

# Bargaining Unit Determination Under the Agricultural Labor Relations Act

*This article explores three issues that arise in cases involving the selection of an appropriate bargaining unit for agricultural workers: multiemployer units, the selection of the employer when agricultural operations are conducted by someone other than the landowner, and the choice of an appropriate unit when employees of one employer work in two or more non-contiguous geographical areas. It examines decisions by the Agricultural Labor Relations Board in each case area, summarizes applicable National Labor Relations Board precedent, and advocates a new approach to the contiguous area question.*

In 1975, in the hope of ending labor strife in California agriculture, California passed the Agricultural Labor Relations Act (ALRA).<sup>1</sup> Patterned in large part after the National Labor Relations Act,<sup>2</sup> the ALRA guarantees agricultural employees the right to select exclusive bargaining representatives through secret ballot elections, and establishes an Agricultural Labor Relations Board (ALRB) to enforce this right. In order to conduct union representation elections, the ALRB must group employees into appropriate bargaining units.

The ALRB's choice of bargaining unit may affect the outcome of the subsequent representation election. Thus when the ALRB faces a unit determination issue, each party involved usually promotes the unit which it feels will give it the best chance to win the subsequent election.

Until recently, the United Farm Workers (UFW) and the Western Conference of Teamsters were engaged in a fierce organizing battle. Many conflicts over unit size represented attempts by each union to structure the unit to increase its chance of victory.<sup>3</sup> During this period

---

1. Cal. Lab. Code Part 3.5, §§ 1140-1166.3, (West Cum. Supp. 1978), Added by 1975 Cal. Stats. 3d Ex. Sess. ch. 1, § 2. All California Labor Code section citations in this article are to Part 3.5 rather than to identically numbered sections in Part 3, Chap. 8.

2. 29 U.S.C. §§ 141-187 (1973).

3. Bud Antle, Inc., 3 A.L.R.B. No. 7 (1977) and Bruce Church, Inc., 2 A.L.R.B. No. 38 (1976) are obvious examples. In both cases the Teamsters, who had existing contracts with both employers on a statewide basis, petitioned for statewide units. The UFW petitioned for single-location elections at the particular ranches of each grower at which it had organized.

employers usually supported a unit which would favor either "no union" or the Teamsters.<sup>4</sup> Although the two unions have signed a jurisdictional agreement designed to end strife between them,<sup>5</sup> this has not eliminated all inter-union conflict.

Some Teamsters have refused to accept the pact and are entering representation elections as independent groups.<sup>6</sup> Meanwhile, several smaller unions are entering elections in specialized areas covered by the ALRA, such as the dairy and poultry industries.<sup>7</sup> Moreover, some employers still work for a "no union" vote if possible; they may support a unit which joins the workers the union seeks to represent with a larger group it has not had time to organize. The union, on the other hand, naturally prefers the unit which gives it the best chance to defeat the "no union" option.

When only one union is on the ballot and there is little employee sentiment for the "no union" alternative, the parties look beyond the election itself at the long-term implications of the proposed unit. In such a situation, the union may favor a larger unit, if it thinks such a unit will give it more strength at the bargaining table. The employer will often oppose the larger unit for the same reason. Since bargaining on a large scale is less likely to lead to a breakdown, both parties may favor the extra stability which a large unit brings to the bargaining relationship.<sup>8</sup>

In order to conduct union representation elections properly, the ALRB must resolve these competing interests and choose an appropri-

---

4. The Teamsters' involvement in the farm labor situation began at the invitation of growers who sought Teamsters representation of their workers as an alternative to the United Farm Workers. The grower-Teamsters relationship is described in detail in *Englund v. Chavez*, 8 Cal. 3d 572, 105 Cal. Rptr. 521, 504 P.2d 457 (1972). In both *Bruce Church, Inc.*, 2 A.L.R.B. No. 38 (1976) and *Bud Antle, Inc.*, 3 A.L.R.B. No. 7 (1977), the employers supported the Teamsters' position.

5. Jurisdictional Settlement Agreement, United Farm Workers of America and Western Conference of Teamsters, May 10, 1977.

6. The International Union of Agricultural Workers (IUAW) (see *Pismo-Oceano Vegetable Exchange*, ALRB representation case 77-RC-6-M) and the Independent Union of Agricultural Workers (*Inland Ranch*, 78-RC-4-M).

