

The NLRA Agricultural Labor Exemption: New Perspectives on Two Old Questions

This article examines the agricultural labor exemption from the National Labor Relations Act. It sketches the approach used by the courts and NLRB to determine whether certain labor is agricultural. It then identifies and evaluates the policy reasons offered in support of the exemption, concluding that Congress ought to abolish the exemption.

The nation's farms are now the sites for the harsh labor practices, violence and crippling strikes which once plagued factories in the early twentieth century.¹ Trade unionism, as developed in urban industry, successfully combatted these evils. Unfortunately, however, agricultural workers have been relatively unsuccessful in organizing and making their voices heard.² One important reason is the absence of congressional guidance provided for labor relations in other industries: agricultural labor is exempt from coverage under the National Labor Relations Act (NLRA).³ The state of labor relations in agriculture today bears a marked similarity to that in other industries before NLRA coverage. Nevertheless, Congress has consistently rejected proposals to abolish the agricultural labor exemption.⁴

1. See, e.g., the accounts of the AFL-CIO's efforts in the early 1960's to organize farm labor in California in Comment, *Agricultural Labor Relations—The Other Farm Problem*, 14 STAN. L. REV. 120, 137-39 (1961-62); Comment, *The Unionization of Farm Labor*, 2 U.C.D.L. REV. 1 (1970); SUBCOMM. ON MIGRATORY LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, THE MIGRATORY FARM PROBLEM IN THE UNITED STATES, S. REP. NO. 83, 91st Cong., 1st Sess. 19, 20 (1969).

2. For a discussion of the many problems confronting farmworker attempts to organize, see Comment, *The Unionization of Farm Labor*, 2 U.C.D.L. REV. 1 (1970).

3. 29 U.S.C. § 152(3) (1970).

4. H.R. 11,635, 94th Cong., 2d Sess. (1976); H.R. 4007, 93rd Cong., 1st Sess. (1973); H.R. 1410, 92d Cong., 1st Sess. (1971); S. 8, 91st Cong., 1st Sess. (1969); H.R. 16014, 90th Cong., 2d Sess. (1968); H.R. 4769, 90th Cong., 1st Sess. (1967). No proposal has as yet been made in the 95th Congress. In addition to the above, members of Congress Leggett and Quie twice proposed alternative coverage under a national Agricultural Labor Relations Board, H.R. 3256, 94th Cong., 1st Sess. (1975); H.R. 4011, 93rd Cong., 1st Sess. (1973).

Most of the states appear to share Congress' reluctance to enact a statutory frame-

In 1935, when Congress considered the subject of agriculture in the context of the proposed Wagner Bill⁵ on national labor relations, two major questions arose. The first was whether Congress should exclude agricultural labor from the protections and responsibilities of the NLRA. The second was how to define agricultural labor. Congress answered the first in the affirmative, excluding agricultural labor from coverage.⁶ Congress then ignored the second question until 1946, when it effectively adopted the definition of agriculture found in the Fair Labor Standards Act.⁷

Forty years after agricultural labor was excluded from the Act, the most difficult questions regarding agricultural labor's specialized treatment have not changed: what is "agricultural labor," and should it be excluded from NLRA coverage? Although the questions are the same, the economic and legal setting for their discussion and resolution has changed dramatically. Agriculture's continued industrialization, NLRA experience with urban-industrial labor relations, the recent enactment in a few states of agricultural labor laws, and a changing political atmosphere necessitate a reevaluation of these questions.

This article attempts to answer these questions. Part I reviews the statutes which create the exemption and define agricultural labor. It

work covering agricultural labor relations. To date, only six have enacted such legislation. These states are Hawaii, Wisconsin, Arizona, California, Idaho, and Kansas. Hawaii and Wisconsin simply did not exclude agricultural labor from their "little Wagner Acts." HAW. REV. STAT., tit. 21, § 377-1(3) (1968); WIS. STAT. ANN. § 111.02(3) (West Cum. Supp. 1973). The other four states adopted specific farm labor legislation. ARIZ. REV. STAT. ANN. §§ 23-1381 to 1395 (West. Cum. Supp. 1977) (Agricultural Employment Relations Act); CAL. LAB. CODE §§ 1140-1166.3 (West Cum. Supp. 1977) (Agricultural Labor Relations Act of 1975); IDAHO CODE ANN. §§ 22-4101 to 4113 (1977) (Idaho Agricultural Labor Act); KAN. STAT. ANN. §§ 44-818 to 830 (1973). For discussion and comparison of these statutes see Fuller, *Farm-Labor Relations*, 8 IDAHO L. REV. 66 (1971); Lewin, *Representatives of Their Own Choosing: Practical Considerations in the Selection of Bargaining Representatives for Seasonal Farmworkers*, 1 INDUS. REL. L.J. 55, 57 n.10 (1976); and Comment, *Labor Management Relations in Agriculture: The Need for Meaningful Collective Bargaining*, 23 AM. U.L. REV. 145, 150-70 (Fall 1973).

5. S. 2926, H.R. 8423, 73d Cong., 2d Sess. (1934). Congress ultimately enacted an amended version of the Wagner Bill as the National Labor Relations Act, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970)) [hereinafter cited as NLRA]. The NLRA guarantees employees the right to organize, bargain collectively, elect representatives of their own choosing, and engage in concerted activities, including strikes and picketing under certain circumstances. It declares employer interference with the exercise of any of these rights to be an unfair labor practice. To hear unfair labor practice cases and oversee the conduct of representation elections, the Act creates the National Labor Relations Board (NLRB), granting the Board broad remedial powers. Significant amendments add the right of employees to refrain from collective activities. The amendments also identify and proscribe unfair labor practices. 61 Stat. 140 (1947) (current version at 29 U.S.C. §§ 157-158 (1970)).

6. 29 U.S.C. § 152(3) (1970).

7. Beginning in 1946, Congress has attached a rider to every NLRB annual appropriations bill specifying that the NLRB apply the FLSA definition of agriculture. See, e.g., 82 Stat. 992 (1968).

also discusses the definitional approach used by the federal courts and National Labor Relations Board (NLRB).⁸ Part II identifies and evaluates the various explanations for the exemption, with particular emphasis on those explanations exemption proponents are most likely to advance today. The article concludes that Congress should abolish the exemption.

I. THE SCOPE OF THE EXEMPTION

The National Labor Relations Act provides that "[t]he term 'employee' shall not include any individual employed as an agricultural laborer."⁹ With this simple language, Congress, in 1935, excluded from NLRA coverage over eleven million workers, or almost twenty percent of the American working public at that time.¹⁰ The 1935 Act did not define agricultural labor. Consequently, during the first ten years after its passage, the courts and the NLRB gleaned Congress' definitional intent from other statutory versions of the term "agriculture" or "agricultural labor."¹¹ In particular, they followed definitions in the Social Security Act (SSA)¹² and the Fair Labor Standards Act (FLSA).¹³

At least one court regarded the Social Security Act definition as highly persuasive evidence of Congress' intent under the NLRA, due to its passage only forty days later.¹⁴ The 1939 Social Security Act defined agricultural labor as including almost any service performed upon an agricultural or horticultural commodity.¹⁵ The definition included other processes in addition to ordinary farming operations such as growing

8. The NLRB was created as a quasi-judicial body to administer the NLRA. 29 U.S.C. § 153 (1970).

9. 29 U.S.C. § 152(3) (1970).

