Access Regulation for Concerted Activity* – November 23, 2015

<sup>8</sup> In *Agricultural Labor Relations Board v Superior Court of Tulare County* (Pandol) 16 Cal 3d 392, 406 (1976).

<sup>9</sup> *Id.* at p. 413.

<sup>10</sup> *NLRB v. Magnavox Co.*, 415 U.S. 322,325 (1974)

<sup>11</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978)

fact that the so-called indigenous workers constitute more than 20 percent of the work force. These workers speak a multitude of native languages, Mixteco, Zapotec, Triqui, Chatino, Purepecha, and are frequently not conversant in Spanish or in English. Most of them are not even literate in their own language. This means that it will be difficult to reach those workers through written materials, so that personal contact is necessitated.

Notwithstanding the fact that the California Supreme Court has subordinated employer property rights to those of the ALRA and that the hearings documented the barriers of undocumented status, numerous languages other than Spanish and English and illiteracy, the argument was made before both the Ad Hoc Committee and in the hearings that various alternative methods of communication outside the workplace were all that was appropriate. For instance, it was said that we could reach the workers through community outreach. But the outreach programs – and we want to increase them in the future- would allow the agency to reach only less than 10 percent of all of California’s agricultural workers in over the next 24 years.

Secondly, it was said that video trainings of the kind that I used when I was an Independent Monitor for the British multinational First Group Company were appropriate. But as one of the leading Labor Contractors who has had broad trainer experience said: “video trainings are ineffective because they are not interactive and people do not pay attention.” Similarly, the testimony before us in the hearings established the proposition that aside from the frequent unavailability of cell phone signals, few workers – particularly the indigenous – have had an opportunity to get on the

internet or to use so called smart phones, the use of which presupposes literacy. And finally we found a great fear of retaliation and an awareness of lack of knowledge about protections against the retaliation that would be available under labor laws.

My hope is that we can move forward with this initiative and that I will obtain constructive commentary from you and others in the agricultural labor relations community. Although we have provided that the worker education procedure is to be initiated by two or more workers who request it (the agency will not initiate it itself.), I think that not only is education about our law a good idea but also that it is desirable for both workers and supervisors- and I want to see it available to both groups. My hope is that when this rule emerges later this year it will establish a forum which allows for all parties to hear from us, albeit for a relatively brief period of time.

Let me thank you again for this opportunity to be with you here in beautiful Monterey, the home of the leading Jazz Festival which I attended just four months ago. I appreciate your invitation and I look forward to working with you in the months and years to come.