7. For example, in the dairy industry, the Christian Labor Association (*John Luis*, 77-RC-116-X), the Dairy and Creamery Employees (D&CE) (*Joe A. Duarte*, 75-RC-55-S), Teamsters, Local 63 (*Milky Way Farms*, 76-RC-13-F), and Teamsters, Local 737 (*Meadow Gold Farms*, 75-RC-13-F) have all filed representation petitions. Other unions which have sought to represent employees include the Fresh Fruit and Vegetable Workers (FFVW) (*Abatti Produce, Inc.*, 75-RC-39-R), Amalgamated Meatcutters and Butchers' Workmen, Local 229 (AMBWNA) (*Jackson Feed Mill*, 75-RC-16-E), Butchers' Union, Local 115 (*McCoy's Poultry Services, Inc.*, 77-RC-2-S), Lumber and Sawmill Workers, Local 3019 (*Cottage Garden Nursery*, 76-RC-9-S), and Amalgamated Farm Labor Union, Inc. (AFLInc.) (*Vasco-Giannini Farms*, 78-RC-3-S). The two Teamster locals in the dairy industry are unaffiliated with the Western Conference of Teamsters and not affected by the Jurisdictional Settlement, *supra* note 5.

8. However, when negotiating breakdowns do occur, the larger scale makes them more damaging. The 1978 United Mine Workers' strike is an example.

ate bargaining unit for each group of workers. Under ordinary circumstances, the ALRA leaves the Board no discretion; the bargaining unit is all agricultural employees of the employer.<sup>9</sup> The ALRA allows the Board discretion, however, in three factual situations. The first such situation arises when a bargaining unit covering the employees of several different employers is proposed. The second occurs when someone other than the landowner conducts farming operations, and it is unclear who is the actual employer. The third situation concerns the employees of an employer who work in two or more non-contiguous geographical areas.<sup>10</sup> In this last circumstance, the ALRA specifically gives the ALRB discretion in choosing the appropriate unit.<sup>11</sup>

This article analyzes the ALRB's decisions in these three areas to determine what standards, if any, the Board has developed to guide its decisions. In the first two situations, the article shows that clear standards have not yet emerged, while in the third situation the article proposes a three-step analysis, suggesting that logic, legislative intent, and the trend of ALRB decisions all support this analysis. The article attempts to summarize current developments and trends in all three areas of ALRB bargaining unit discretion to serve as a guide to anyone practicing or interested in agricultural labor law.

## I. MULTI-EMPLOYER BARGAINING UNITS

Sometimes a proposed bargaining unit may encompass the work force of more than one employer. A party may propose such a unit in one of two circumstances. First, a single business may consist of two or more nominally separate entities, whose business operations and labor force are so intertwined that it is appropriate to treat them as one employer. Alternatively, where several employers have bargained jointly with a union for a significant period of time, one of the parties may propose a unit encompassing the employees of all those employers.

### A. *The single employer doctrine*

In the former instance, where several business entities operate as one, the National Labor Relations Board<sup>12</sup> often treats the businesses as a

---

9. Cal. Lab. Code § 1156.2 (West Cum. Supp. 1978). For a discussion of who is an "agricultural employee" see Note *The NLRA Agricultural Labor Exemption: New Perspectives on Two Old Questions*, this volume.

10. The definition of the term "non-contiguous geographical areas" is a matter of much disagreement; in fact it is one of the major issues covered by this article. See section III A *infra*, notes 65-88 and accompanying text for discussion of the phrase and its meaning.

11. Cal. Lab. Code § 1156.2 (West Cum. Supp. 1978).

12. For a detailed discussion of all aspects of NLRB bargaining unit determinations, including many issues not discussed in this article because they don't apply to agriculture, see J. ABODEELY, *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* (1971).

single employer for bargaining purposes.<sup>13</sup> The NLRB terms this grouping of several employers into one the single-employer principle.<sup>14</sup>