10. AGRICULTURAL MARKETING SERVICE, U.S. DEP'T OF AGRICULTURE, AVERAGE ANNUAL FARM EMPLOYMENT. In 1976, farm employment was down to approximately 4,375 workers. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 435 (1977).

11. See, e.g., *NLRB v. John W. Campbell, Inc.*, 159 F.2d 184, 186 (5th Cir. 1947); *North Whittier Heights Citrus Ass'n*, 10 N.L.R.B. 1269 (1939).

12. Int. Rev. Code of 1939, § 1607(l), 53 Stat. 1377-78 (1938) (current version at I.R.C. § 3121(g) (1970)).

13. 29 U.S.C. § 203(f) (1970).

14. *NLRB v. John W. Campbell, Inc.*, 159 F.2d 184, 186 (5th Cir. 1947). But it is noteworthy that the Social Security Act language asserted as persuasive of Congress' intent in 1935 was not adopted until 1938. 53 Stat. 1377-78 (1938).

15. The relevant statutory language is:

The term "agricultural labor" includes all service performed . . . (4) [i]n handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market, or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with

and harvesting. For example, handling, packing, processing and storing of farm commodities were also considered agricultural labor, as long as they were incidental to ordinary farming operations, or, in the case of fruits and vegetables, incidental to preparation for market.¹⁶ Some members of Congress, however, thought the Social Security Act language was too inclusive for use under the NLRA.¹⁷ For instance, the language seemed to imply that any fruit or vegetable packing operation involved agricultural labor, even though the operation might be entirely divorced from the actual farming of the crops. Therefore, a different definition was sought.

Congress apparently wanted a definition susceptible to a more narrow construction and yet flexible enough to allow for changes in agriculture. The 1938 FLSA definition provided this. It states:

“Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities. . . , the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.¹⁸

The NLRB and courts have been able to construe this language to include commercial fruit and vegetable packing operations under the NLRA.¹⁹ Probably due to this flexibility, since 1946, Congress has attached a rider to its annual NLRB appropriations authorization, using the FLSA definition to determine NLRB jurisdiction.²⁰

Although the FLSA definition is an improvement over the Social Security Act version, interpreting and applying it in actual labor dispute cases has proved difficult. This difficulty is evident in the NLRB's failure, until recently, to enunciate a single comprehensive test construing the definition. However, the earlier cases of both the federal courts and the NLRB are generally consistent with the NLRB's current announced approach. This consistency suggests that the problem has been more one of describing the test than of applying it. Unfortunately, even applying

any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term “farm” includes stock, dairy, poultry, fruit, furbearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

53 Stat. 1377-78 (1938).

16. *Id.*

17. H.R. REP. NO. 245, 80th Cong., 1st Sess. 360 (1947).

18. 29 U.S.C. § 203(f) (1970).

19. See text accompanying notes 46-53 *infra*.

20. See, e.g., 82 Stat. 992 (1968).

the judicial test causes some anomalous results. The following three sections present, discuss and critique this test and its results.

A. The Test: A Two-Level Approach

For purposes of judicial construction, the statutory definition of agriculture is divided into two distinct "branches."²¹ The first, or "primary," branch of agriculture consists of certain functions listed in the FLSA statutory definition.²² These functions include such traditional farming practices as cultivation and tillage of the soil, the raising of livestock, and the growing and harvesting of agricultural commodities.²³ Labor performed in the pursuit of such practices is agricultural per se, irrespective of whether the worker is employed by a farmer or on a farm.²⁴ Such labor therefore is exempt from NLRA coverage. The second, or "secondary," branch consists of any other practices, whether or not themselves traditional farming practices, which are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.²⁵ Labor directed to practices which fall under the secondary branch will be deemed agricultural and thus exempt only if two conditions are met. First, the practice performed must be one ordinarily, customarily, or usually performed by a farmer or on a farm.²⁶ Second, the practice must be part of the agricultural function rather than part of an independently and separately organized productive activity.²⁷ Frequently, a particular worker's labor includes both primary or secondary branch agricultural activity and nonagricultural activity. In this case, NLRA coverage will apply to the nonagricultural activity only if it involves a regular and substantial portion of total work effort.²⁸

B. Application of the Test

The two-level construction of the FLSA definition of agriculture permits consideration of both the function performed and the manner and

21. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63 (1949). The NLRB follows this two-branch analysis. *Guadalupe Carrot Packers*, 228 N.L.R.B. No. 40 (Feb. 22, 1977).

22. *Id.* The primary branch includes all those functions listed in the statutory definition up to the words "and any practices," which begin the second branch. 29 U.S.C. § 203(f) (1970) (*set forth in text accompanying note 18 supra*).

23. *Id.*

24. *Id.* See also 29 C.F.R. § 780.105 (1976), interpreting the FLSA definition of agriculture.

25. *Id.*

26. *Guadalupe Carrot Packers*, 228 N.L.R.B. No. 40 (Feb. 22, 1977).

27. *Id.*

28. *Grower-Shipper Vegetable Ass'n*, 230 N.L.R.B. No. 150 (July 21, 1977); *Olaa Sugar Co.*, 118 N.L.R.B. 1442 (1957).

circumstances of that performance. The results and rationales from the cases illustrate this point.

Few cases have turned on whether labor is agricultural per se under the primary branch of the definition. This suggests that the courts and the NLRB have had little difficulty identifying such labor. The reason is that the statutory definition expressly identifies the farm practices which qualify under that branch. These practices include cultivating the soil, growing and harvesting crops, and raising livestock or poultry. The practice, or function, performed conclusively establishes agricultural labor status. The manner and circumstances of performance, however, are also reflected in the result, because these practices share the common attribute of being necessarily performed *in* the field, orchard, livestock yard, or poultry coop. In contrast, other practices such as produce packing and tractor repair are usually performed elsewhere. Thus, primary branch agriculture includes stoop field labor²⁹ and cultivator-tractor driving.³⁰ Practices not listed, such as food processing,³¹ fruit and vegetable packing³² and produce hauling,³³ are excluded.

Generally exemptions from comprehensive remedial statutes are to be narrowly construed, and this is evidently true of the agricultural labor exemption.³⁴ As a result the courts and the NLRB are very restrictive in their interpretations of what is included under agriculture per se.³⁵ For instance, in the leading case of *Farmers Reservoir and Irrigation Co. v. McComb*,³⁶ the Supreme Court found that employees of an irrigation company who tend the ditches *leading to* the farmers' fields are not exempt under the primary branch of the definition. The Court reasoned

29. See *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir. 1951) (assumed as necessary for holding on other matters that union of field workers, irrigators and packing shed workers composed exclusively of agricultural laborers).

30. This is apparent from the definition itself and dicta in the relevant cases cited in this section generally, e.g., *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949).

31. See, e.g., *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 (1955) (sugar-processing).

32. See, e.g., *NLRB v. John W. Campbell, Inc.*, 159 F.2d 184 (5th Cir. 1947).

33. See, e.g., *Guadalupe Carrot Packers*, 228 N.L.R.B. No. 40 (Feb. 22, 1977).

34. See *Hearnberger v. Gillespie*, 435 F.2d 926, 929 (8th Cir. 1970) (technically an FLSA, not NLRA, case).

35. Another example of restrictive interpretation is the special meaning attached to the word "production", which appears as one of the functions under the primary branch of the definition. If given its plain meaning, "production" would swallow all other functions, broadening the scope of the exemption considerably. In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764-65 (1949), the Supreme Court went to the legislative history behind the word's inclusion and found that it was added to account for a special situation: the production of turpentine and gum rosins. The Court therefore limited the scope of application of the word "production" in the FLSA definition of agriculture to this single context.

36. 337 U.S. 755, 762-63 (1949).

that the employees were not engaged in the cultivation or tillage of the soil, or the growing of agricultural or horticultural commodities. The Court did indicate, however, that it would have found irrigators working *in* the fields to be engaged in cultivation and tillage, and therefore exempt.³⁷ Similarly, in an NLRB case the Board focused upon the fact that cemetery and park maintenance does not produce agricultural or horticultural "commodities" as marketable items.³⁸ Instead, it merely enhances another mercantile enterprise. Thus, the Board was able to avoid classifying the lawn and flower tending as agricultural labor.

The courts and the NLRB have a precise and narrow view of what labor is agricultural *per se*. Because of this, almost all cases turn on whether the labor in question is exempt under the broader secondary branch of the definition. The classification of labor as agricultural or nonagricultural under this branch is more complex.

The first requirement under the second branch, that the practice performed is ordinarily, customarily, or usually performed by a farmer or on a farm, presents few problems. Activities capable of falling within the scope of this requirement include repairing farm implements,³⁹ hauling the harvested crop from the fields,⁴⁰ and grading and packing perishable fruits and vegetables.⁴¹ In contrast, workers at sugar processing mills cannot qualify as agricultural, largely because processing is customarily a separate operation from farming.⁴² Processing is usually removed from the farming operations in terms of time, place, personnel and management.

The second requirement, that the practice must be part of the agricultural function rather than an independently and separately organized productive activity, is more difficult to apply. The NLRB has not expressly defined the crucial terms "agricultural function" and "independently and separately organized productive activity." Neither has the Board indicated precisely how this requirement corresponds to the statutory language on which it is based. The requirement is apparently a generalization which encompasses three conjunctive factors found in the statutory language: the practice in question must be performed 1) by a farmer or on a farm, 2) incidental to or in conjunction with, 3) such

37. *Id.*

38. *Hershey Estates*, 112 N.L.R.B. 1300 (1955) (employees divided their time among greenhouse, nursery, park and cemetery work. NLRB found only greenhouse and nursery work to be agricultural labor).

39. *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 (1955).

40. *Clinton Foods, Inc.*, 108 N.L.R.B. 85 (1954).

41. *NLRB v. John W. Campbell, Inc.*, 159 F.2d 184 (5th Cir. 1947) (discharged vegetable packing shed employees who filed unfair labor practice charges held not protected by NLRA where employer packed only own produce during relevant period).

42. *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 (1955).

farming operations.⁴³ To date the courts and the NLRB have found little occasion to focus independently upon either of the first two factors.⁴⁴ The third factor, however, has been of central importance since the first attempts to determine the parameters of the exemption.

In interpreting the term "such farming operations," the courts and the NLRB have placed special emphasis on the word "such," limiting its meaning to an employer's *own* farming operations.⁴⁵ Under this interpretation, labor is not agricultural under the second branch of the definition unless performed only with regard to the employer/farmer's own product. For example, a produce packing shed worker's activity is agricultural labor only to the extent that produce grown by the worker's own employer is packed.⁴⁶ If and to the extent that the worker packs the produce of other growers, the activity is not agricultural. How this rule works in practice is demonstrated by the case of an employer cooperative which maintained its own large packing operations for the produce of its several grower-members.⁴⁷ Since the cooperative was not the grower, the court found the packing shed work not agricultural labor.⁴⁸ Compare, however, the case of packing shed employees of a close family farming partnership which grew, graded, and packed only its own fruit.⁴⁹ Even though some of the land was separately owned by the individual partners, the court found the employees exempt from the NLRA.⁵⁰ These two results are arguably compatible because the presence of a family partnership may refute the argument that the packing operation was the separate commercial operation of several growers.

The courts and the NLRB, however, discovered that requiring only that the operations be restricted to the employer's own crops resulted in too broad an exemption. For instance, in *In Re Imperial Garden*

43. 29 U.S.C. § 203(f) (1970). See text accompanying note 18 *supra*.

44. *But see* Farmers Reservoirs & Irrigation Co. v. McComb, 337 U.S. 755, 766-68 (1949).

45. *E.g.*, NLRB v. O'laa Sugar Co., 242 F.2d 714 (9th Cir. 1957) (truck driver hauled sugar cane from fields to mill for both corporate employer and other growers. Held, as to hauling from fields of other growers, driver's activity not incident to "such" farming operations within the meaning of the statute); Crown Crest Fruit Corp., 90 N.L.R.B. 422 (1950). See also 29 C.F.R. §§ 780.137, 780.141 (1976) (federal regulations interpreting the FLSA definition).

46. NLRB v. John W. Campbell, Inc., 159 F.2d 184 (5th Cir. 1947); H-M Flowers, Inc., 227 NLRB 1183 (1977) (corporate employer packed, shipped and wholesaled cut flowers not its own. Held, not agricultural work.); Bodine Produce Co., 147 N.L.R.B. 836 (1964). This rule is not restricted to the packing shed context, but includes truck drivers who haul sugar cane from the fields of their corporate employer. NLRB v. O'laa Sugar Co., 242 F.2d 714 (9th Cir. 1957).

47. NLRB v. Edinburg Citrus Ass'n, 147 F.2d 353 (5th Cir. 1945) (corporate cooperative of citrus growers packed only the fruit of its members, the corporation itself growing no fruit).

48. *Id.* at 354.

49. Dofflemyer v. NLRB, 206 F.2d 813 (9th Cir. 1953).

50. *Id.*

Growers,⁵¹ a California corporation grew, packed, and shipped only its own lettuce and melons. The employer, however, had invested substantially in building equipment and a railroad siding for the packing operation. In addition, the corporation hired a separate labor force for the packing operation which worked seven months per year. A test which requires only that the produce packed be grown by the employer would exclude packing shed employees from NLRA coverage. The NLRB held, however, that the packing operation was so substantial and independent that it constituted a separate commercial enterprise, and was therefore not truly part of the employer's farming operations. The Board stated that the determination of whether labor is agricultural must ultimately rest on the "complete factual picture."⁵² Relevant factors include the relative size of the ordinary farming operations and the packing operation, the extent to which the particular operations are performed by ordinary farm employees, the degree of industrialization involved, the degree of separation between the farming and packing operations, and the type of product resulting from the packing operation.⁵³ This "complete factual picture" is in essence what the NLRB presently uses to determine whether an operation is either part of the agricultural function or an independent and separately organized productive activity.

The last consideration necessary to determine whether an employee is an agricultural laborer is the percentage of work time spent in exempt activity. The courts and the NLRB consider this factor when an employee apportions work time between agricultural and nonagricultural labor under the two-branch construction.⁵⁴ A hypothetical serves to il-

51. 91 N.L.R.B. 1034 (1950).

52. *Id.* at 1037.

53. *Id.* In a later case, the NLRB appeared to disapprove of *Imperial Garden Growers'* "complete factual picture" approach in favor of the "own employer" approach discussed *supra* in text accompanying notes 45-50. *Bodine Produce Co.*, 147 N.L.R.B. 836 (1964). The NLRB's recent restatement of the applicable test in *Guadalupe Carrot Packers*, 228 N.L.R.B. No.40 (Feb. 22, 1977), however, suggests the contrary.