The ALRB is required by law to follow NLRB precedent where applicable.<sup>15</sup> The ALRB has twice applied the single-employer doctrine in cases before it. In one case<sup>16</sup> the same group of partners owned four identical businesses.<sup>17</sup> One partner managed all four operations, and one office handled all business and legal affairs. The ranches shared a single labor force, and had the same wages and conditions of employment. Looking at this interrelationship, the ALRB held that "it is obvious that the four ranches are a single employer, regardless of any nominal separation."<sup>18</sup>

Later the Board applied the single-employer doctrine to a pair of businesses, despite the fact that they had almost no workers in common, had different labor policies, and performed different functions.<sup>19</sup> One of the companies involved was a custom harvester,<sup>20</sup> while the other conducted planting, pruning and other pre-harvest operations. Unlike the prior case, which involved four identical businesses under common ownership, the employers in this case were two different but functionally integrated businesses. The hearing officer held that this functional integration, along with common ownership and control,<sup>21</sup> made the two businesses a single employer.<sup>22</sup>

In both of the above cases, the businesses involved had exactly the same owners, though not always in the same proportion. Also, the

---

13. For example, two corporations owned by the same person, sharing the same office, and engaged in the same business may be joined as one employer. *Pizza Prods. Corp. v. N.L.R.B.* 369 F.2d 431 (6th Cir. 1966). Similarly, a corporation and its subsidiary, *N.L.R.B. v. Hurley Co.* 310 F.2d 158 (8th Cir. 1962), or a corporation and its owner's sole proprietorship, *N.L.R.B. v. Lund*, 103 F.2d 815 (8th Cir. 1939), may be so linked that they should be treated as one employer.

14. *See Local 627, Int'l Union of Operating Eng'rs v. N.L.R.B.* 518 F.2d 1040 (D.C. Cir. 1975).

15. "The Board shall follow applicable precedents of the National Labor Relations Act, as amended." Cal. Lab. Code § 1148 (West. Cum. Supp. 1978). On this issue the ALRB does follow NLRB precedent.

16. *Louis Delfino Co.*, 3 A.L.R.B. No. 2 (1977).

17. Artichoke ranches, all in the Watsonville area.

18. *Delfino*, 3 A.L.R.B. No. 2, at 3.

19. *Abatti Farms, Inc.*, 3 A.L.R.B. No. 83 (1977).

20. A custom harvester is a contractor who harvests a landowner's crop for a fee. For a more detailed description *see* text accompanying note 56.

21. The two businesses are both owned by a pair of brothers. One brother runs each company but they consult on business matters almost daily.

22. *Abatti Farms, Inc.*, 76-RC-17-E(R), Investigative Hearing Examiner's opinion. Affirmed by Board, 3 A.L.R.B. No. 83 (1977). The Board's decision merely affirmed all rulings, findings, and conclusions of the hearing officer, without giving any additional analysis of its own. More recently, in *Perry Farms, Inc.*, 4 A.L.R.B. No. 25 (1978), the Board found two corporations to be one employer where one person owned one, co-owned the other and controlled both. The businesses were functionally integrated like those in *Abatti*, and the one owner exercised complete control over which entity would perform what tasks in any given season.

same partner controlled all four businesses in one instance, while the controlling partners jointly made most of the major decisions in the other. In addition, the firms' functions were closely interrelated. The ALRB's refusal to apply the single-employer doctrine<sup>23</sup> in a later case,<sup>24</sup> in which the facts were just slightly different in each of these three respects, may indicate the degree of relationship the ALRB will require before applying the doctrine. Although two businesses were owned and managed by a small group of family members,<sup>25</sup> different members held different positions in each firm. The firms' primary farming activities were dissimilar,<sup>26</sup> though one aspect of their business was interrelated. Citing *Delfino* and *Abatti* for the criteria to consider in this type of case, the hearing officer, whose opinion the ALRB affirmed without additional comment, held that the employers in this case did not meet those criteria.

From those opinions, it is clear that the ALRB has adopted the single-employer doctrine. Despite the Board's proclaimed unwillingness to judge this issue on other than a case-by-case basis, the opinions provide some guidelines. Either similarity of operation or functional integration is necessary. Joint ownership and control will be judged rather strictly; the fact that all of the owners and managers are drawn from a small related group is not sufficient.

### B. Voluntary multi-employer bargaining

In some industries, several employers and the union representing their workers voluntarily conduct joint negotiations. Where such multi-employer bargaining has existed for an extended period of time, the relationship among the parties may become so established that it would be disruptive, or even unfair, for one party to lightly withdraw from the bargaining group. In such a case, both the ALRB and the NLRB have discretion to certify a multi-employer bargaining unit. Although neither the NLRA nor the ALRA expressly authorizes the multi-employer unit, the NLRB has certified such units since 1938.<sup>27</sup> The ALRB, in its very

---

23. Though the opinion describes the case in terms of joint employers, an NLRB term of art for a type of situation not yet encountered by the ALRB, the facts clearly indicate the single-employer doctrine is at issue.

24. *Signal Produce Co.*, 4 A.L.R.B. No. 3 (1978).

25. Warren Brock owns Brock Research and is Chairman of its Board of Directors. The other directors are not identified. Son David, president, son Donald, vice-president, and son-in-law Eliot are the officers. David, Donald, Warren's daughter Mary Jean (Eliot's wife), and James, another son, are the partners in Signal. David manages Brock's field operations. Donald, Brock's president, manages Signal's operations. David and Donald jointly establish wage scales at Brock; Donald does so alone at Signal.

26. Signal grew asparagus. Brock primarily farmed citrus although it owned some asparagus which it sold to Signal just prior to harvest. *Signal Produce*, 4 A.L.R.B. No. 3, Hearing Examiner's Opinion at 3.

27. *Shipowners Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002 (1938).

first decision,<sup>28</sup> indicated that in some circumstances it would allow multi-employer bargaining as well.<sup>29</sup>

In industries that have tried multi-employer bargaining, both employers and unions are generally enthusiastic about its benefits. Employers favor large-scale bargaining because it reduces the leverage that unions can command through whipsaw strikes.<sup>30</sup> Also, employers feel secure that, whatever the bargaining outcome, their labor costs will remain constant relative to their competitors. Unions have fewer contracts to negotiate and administer. Standardized wage rates reduce member dissatisfaction, and unions can sometimes obtain concessions from an employer association that no single employer would grant for fear of competitive disadvantage.<sup>31</sup> Industry-wide bargaining usually promotes a stability beneficial to employers, employees and the public alike. Counterbalancing the advantages, however, is the fact that when negotiating breakdowns do occur they are usually larger and more crippling to the economy.<sup>32</sup>

The NLRB favors a single-employer unit in the absence of a controlling history of collective bargaining on a multi-employer basis by the members of the unit.<sup>33</sup> This history must be a substantial record of active negotiations by an employer as part of a larger group.<sup>34</sup> The NLRB has adopted one year as a presumptive minimum for a substantial bargaining history.<sup>35</sup> The determining factor is whether or not an employer has participated in joint negotiations; merely signing the same contract is not enough. A reason for this insistence on a bargaining history is that any unit must be cohesive enough to allow for effective bargaining, in order to avoid a need for later repeated modification of the unit.<sup>36</sup> If a multi-employer group has bargained effectively in the

---

28. Eugene Acosta, 1 A.L.R.B. No. 1 (1975).

29. *Id.* at 11-12. The ALRB refused to certify a multi-employer unit in that case for reasons discussed *infra*. See note 43 and accompanying text.

30. Whipsaw strikes are strikes in which a large union, engaged in a dispute with several employers, strikes each one in succession. The whipsaw has two advantages over a strike against all of the companies at once. First, a struck company loses more if its competitors remain open; its customers do not have to stockpile supplies before the strike or build up their stock afterward. Second, the union can concentrate its strength against one company at a time.

31. J. ABODEELY, note 12 *supra*, at 217.

32. 93 CONG. REC. 4574 (1947) (remarks of Sen. Kilgore).

33. Cab Operating Corp., 153 N.L.R.B. 878 (1965); Bennett Stone Co., 139 N.L.R.B. 1422 (1962); Chicago Metropolitan Home Builders Ass'n, 119 N.L.R.B. 1184 (1957).

34. Quality Limestone Products, Inc., 143 N.L.R.B. 589 (1963); Morgan Linen Serv., Inc., 131 N.L.R.B. 420 (1961).

35. Miron Building Prods. Co., Inc., 116 N.L.R.B. 1406 (1956).

36. Unit modification by withdrawal of an employer, without the consent of all parties, is generally a difficult process. The NLRB may, however, waive the requirements in highly unusual economic situations, such as the bankruptcy of an employer. U.S. Lingerie Corp., 170 N.L.R.B. 750, 67 L.R.R.M. 1482 (1968); NLRB v. Spun-Jee Corp., 385 F.2d 379, 381-82 (2d Cir. 1967).