54. That is, agricultural and nonagricultural as it would be classified under the two branch judicial construction of the statutory definition discussed *supra* in text accompanying notes 21-53. From 1954 to 1957, the NLRB followed a rule known as the *Clinton Foods* doctrine: if employees spent a substantial part of their time in an agricultural activity, they were agricultural laborers exempt from the Act. In *Clinton Foods*, 108 N.L.R.B. 85 (1954), the NLRB found one-third of one's time "substantial." Under this rule, if the truck driver in the example were to devote one-third or more of total work-time to hauling the sugar cane of his or her own employer, all hauling would be exempt. In 1957, however, the Board overruled this aspect of *Clinton* and adopted the present rule. *Olaa Sugar Co.*, 118 N.L.R.B. 1442 (1957) (the Board had previously decided that the produce-hauling truck drivers in question, who spent about fifty percent of their time hauling for their own employer and fifty percent for other farmers, were not agricultural labor. On appeal, the ninth circuit remanded the case for a finding on the "substantial time" issue under *Clinton*. The Board took its opportunity to expressly reject the *Clinton* rule).

lustrate the NLRB's rule that the employee is not exempt if a regular and substantial portion of the labor is nonagricultural. A truck driver hauls raw sugar cane from the fields to the employer's mill. Some of the fields belong to the employer. To this extent the labor is agricultural. Some of the fields belong to other growers. Hauling their cane is nonagricultural. The issue is whether to include the driver in an NLRA bargaining unit. In a recent case, the NLRB indicated that twenty percent or more of total work time is "substantial," while ten percent or less is not.⁵⁵ Thus, the truck driver in the example would be assuredly exempt from NLRA coverage only if ninety percent or more of total work time were spent hauling his or her own employer's produce.

The future of the regular and substantial time rule is uncertain. One court has noted that an apportioned time rule is merely a self-imposed limitation on the Board's jurisdiction and is not mandated by the language of the statutory definition.⁵⁶ Under this view, the statutory definition requires only consideration of the function performed and whether or not the labor is part of an independent and separate productive activity. Thus, the Board could hold that employees who perform *any* non-agricultural work are covered by the NLRA. Increasing political pressure on Congress to abandon the agricultural labor exemption could conceivably motivate the Board to increase its area of active jurisdiction by eliminating the apportioned time factor entirely.

C. Critique of the Test

It is important that the courts and the NLRB are able to include under NLRA coverage work which is part of an independent and separate commercial enterprise and work which is not customarily performed by a farmer or on a farm. It demonstrates how the second branch of the exemption adapts to significant changes in American agriculture. As agriculture modernizes and industrializes, the exemption should not continue to exclude workers doing essentially factory work merely because the employer grows agricultural products. The present NLRB approach to agricultural labor determinations reflects this concern by very narrowly construing the exemption.

In some situations, however, applying the present two-level approach creates anomalous disparities in coverage. For example, some fruit and vegetable packing labor and some truck hauling of harvested produce from the fields are exempt, while some are not.⁵⁷ To the extent that the cases turn on whether the produce is only that of the employer, the form

55. Grower-Shipper Vegetable Ass'n, 230 NLRB No. 150 (July 21, 1977).

56. NLRB v. Olaa Sugar Co., 242 F.2d 714 (9th Cir. 1957).

57. See text accompanying notes 39-53 *supra*.

of the economic enterprise determines the outcome. Thus, the packing shed or produce hauling labor of the large or small cooperative or independent packing house is not exempt, while the identical work performed in a sole proprietorship, farming corporation, or close family farming partnership may be exempt.⁵⁸ The work, working conditions, and practical and economic concerns of the employer may be identical, but the treatment differs.

Another similar anomaly may occur whenever the location of the work or the classification of the function as an agricultural practice per se determines exemption status. Tomato harvesting, for example, is essentially an assembly-line operation for those persons riding the machine harvester and sorting the "greens" and "over-ripes" as they pass along the belt. The work and working conditions are very similar to the sorting of vegetables in a commercial packing shed. The treatment of such labor, however, may differ from the treatment of packing house labor because harvesting is per se agricultural under the primary branch of the statutory definition. Classifying such labor as agricultural seems artificial. Moreover, the agricultural labor classification has significant consequences for the workers who are deprived of NLRA benefits that other packing house employees enjoy.

The two-level analysis and apportioned time rule provide a workable approach to agricultural labor determinations. This approach seems to be consistent with the plain meaning of the statutory language. By considering the function performed and the manner and circumstances of that performance, it attempts to account for Congress' interest in flexibility to reflect changes in agriculture. Nevertheless, NLRA coverage varies in some essentially identical contexts so that persons similarly situated do not derive similar advantages.

II. THE ARGUMENTS FOR AND AGAINST THE EXEMPTION

The federal courts and the NLRB have fashioned their understanding of the meaning of agricultural labor primarily from their perception of congressional intent at the time it created and defined the exemption.⁵⁹

58. See text accompanying notes 47-51 *supra*.

59. Congress was strangely silent in 1935 as to the reasons for the exemption of agricultural labor. Apparently the only recorded reasons actually mentioned in Congress were 1) the possibility that the Supreme Court would hold coverage of agriculture to be unconstitutional as an interference with intrastate activity, 2) the assertion that agricultural laborers were generally casual employees, few in number, 79 CONG. REC. 9721 (1935), reprinted in NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3203 (1949) [hereinafter cited as LEGISLATIVE HISTORY], and 3) unidentified "administrative" reasons, S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935), reprinted in LEGISLATIVE HISTORY, at 2306. Many of the rationales for the exemption were not suggested until considerably later. For a thorough and excellent discussion of the legislative his-

Both proponents and opponents have suggested reasons for its existence. Considerations of administrative practicality, necessity, economics, or political expediency provide the basis for these reasons. In recent years, an increasing number of critics have attacked the exemption.⁶⁰ These criticisms suggest that although the rules accomplish the original purposes underlying the exemption, they do not correspond to the reality of modern agricultural labor relations. Some of the rationales for the exemption fail because they are improperly reasoned or based on unproved factual assumptions. Time and changed conditions undermine others. The proper recognition of certain interests involving human rights and legal equality offset still others. The following discussion identifies and evaluates the reasons offered for the exemption. It concludes that, for administrative, economic and humanitarian reasons, Congress should eliminate the NLRA agricultural labor exemption.

A. *Unique Problems of a Seasonal Industry*

One rationale for the agricultural labor exemption, that of administrative impracticality, relates closely to the unique seasonal nature of agriculture. Supposedly, agricultural labor is impractical to organize and collective bargaining agreements difficult to enforce because so much of the labor force is short-term and migratory.⁶¹ Moreover, exemption proponents have asserted that it is inappropriate to apply the same rules that control industrial union activity to agricultural labor. In particular, the threat of harvest-time strikes places the farmer/employer at an unfair disadvantage with the union in collective bargaining.⁶² In other industries, a temporary shutdown injures both employer and employee. In an agricultural strike, however, because of the perishability of the crop, a single farmer may lose an entire year's capital investment within a period of two or three days, whereas the worker may lose only a few days' wages.

tory of the exemption's creation and definition, see Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939 (1966).

60. Earlier discussions of the agricultural labor exemption which, like this comment, advocate its elimination include: Lewin, *Representatives of Their Own Choosing: Practical Considerations in the Selection of Bargaining Representatives for Seasonal Farmworkers*, 64 CALIF. L. REV. 732 (1976); Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939 (1966); Murphy, *An End to American "Serfdom"—The Need for Farm Labor Legislation*, 25 LAB. L.J. 85 (1974); Comment, *The Farm Worker: His Need for Legislation*, 22 MAINE L. REV. 213 (1970); Comment, *Agricultural Labor Relations—The Other Farm Problem*, 14 STAN. L. REV. 213 (1961); and Comment, *Legislation and Agriculture Labor*, 1949 WIS. L. REV. 563.

61. See Lewin, *supra* note 60, at 742-43, which points out some of the specifics of this problem.

62. *Extension of National Labor Relations Act to Agricultural Employees: Hearings on H.R. 4769 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 206 (1967) [hereinafter cited as *1967 Hearings*] (statement of Matt Triggs, American Farm Bureau Federation).

Although a popular pro-exemption argument, the rationale is supported by neither reason nor facts. First, since only about one-third of the hired farm labor force is "seasonal" and about eight percent is migratory,⁶³ this rationale applies only to a small part of the total farm labor force. Impracticality in some situations should not serve as a reason to exclude NLRA coverage in others. Where union organization is truly infeasible, it will not occur, whether or not agricultural labor is covered under the Act.

Second, seasonal and migratory labor is organizable. The successes of organized labor in Hawaii, where state law has covered agricultural labor for years, and in California under the United Farm Workers Union (UFW),⁶⁴ establish this fact.⁶⁵ Moreover, even if farm labor was once difficult to organize because of informal and erratic farm hiring practices and consequent labor force discontinuity between seasons, the gradual modernizing of agriculture reduces this difficulty. In agriculture, as in other industries, mechanization is leading to industrialization. Today, many fruit and vegetable packing sheds operate as factory assembly-lines, with various operations being performed in stages as the products pass along a conveyor belt.⁶⁶ Some of these assembly-lines have even been moved directly into the fields, combining both harvesting and preparation for market into one operation.⁶⁷ Where an operation industrializes, job specialization occurs and the value of moderately skilled labor increases. In such situations, continuity of the labor force between seasons is likely to increase, with a consequent decrease in the practical barriers to labor organization. The NLRB's experience with farmer cooperative packing houses, and the California successes in organizing farm grading and packing labor under the state's Agricultural Labor Relations Act⁶⁸ demonstrate that it is no longer impractical to organize farm assembly-line type operations.

Third, the belief that NLRA rules and procedures are inappropriate to seasonal industry is also unsupported. The Act already covers the related seasonal sub-industries of food processing and commercial fruit

63. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 265, THE HIRED FARM WORKING FORCE OF 1973 14 (1974). "Seasonal" workers, as defined by the Department of Agriculture are persons working between 25 and 149 days per year.

64. The UFW enjoyed some success even before California's legislature enacted its Agricultural Labor Relations Act, CAL. LAB. CODE §§ 1140-1166.3 (West Cum. Supp. 1977). See note 1 *supra*.

65. See the discussion of the Hawaiian and other states' experiences in Comment, *Agricultural Labor Relations: The Need for Meaningful Collective Bargaining*, 23 AM. U.L. REV. 145, 150-60 (1973) [hereinafter cited as *The Need for Collective Bargaining*]; Comment, *The Unionization of Farm Labor*, 2 U.C.D.L. REV. 1, 6-27 (1970).

66. Some of these operations are covered under the NLRA and some are not, even though they are essentially identical. See text accompanying notes 21-53 *supra*.

67. Tomatoes are a prime example of a crop produced in this manner.

68. CAL. LAB. CODE §§ 1140-1166.3 (West Cum. Supp. 1977).

and vegetable packing.⁶⁹ In addition, the Act covers the construction industry. This industry is seasonal where winters are severe and also demands considerable mobility from its labor force. Thus, the NLRB has experience in seasonal industries upon which to draw. Such experience establishes the adaptability of the basic NLRA framework to such industries. One particular NLRA adjustment for the construction industry that would help agriculture is the provision allowing union hiring halls to improve labor continuity between seasons.⁷⁰ The NLRB is confident that the remainder of the present statutory framework is adequately flexible to deal with whatever unique issues may arise in agriculture.⁷¹ Some change in the Board's discretionary rules regarding, for instance, election procedures and recognitional picketing, would be advisable.⁷²

Finally, the argument that a harvest-time strike could cause irreversible damage to the employer in a few days' time is accurate. However, with or without the NLRA, harvest-time strikes have always been a possibility,⁷³ and today occurs with regularity in many areas. Assuming that organized labor would act in the best interests of its members to preserve jobs against the threat of further mechanization by farmers,⁷⁴ and recognizing the experience of states in which some agricultural labor has been organized, this danger is largely illusory. The suggestion, therefore, that eliminating the agricultural labor exemption would result in a significant increase in damaging strikes is exaggerated.

B. Disharmony in Agriculture

Another pro-exemption argument is that it is unnecessary to include agricultural labor under the NLRA. This is also known as the "harmony in agriculture" theory.⁷⁵ According to this argument, the dominant employment structure in agriculture is the "hired hand"

69. See text accompanying notes 21-53 *supra*.

70. 29 U.S.C. § 158(f) (1970). A hiring hall arrangement works basically as follows: the workers' employment contracts provide that based on their collective bargaining rights, if they arrive at the site of the employer's operations by a certain date the following year, and there is any work to do, they will be hired first.

71. 1967 Hearings, *supra* note 62, at 147-55 (statement of Ogden W. Fields, Executive Secretary, NLRB). *But see* Lewin, *supra* note 60, at 744-94, for a discussion that suggests other minor amendments would be necessary. See also, *The Need for Collective Bargaining*, *supra* note 65, advocating agricultural labor coverage under a separate national Agricultural Labor Relations Board with separate guidelines.

72. *Id.*

73. The right of employees to organize and bargain collectively exists independently of the statutory provisions of the NLRA. *Amalgamated Util. Workers v. Consolidated Edison Co. of N.Y.*, 309 U.S. 261, 263-64 (1940).

74. Although organized labor in general has not always fought mechanization to preserve jobs, there is evidence that the agricultural labor movement, spearheaded by the UFW, is doing so. See, e.g., S.F. Chronicle, Sept. 20, 1977, at 16, col. 1.

75. Morris, *supra* note 60, at 1968-69.

arrangement in which the farmer and one or a few "hired hands" perform all the functions of farming. The relationship between employer and employee is a close one, almost familial. The farmer must employ substantially more persons during harvest seasons and only for certain crops. With so few employees, there are never enough workers to necessitate a collective bargaining agent and procedure. In this harmonious atmosphere, conditions leading to strikes and violence do not occur. If the factory conditions and the threat of strikes and violence do not exist, the need for a protective labor law is absent.⁷⁶

The harmony in agriculture rationale rests on both irrelevant and inaccurate assertions. Opponents of the exemption have pointed out that farms on which "hired hand" arrangements occur are so small and their impact on interstate commerce so slight that labor disputes are unlikely to arise. Further, the NLRB will probably decline to assert jurisdiction over the few that do.⁷⁷ Indeed, since 1958, the NLRB has consistently refused to assert jurisdiction in any case where direct or indirect interstate shipments by the employer do not exceed \$50,000.⁷⁸ As of 1967, that would have excluded all but three percent of the nation's farms.⁷⁹ Extending NLRB jurisdiction to agriculture would therefore have no adverse effect on the small farms. As to those few large farms which carry on assembly line type operations, NLRA coverage probably would be necessary, and NLRB jurisdiction applicable. Though NLRA coverage would directly affect only a small percentage of the nation's farms, the impact on agricultural labor in general would probably be substantial, as these larger farms employ approximately forty-five percent of the hired farm work force.⁸⁰

In addition to the irrelevance of the asserted dominance of "hired hand" arrangements, the pro-exemption argument fails because the close employer-employee relationship assumed by the harmony in agriculture theory no longer exists. The farm assembly-lines and increased labor skill and continuity which accompany agricultural modernization are having a profound impact on the awareness and attitude of agricultural workers. The result is that, to a much greater extent than in 1935, factory-like conditions and the concomitant threat of industrial strife

76. The avoidance of strikes and other forms of industrial strife which burden interstate commerce is the explicit underlying rationale for the NLRA. 29 U.S.C. § 151 (1970).