If all parties consent to withdrawal, it is generally permissible at any time.

past, it is more likely that the unit is an appropriate one.

The ALRB has fully considered the issue of multi-employer bargaining only once, in the case of *Eugene Acosta*.<sup>37</sup> In every other case involving the issue, the Board has simply cited *Acosta* as determinative.<sup>38</sup> In *Acosta*, the ALRB found implied authority for multi-employer bargaining units in two provisions of the ALRA: California Labor Code section 1140.4(c), which construes the term "agricultural employer" liberally to include "any association of persons or cooperatives engaged in agriculture," and section 1140.4(d) which defines "person" to encompass "one or more associations."<sup>39</sup> In its opinion, the ALRB stated its intention to follow relevant NLRB guidelines: the single-employer bargaining unit would be presumed correct, with a broader unit permitted only on the basis of a controlling history of collective bargaining.<sup>40</sup>

In *Acosta*, the Teamsters union filed a petition with the ALRB for an election among some 600 agricultural field workers employed by 156 different growers who, according to the Teamsters petition, constituted a single agricultural employer for bargaining purposes. Both prior and subsequent to the petition by the Teamsters, the UFW filed several petitions seeking elections among these employees in various single-employer units. The ALRB dismissed the multi-employer petition and approved the petitions of the UFW.

Besides the inadequacy of the bargaining history, the ALRB gave another reason for declining to certify a multi-employer unit, one which is important in guessing the future fate of such units. The NLRB only certifies a multi-employer unit if it participated in the initial unit determinations and in selection of bargaining representatives for the employers involved.<sup>41</sup> To do otherwise would invite collusion. Because the ALRA precludes selecting bargaining representatives by any means other than secret ballot elections,<sup>42</sup> this requirement would be even more important in ALRB cases. The history in *Acosta* showed a pattern of inadequate procedures, actual employer/union collusion, and inability on the ALRB's part to ascertain worker sentiment during the bargaining history.<sup>43</sup> Thus, even had there been a controlling history of

---

37. *Eugene Acosta*, 1 A.L.R.B. No. 1 (1975).

38. *J.J. Crosetti Co., Inc.*, 2 A.L.R.B. No. 1 (1976); *West Coast Farms*, 1 A.L.R.B. No. 15 (1975); *Green Valley Produce Cooperative*, 1 A.L.R.B. No. 8 (1975).

39. *Acosta*, 1 A.L.R.B. No. 1 at 12 (1975).

40. *Id.* at 9.

41. J. ABODEELY, note 12 *supra* at 217.

42. CAL. LAB. CODE § 1156 and CAL. LAB. CODE § 1159 (West Cum. Supp. 1978).

43. A detailed discussion of the early part of the rather tangled bargaining history behind the *Acosta* case may be found in *Englund v. Chavez*, 8 Cal. 3d 572, 504 P.2d 457, 105 Cal. Rptr. 521, (1972). The *Acosta* opinion (1 A.L.R.B. No. 1, at 3-7) describes the entire bargaining history in less detail.

In 1970, when bargaining between some of the unit members and the Teamsters first began, the employers and the union gave no consideration to employee preferences. In *Englund v.*

multi-employer bargaining, the past negotiations were too tainted to support a unit determination.

Because this taint eliminates the major source of pre-ALRA bargaining history,<sup>44</sup> and because the secret ballot election requirement limits the value of such history anyway, any proposed multi-employer unit would have to be based upon a bargaining history that began after the first round of ALRB-supervised elections in 1975. Because of the chaos that surrounded the ALRB's early operations and the long period when the Board was without funds,<sup>45</sup> it is only recently that large-scale joint bargaining could take place. Thus until the early 1980's, when recently negotiated contracts begin to run out, major attempts to form a multi-employer unit are not likely to occur.

## II. NON-LANDOWNING FARM OPERATORS AS POSSIBLE EMPLOYERS

If all landowners managed their property themselves, hired and supervised the employees, and conducted each step in the process of raising and marketing the crop, identifying the employer of any particular group of farmworkers would be a simple matter. In many instances, however, independent operators, who hire their own workers and control their own operations, perform much of the work. These independent operators range from labor contractors, who merely provide and supervise a crew of workers on a daily basis,<sup>46</sup> to full-service land

---

Chavez the California Supreme Court based its pro-United Farm Workers decision on the fact that many, and probably most, of the workers favored the UFW. The ALRB took judicial notice of this fact in the *Acosta* case. In 1973, when a multi-employer contract covering most of the farms involved in *Acosta* took effect, it is questionable whether the Teamsters actually had the support of the workers. The union based its claims of support on authorization cards signed by the workers. Many of these cards were signed *after* the Teamsters and the growers had reached their agreement. The ALRB noted that the evidence was mixed as to whether the workers were aware that the "union shop" provision in the contract was not to be enforced until after the workers had initially given their support to the agreement. Even if there had been no hint of misrepresentation in connection with the union authorization cards, the Board noted that the employee consent might still have been invalid for not having been obtained pursuant to a secret ballot election.

44. The *Acosta* group of employers has provided the only source of petitions for multi-employer bargaining history based on prior history and there is no evidence of any other attempts at bargaining on a similar scale during the same period.

45. The ALRB has several times refused to resolve an election challenge and ordered a rerun election because the temporary shutdown for lack of funds had made the election so stale that rerunning the election was the only appropriate means of effectuating the policy of the ALRA. *See, e.g.,* Pandol and Sons, 3 A.L.R.B. No. 72 (1977) and Tenneco Farming Co., 3 A.L.R.B. No. 20 (1977). *See also* Vista Verde Farms, 3 A.L.R.B. No. 19 (1977) in which the ALRB, discussing procedural violations by Board agents, noted that the election occurred in the "first, harried days of the Act". *Id.* at 2.

46. CAL. LAB. CODE § 1682(b) (West 1971):

Farm labor contractor designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection there-



management firms which perform the entire growing operation for the landowner.<sup>47</sup> Because the ALRA provides a broad definition of the word "employer" which specifically includes many types of non-landowning farm operators,<sup>48</sup> there are many instances where both the landowner and the farm operator fit the definition. Then the ALRB must decide who should be considered the employer for bargaining purposes.

The ALRA specifically excludes one type of farm operator from its definition of employer. The farm labor contractor, who merely supplies workers for a fee, may never be considered an employer.<sup>49</sup> There are two policy reasons for this exclusion. First, the UFW has strong objections to the labor contractor system, and might want to make the system itself a topic for bargaining.<sup>50</sup> Effective bargaining on the labor contractor system would be impossible if the contractors themselves were parties. Second, many labor contractors remain in business for a very short time, and operate from no fixed location. By the time a union won the right to negotiate with such an employer, the latter might be out of business, gone from the area, and impossible to locate.

Neither the Act's exclusion of labor contractors as employers nor the policy reasons behind that exclusion apply to farm operators who do something more than just provide workers. Thus the ALRB has several times held farm operators to be employers. There is an important policy reason for so holding. Where land is managed by a full-service land management company, the owner has little involvement with the farming operations,<sup>51</sup> and may be little more than a landlord. In the absence of bargaining, the non-landowning farm operator would set the terms and conditions of employment, hire and fire workers, and administer

---

with one or more of the following services: furnishes board, lodging, or transportation for such workers; or measures their work; or disburses wage payments to such persons.

47. This article will use the term "non-landowning farm operator" or just "farm operator" to refer to all types of individuals or businesses who employ agricultural workers to work land owned by someone else.

48. The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land for agricultural purposes. . . .

CAL. LAB. CODE § 1140.4(c) (West Cum. Supp. 1978).

49. *Id.* "The term "agricultural employer". . . shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682 [see *supra* note 46], and any person functioning in the capacity of a labor contractor.