77. 1967 *Hearings*, *supra* note 62, at 19 (statement of W. Willard Wirtz, Secretary of Labor).

78. *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958).

79. 1967 *Hearings*, *supra* note 62, at 19 (statement of W. Willard Wirtz, Secretary of Labor).

80. THE SUBCOMM. ON MIGRATORY LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, *THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES*, S. REP. NO. 83, 91st Cong., 1st Sess. 22 (1969).

and violence can and do exist within agriculture.⁸¹ This situation creates the same need for statutory coverage of agricultural labor that prompted the enactment of the NLRA over forty years ago.

C. *The Economic Rationale*

Exemption proponents also assert that economic reasons support the statutory distinction between agriculture and other industries.⁸² The basic argument proceeds as follows: farmers are numerous and farm products fungible so that any one farmer has no control over the price received for goods sold.⁸³ As a result, agricultural wholesale market prices may barely exceed the costs of production.⁸⁴ If a farm unionizes, the farmer, unlike the industrial employer, cannot add the cost of increased wages and other benefits to the price of the produce unless agricultural labor costs for all farmers in that market increase similarly and simultaneously. Many farmers would be ruined. Foreign producers with lower labor costs would pick up the slack in production.

When Congress was considering labor legislation in 1935, not only did it confront this theory of "perfect competition"⁸⁵ in agricultural markets, but it faced another problem as well. Agricultural prices, which traditionally produce lower economic returns than in non-farm industries in terms of relative purchasing power,⁸⁶ were even more depressed than normal.⁸⁷ It is reasonable to assume, therefore, that Congress feared a post-depression collapse of the vital food industry. If Congress applied the NLRA to agricultural labor, farm labor costs would increase for those farmers immediately organized but not for others, among whom would be foreign producers. Not only would production decrease, but to the extent that farm prices might rise, the cost

81. See 1967 Hearings, *supra* note 62, at 2-203.

82. 1967 Hearings, *supra* note 62, at 206 (statement of Matt Triggs, American Farm Bureau Federation).

83. In addition, the reluctance of farmers and their children to migrate out of agriculture, despite perennial low incomes, and the inelastic consumer demand for farm products, see text following note 92 *infra*, create a recurrent tendency for oversupply of agricultural products that also depresses farm prices. W. WILCOX, W. COCHRANE, & R. HERDT, *ECONOMICS OF AMERICAN AGRICULTURE* 240-48 (3d ed. 1974) [hereinafter cited as WILCOX].

84. Farmers use this argument as the basis for their continuing demands for government price supports to achieve parity of purchasing power with non-farm enterprises. See CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, *EVALUATIONS OF PROPOSALS GUARANTEEING FULL PARITY FOR FARMERS IN THE MARKETPLACE*, 95th Cong., 2d Sess. (1978) (study prepared for the House Comm. on Agriculture).

85. The theory of perfect competition is more completely set out and discussed in Chapter 8 of MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 222-52 (1970).

86. WILCOX, *supra* note 83, at 172-74 (including Figures 11-2 and 11-3).

87. *Id.*

of the consumer food basket would increase at a time when buying power was already suffering.

Although the economic rationale for the exemption may once have been valid, the passage of time has seriously undermined it. To the extent that it focuses on the 1930's post-depression concern with low consumer buying power, it is of little relevance at the present time.⁸⁸ Proponents insist, however, that the basic point is still viable: agriculture is too vulnerable to afford unionization.⁸⁹ This too is false. The change in the economic setting since the 1930's has not been solely external to agriculture. Mechanization within American agriculture has progressed to where small-scale operations are no longer cost-efficient.⁹⁰ In some agricultural fruit and vegetable markets, the larger farmers produce such a significant portion of the nation's need for a particular food product that competition has become "imperfect" in the sense that individual sellers knowingly have some control over the price they receive for their produce.⁹¹ In addition, the consumer demand for food is inelastic.⁹² In other words, as food prices increase, demand does not proportionately decrease. Thus, if some farmers must increase prices due to the rising labor costs caused by unionization, the consumers probably will pay them, eating about the same amount of food and decreasing expenditures on other goods. For these reasons, the assertion that farmers, particularly the large ones, cannot survive labor unionization and higher wages, is largely illusory.

The only significant threat to large modern American farmers comes from foreign competition. Certain factors, however, may tend to mitigate even this problem. These factors are the variation in harvest seasons throughout the world, increasing foreign labor costs, and the natural protective barrier of significant transportation costs.⁹³ Protective tariffs and quotas are also a possibility, if necessary to protect farmers.

88. Real disposable personal income, the closest statistical estimate to consumer buying power, more than doubled from 1935 to 1970. 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 225 (1975). Despite severe inflation, this trend has continued, at least through 1976. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 431 (1977).

89. *1967 Hearings*, *supra* note 62, at 206-08 (statement of Matt Triggs, American Farm Bureau Federation).

90. WILCOX, *supra* note 83, at 68-71. As used here, an operation is "cost-efficient" if its long run average cost per unit of output is at or near the minimum for firms operating in that market.

91. *Id.* at 206-09. For a specific example of such an industry, see R. Christopher, *Garlic in Gilroy: An Analysis of the American Fresh Garlic Industry* 58-60, 68-70 (May 1976) (unpublished A.B. honors thesis in Stanford University Department of Economics).

92. Wilcox, *supra* note 83, at 245.

93. See, e.g., Christopher, *supra* note 91, at 36-40.

Moreover, there is evidence that organized agricultural labor may be farsighted enough not to press for wage and benefit increases so great as to force employers into reduced production or replacement of jobs by mechanization.⁹⁴

Eliminating the agricultural labor exemption would probably benefit the small, less cost-efficient family farms.⁹⁵ First, union attention probably will not focus on the small farms. Second, NLRB jurisdiction may not extend to them under the present Board \$50,000 minimum sales policy. Third, contrary to the exemption proponents' assertions that removal of the exemption will ruin the small family farmers,⁹⁶ it seems more likely that it will improve their cost position compared to the large corporate farmers. The large farmers' costs per unit of output are lower, due primarily to their ability to afford technologically superior methods. If the large farms must bear increased costs due to unionization, the small farmers may survive where otherwise they could no longer compete.⁹⁷

If the unionization of agriculture will cause consumer food prices to increase, the relevant issue is by how much. Two factors combine to provide insight on this question. First, a result of increased mechanization is that agriculture uses less labor to produce more.⁹⁸ Second, labor costs are but a small fraction of retail food prices,⁹⁹ especially in highly capital-intensive sub-industries like meat and grain.¹⁰⁰ For these reasons, the unionization of agriculture today probably will have less impact on consumer food prices generally than in the 1930's. It is primarily fruit and vegetable prices that increased labor costs will affect, as their production requires far more labor per unit of output than other food products.¹⁰¹

D. Exemption Politics

Finally, some commentators have suggested that the creation and perpetuation of the agricultural labor exemption is pure political expediency.¹⁰² Considerable evidence supports the theory that agriculture was removed from coverage under Senator Wagner's original bill due to

94. See note 74 *supra*.

95. The author assumes, for the purposes of this comment, that small family farms are desirable from a policy standpoint.