50. Groden, *California Agricultural Labor Act: Early Experience*, 15 IND. RELS. 275, 279 (1976).

51. For example, the opinion in *Napa Valley Vineyards Co.*, 3 A.L.R.B. No. 22 (1977) noted that the company's contracts with landowners were for at least a year and usually much longer, during which time the company was completely responsible for the operations. In some cases, the company's contact with owners was as little as three or four times a year.

benefits. Thus it makes sense for the farm operator rather than the landowner, to negotiate with the workers. Additionally, requiring the employees of a farm operator to change bargaining units every time they worked on a different owner's land would unreasonably complicate the bargaining process. Workers employed by a farm operator may not even know the identity of the landowners whose products they are picking; they may not even know whether the fields they pick are owned by one or several growers. Unions would have to ascertain who had worked on which plots of land, and then petition for an election with each landowner.

In interpreting section 1140.4(c), and in deciding who is the appropriate employer where a non-landowning farm operator is involved, the ALRB has faced two major issues. First, if a business's main activities fall within the definition of an employer but it also operates as a labor contractor in some circumstances, does the labor contractor exclusion in the law preclude finding the business to be an employer for any of its operations? Second, how should the line be drawn between those farm operators who may be considered employers and those who may not?

The ALRB has twice addressed the first question, whether the labor contractor exclusion is a complete bar to finding a business to be an employer. In the cases of *Napa Valley Vineyards*<sup>52</sup> and *Gourmet Harvesting*<sup>53</sup> the named parties were non-landowning farm operators. Both of these farm operators argued that even if their activities in these cases made it appropriate to consider them the employers of the workers involved, the fact that they sometimes acted as labor contractors exempted them from being considered employers. In both cases, the ALRB held that the labor contractor exclusion is not a blanket exception. It applies to a business only insofar as it is actually functioning as a labor contractor. It appears that this principle is well established. In both of the above cases the Board stated the rule without reservation. In several other cases this rule is clearly an unarticulated premise.<sup>54</sup>

The second issue involving non-landowning farm operators is more complex. It involves distinguishing between different types of farm operators, a difficult task because of the multiplicity of ways in which farm operators and similar business entities are structured. Several of the cases in this area have involved a type of entity known as a "custom harvester." Because custom harvesters provide a more limited service than some other types of farm operators, they are sometimes difficult to

---

52. *Id.*

53. 4 A.L.R.B. No. 14 (1978).

54. In fact, both *Napa Valley* and *Gourmet* cited the fact that the issue in *Kotchevar Brothers*, 2 A.L.R.B. No. 45 (1976), whether a particular non-landowning farm operator was acting as a labor contractor or a custom harvester, would not have arisen without an unstated presumption that the individual involved, despite being a labor contractor, could also be an employer under some circumstances.

distinguish from labor contractors, or even from supervisory employees of a landowner.

The custom harvester supplies the landowner with field workers, but, unlike a labor contractor, is not compensated solely according to the number of workers provided. Instead, the harvester is paid a flat price per ton of crops harvested for a total package of services which includes transporting the harvested produce, providing machinery used for harvesting and transporting the crop, paying and supervising the field laborers, and generally managing the harvest.

In two of its custom harvester cases, *Kotchevar Brothers*<sup>55</sup> and *Cardinal Distributing Co.*,<sup>56</sup> the ALRB reached opposite conclusions on nearly identical facts. In each case, the landowner hired some workers directly and others through a farm operator. In both cases, the validity of an election among the landowner's employees depended upon whether the employees working for the farm operator were part of the same bargaining unit.<sup>57</sup> At both ranches, the non-landowning operator not only supplied large numbers of workers needed for a short time during the harvest but also provided substantial equipment and assumed overall authority over the conduct of the harvest. In addition, the harvester in *Kotchevar* was responsible for transporting the grapes to wineries; his counterpart in *Cardinal* brought the harvested produce to packing sheds.

In *Kotchevar*, the Board ruled that a custom harvester could be considered the employer for bargaining unit purposes and that the individual who managed the harvest for *Kotchevar* was a custom harvester. Accordingly, the workers he provided were not employees of the *Kotchevar Brothers* farm operation and thus not a part of the bargaining unit. In the *Cardinal* decision, on the other hand, the two member Board majority<sup>58</sup> found the harvest manager to be a labor contractor. The opinion attempted to distinguish *Kotchevar* on the ground that the harvester in that case provided expensive equipment such as tractors, while his counterpart in *Cardinal* conducted only "manual" harvesting. The dissent,<sup>59</sup> however, pointed out that the harvesting operations were manual

---

55. 2 A.L.R.B. No. 45 (1976).