96. 1967 Hearings, *supra* note 62, at 245 (statement of Richard O'Connell, National Council of Farmer Cooperatives).

97. *Id.* at 5 (statement of George Meany).

98. WILCOX, *supra* note 83, at 288-99.

99. U.S. DEP'T OF LABOR, FARM LABOR SITUATION IN 1966 (Feb. 1967).

100. 1967 Hearings, *supra* note 62, at 26 (statement of Frank A. Potter, Farm Labor Service).

101. *Id.* at 245 (statement of Richard O'Connell).

102. See, e.g., Lewin, *supra* note 60, at 794; Murphy, *An End to American "Serfdom"—The Need for Farm Labor Legislation*, 25 LAB. L.J. 85 (1974).

its proponents' fear that if the national farm lobby joined urban industry's opposition, the entire program would fail.¹⁰³ The farm block traditionally has opposed all efforts to extend coverage under the NLRA to agricultural laborers.¹⁰⁴ Recently, however, some of the farm organizations which represent small farmers have reversed their position.¹⁰⁵ Moreover, in 1973, a major voice of agribusiness, the American Farm Bureau Federation, supported a House bill to provide coverage of agricultural labor under a separate "Agricultural Labor Relations Act."¹⁰⁶ In contrast to the farm block, organized labor has traditionally favored inclusion of agricultural labor under the NLRA.¹⁰⁷ The softening of part of the farm block's hard line, therefore, accompanied by prodding from organized labor, should have motivated Congress to eliminate the exemption. However, the UFW, led by Cesar Chavez, has confused the issue by withdrawing its previous support.¹⁰⁸ Chavez objects primarily to applying to agriculture the picketing and secondary boycott restrictions in the present NLRA framework.¹⁰⁹ These restrictions prohibit some of the secondary economic pressure tactics which the UFW has found so effective in California.¹¹⁰ Perhaps because the UFW would be the union most directly affected by NLRA inclusion, a confused Congress has remained silent.¹¹¹

Criticism of the agricultural labor exemption has thus far focused on weaknesses in the rationales offered in its support. This criticism proba-

103. See Morris, *supra* note 60.

104. See, e.g., 1967 Hearings, *supra* note 62, at 205-47, 270-94 (testimony and statements of opponents of H.R. 4769).

105. The National Farmers Union and the National Farmers Organization favor inclusion of agricultural labor in the NLRA, probably because it would serve their economic interests. See text accompanying notes 95-97 *supra*.

106. H.R. 4011, 93d Cong., 1st Sess. (1973); *Agricultural Labor-Management Relations: Hearings on H.R. 4011 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 148 (1973) (prepared statement of Clifford McIntire and Matt Triggs).

107. *Id.* at 2-18, 62-76 (testimony and statements of George Meany and Cesar Chavez).

108. *Agricultural Labor Legislation: Hearings on S. 8 and S. 1808 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. 12, 22-23 (1969) [hereinafter cited as 1969 Hearings].

109. Chavez contends that the farm labor movement is still so inferior to that in urban industry that farm labor should be allowed to operate for a while under the pre-1947 NLRA framework which did not mention unfair labor union practices. 1969 Hearings, *supra* note 108, at 22 (prepared statement of Cesar Chavez).

110. 29 U.S.C. § 158(b)(4), (7) (1970). California's Agricultural Labor Relations Act (ALRA) incorporates the same basic prohibition of secondary activity, but permits certain significant exceptions. CAL. LAB. CODE § 1154(d) (West Cum. Supp. 1977). See Comment, *Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act*, 29 STAN. L. REV. 277 (1977). The UFW's present preference for state coverage is therefore easily understood.

111. Murphy, *An End to American "Serfdom"—The Need for Farm Labor Legislation*, 25 LAB. L.J. 85, 87-90 (1974).

bly does not completely invalidate the argument for the continued special treatment of agricultural labor. Arguably, with the removal of the exemption and increased labor organization in agriculture, it is likely that 1) farm labor costs will rise significantly; 2) consumer food prices may also rise to some extent; 3) farmers and farm labor will suffer from some increased foreign competition; 4) more farmers will be forced to give in to unreasonable harvest-time demands because of the unique problem of perishability; and 5) some laborers will lose their jobs as farmers turn to more capital-intensive modes of production. The major lesson of the criticism presented so far is that the structure, methods and needs of modern agriculture are not as unlike any other industry as proponents of the exemption claim.

E. Offsetting Considerations: The Positive Case for Eliminating the Exemption

One final area of criticism provides perhaps the most compelling reasons for eliminating the exemption. Whatever remain of the rationales for excluding agricultural labor from NLRA coverage, they are offset by society's moral obligation to treat agricultural workers similarly to those who work in other industries. Farmworkers ought to have the same protections as all other workers in exercising their right to organize and bargain collectively. In the words of AFL-CIO President George Meany,

[t]he continued denial of that right is an affront to the farmworkers and to the American principle of equal justice under the law Its continuance will help to perpetuate the shocking poverty—even degradation—of the men and women, and shamefully the children, who harvest so much of the food and fiber upon which the Nation depends.¹¹²

To force a powerless and poor minority to bear disproportionately the burden of keeping food prices down, is to discriminate unfairly in favor of workers in other industries.¹¹³ Similarly, if employers in other industries must face the possibility of crippling strikes, increased costs, and increased foreign competition, it is not clear why farmers should be exempted. Concerning harvest-time strikes, one critic of the exemption has said:

Labor negotiation is not supposed to be a set of circumstances in which there is a phony semblance of equality, in which the employer is very pleasant and polite to the employee, but in which the end result is foreordained because the employees simply have no way to make their point. The very purpose of the right to organize

112. *1967 Hearings*, *supra* note 62, at 7.

113. The average annual earnings in 1976 of hired farm laborers who only did farmwork and who worked at least 25 days were \$3,176 per person. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS (1977) (Table 606).

and the right to strike is to give to labor some leverage, some method of bringing pressure to bear on the employer.¹¹⁴

To exclude agricultural labor from the NLRA is to disenfranchise it. Farmers should have no more and no less right to unilaterally decide the value of labor's contribution and the best interests of their employees than other employers.

The positive case for including agricultural labor in the NLRA framework does not end with considerations of fairness and justice. Labor organization in agriculture will likely improve the standard of living for a segment of the American population which is at the bottom of the socio-economic ladder. In terms of the net social and economic benefits versus detriments to American society, losses to farmers and consumers should be at least partially, if not entirely, offset by a reduction of poverty and concomitant increase in purchasing power among agricultural laborers.

F. The Impact of State Legislation

On balance, the case for eliminating the agricultural labor exemption is persuasive. However, recent enactments by some states of agricultural labor relations legislation may induce the assertion that state coverage has obviated the need to eliminate the exemption.¹¹⁵ Arguably, local laws and labor boards are better suited than the federal government to deal with the peculiar agricultural labor problems of each state. In addition, considerable administrative waste would result if Congress were to eliminate the federal agricultural exemption because removing the exemption would require abandoning existing state programs due to preemption. Under the present law, the states can avoid NLRA conflicts and the possibility of federal preemption by following California's example. In its Agricultural Labor Relations Act, California expressly provides for mutually exclusive coverage between its Agricultural Labor Relations Board (ALRB) and the NLRB.¹¹⁶

In addition to displacing state legislation, eliminating the exemption may also frustrate a major California interunion agreement based on state-federal distinctions. In March 1977, the rival United Farm Workers (UFW) and Teamsters unions announced the signing of an agree-

114. 1967 *Hearings*, *supra* note 62, at 168 (statement of Elmer J. Holland, member of Congress).

115. These state laws are set out in note 4 *supra*.

116. CAL. LAB. CODE §§ 1140-1166.3 (West Cum. Supp. 1977). California's legislature was extremely cautious. Section 1140.4 adopts the same statutory definition from the FLSA. Section 1155.7 states "nothing in this chapter shall be construed to apply or be applicable to any labor organization in its representation of workers who are not agricultural employees." Finally, § 1148 requires the state labor board (ALRB) to "follow applicable precedents of the National Labor Relations Act, as amended."

ment designed to end the long-standing jurisdictional labor dispute between them.¹¹⁷ For the purpose of determining which union would have jurisdiction to organize and represent the workers of a given employer, the agreement adopts the same jurisdictional test used in labor dispute cases between the NLRB and the California ALRB.¹¹⁸ The Teamsters agree that employees classified as agricultural laborers are not within their jurisdiction, and the UFW agrees to organize only those included in that class. Whether the unions could arrive at another mutually satisfactory dividing line is uncertain. Therefore, considering California's significant role in the national agricultural picture,¹¹⁹ some observers may feel that to eliminate the exemption at this time would be ill-advised.

A closer look at the problems, however, reveals that state agricultural labor legislation is not preferable to NLRA coverage of agricultural labor. First, few states have enacted such legislation, so many agricultural laborers do not enjoy the protections, nor bear the responsibilities, of a statutory scheme. Second, there is no evidence that the labor relations problems within a given crop in one state are significantly different from those within the same crop in another state. Indeed, two factors suggest the contrary. American agricultural markets are national or international markets which tend to force farmers to adopt similar methods under similar conditions regardless of farming location.¹²⁰ In addition, the principle of regional comparative advantage operates to insure that a given crop is grown in areas where its production costs are lowest relative to other areas.¹²¹ Thus, for example, apple farmers in Washington and Wisconsin probably face similar soil, climate, market, labor availability, and other conditions.¹²² Third, a uniform rule in all states would avoid confusion and forum-shopping by labor, labor organizations, and management which could result in economic imbalances.¹²³ For example, farmers in states with agricultural labor

117. S.F. Examiner, Mar. 10, 1977, at 1, col. 2. For a history of this dispute, see *The Need for Collective Bargaining*, *supra* note 65, at 164-68.

118. S.F. Chronicle/Examiner, Mar. 13, 1977, § A, at 1, col. 2.

119. California is the leading producer of agricultural commodities in the nation. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 469 (1977) (as measured by cash receipts). In addition, many of its most important crops are the so-called "specialty" crops, like fresh fruits and vegetables, which require more hand labor than other crops. As of 1976, California farmers employed 17 percent of the nation's hired farm labor force. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 435 (1977). Therefore, events in California should play a major role in federal consideration of agricultural labor relations.

120. WILCOX, *supra* note 83, at 287-89.

121. *Id.* at 19.

122. However, to the extent that one condition may offset another, dissimilarities are possible.

123. For an interesting discussion contrasting the provisions of those states which have enacted agricultural labor relations legislation, see *The Need for Collective*

legislation probably suffer a disadvantage compared to those in non-regulated states: the latter can pay inferior wages due to the reduced likelihood of unionization. Fourth, because of the importance of the rights at stake, considerations of administrative convenience¹²⁴ probably have little place in the evaluation of the exemption. Even if administrative efficiency were a valid concern here, the net long run administrative effect of eliminating the exclusion would be to simplify the job of labor boards, courts, and all parties concerned. Eliminating the exemption would be therefore the more administratively efficient road to follow.

III. SUMMARY AND PROPOSAL

The NLRA classification of labor as agricultural or nonagricultural has important consequences. It determines the substantive rights of employers and employees, federal or state labor dispute jurisdiction, and even union organizing jurisdiction. It is important that the labor lawyer, the legislator, and the economic actors themselves possess a clear understanding of what "agricultural labor" is under present federal law. The answer ought to be significant in their decisions concerning these subjects. The two-level approach of the courts and the NLRB to agricultural labor determinations provides an identifiable and workable solution to the question of defining agricultural labor.

The current NLRB approach also well serves the reasons offered in favor of the exemption. In practice, the exemption is restricted to agricultural functions and thus operates on only those markets which, at least in theory, are seasonal, are perfectly competitive,¹²⁵ and which in 1935 required special treatment to assure and accelerate post-depression recovery. Those limitations permit the NLRB to include under NLRA coverage what are essentially separate commercial enterprises, thus providing flexibility to adapt to changes in the structure and methods of American agriculture. Generally not exempt are the larger operations creating factory-like conditions with greater continuity of personnel throughout the year. The cooperative packing houses for the numerous crops of several growers provide an example. To some extent, considerations of practicality, necessity, and economics are all present.

Inequities in coverage exist under the present guidelines, however, which do not comport with any rational distinction in labor's function or performance. Among these, the most important is the disparity in exempt status among packing shed workers based on whether the opera-

Bargaining, *supra* note 65, at 150-60. See also *Lewin*, *supra* note 60, generally and at 734, n.10.

124. See text accompanying notes 115-119.

125. See text accompanying notes 82-85.

tion is restricted to the employer's own produce. This artificial distinction favors large, integrated corporate farmers whose packing shed labor may be exempt, while cooperative packing houses for the produce of smaller farmers are always covered by the Act.

The inequity of the exemption as a whole dwarfs the inequities in its application. The rationales for its existence are almost entirely inapposite today. The discrimination it authorizes is therefore without justification. American agriculture has a great present need for federal labor relations law coverage.

Congress, however, has remained silent. The present Congress has yet to see a proposal to eliminate the agricultural labor exemption. The opposition of Cesar Chavez and the UFW to inclusion of agriculture in the present federal statutory scheme and conflicting legislative proposals¹²⁶ have undoubtedly confused Congress. The recent enactment of agricultural labor legislation by some states, most notably California, has probably also reduced political pressure on Congress to act. Perhaps Congress has decided to wait and see how the state programs fare. Continued Congressional inaction based on this attitude would indeed be unfortunate news for the nation's farm employees, who first heard this viewpoint expressed in 1935. Representative Connery, who directed the NLRA bill through the House, stated: "If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers."¹²⁷ The fulfillment of that promise is long overdue. Congress should abolish the NLRA agricultural labor exemption.

Robert Artie Christopher

126. See note 4 *supra*.

127. 79 CONG. REC. 9721 (1935), reprinted in LEGISLATIVE HISTORY, *supra* note 59, at 3202.