56. 3 A.L.R.B. No. 23 (1977).

57. In *Kotchevar* the issue was the timeliness of the election petition. Petitions must be filed when the number of employees working is at least half the maximum number for the year. CAL. LAB. CODE § 1156.4 (West Cum. Supp. 1978). If 60-80 workers expected to be hired through a farm operator later in the season were part of the unit, then this requirement would not be met. In *Cardinal*, the outcome of the election depended on whether the ballots cast by employees of the farm operator were allowed to be counted.

58. There were two vacancies on the five-member ALRB.

59. By Richard Johnsen, since resigned. On the original ALRB, which contained a representative of each major interest group involved with farm labor, Johnsen represented farmers. On the second Board, which theoretically had no such representatives, Johnsen, the only hold-over, was still identified with the farmers' point of view.

in both instances and that the types of equipment provided, tractors in one case, trucks in the other, were equivalent. Reviewing the nature of the responsibility given to the harvester on the Cardinal farm, and the basis on which he was paid, the dissent concluded that the independent manager in that case was not a labor contractor as defined by the labor code, and was a custom harvester as defined by the *Kotchevar* decision.

The apparent contradiction may be reconciled if the decisions are viewed in the context of the Board's strong policy of upholding the validity of elections. Because of the unexpected number of contested elections, and a resulting concern that the backlog of cases not become intolerable, the Board has consistently tried to avoid having to rehold elections.<sup>60</sup> In *Cardinal*, therefore, the facts appear to have been juggled to support upholding the election.

In the *Jack Stowells* case,<sup>61</sup> the ALRB faced the task of distinguishing between a custom harvester and a supervisory employee. Mr. Stowells was employed on a regular basis to manage operations on approximately ten ranches. He maintained a regular crew of workers who were hired to work under him at all of the ranches. He contended that he was a management employee of each of the ranches, while the union argued that he provided services equivalent to those of a custom harvester and was the employer of his crew of workers. As in the labor contractor/custom harvester disputes, the ALRB noted the complexity of agricultural management and the multiplicity of possible relationships between landowner and non-landowning operator; thus the Board declined to establish any firm guides. In this case, the ALRB considered the manner in which Stowells was paid and the degree of his control over his workers in finding him to be a custom harvester and, therefore, an employer.

Though the ALRB's insistence on acting only on a case-by-case basis in this area makes it difficult to project the existing decisions into general rules, a few generalizations can be made. First, it is clear from the *Napa Valley* and *Gourmet* decisions that no business which otherwise qualifies as an employer will be exempted merely because it also operates as a farm labor contractor. With regard to custom harvesters and other businesses on the borderline of the definition of employers, the

---

60. Board Member Joseph Grodin, in a concurring opinion to an election misconduct case, argued that the language of the ALRA (CAL. LAB. CODE § 1156.3(c)) creates a strong presumption in favor of the validity of any election. *Chula Vista Farms, Inc.*, 1 A.L.R.B. No. 23, at 8-9 (1975). The ALRB, in *Perez Packing, Inc.*, 2 A.L.R.B. No. 13, at 1, n.2 (1976), adopts Grodin's statement in passing. The ALRB's policy toward sustaining elections is indicated by the outcomes of the cases it has decided involving challenges to elections. Of 145 such cases, 23 involved challenges to particular voters, so the Board's decision determined the election's outcome but not its basic validity. One decision involved two elections in incompatible bargaining units, so the ALRB had to invalidate at least one. Of the remaining 117 cases the ALRB upheld the validity of the election in 94, or 80.3%.

61. *Jack Stowells, Jr.*, 3 A.L.R.B. No. 93 (1977).

ALRB has been fairly liberal in declaring them to be employers.<sup>62</sup>

### III. NON-CONTINUITY AND MULTI-LOCATION UNITS

Whenever an employer has employees in two or more non-contiguous geographical areas, the ALRB has discretion to choose the appropriate unit for those employees.<sup>63</sup> Only the ALRA's mandate to follow NLRB precedent where applicable<sup>64</sup> limits this discretion.

In considering cases where the employees of one employer work at two or more different locations, the most logical approach is a three-step analysis. First, the ALRB must decide whether the workers are truly employed in non-contiguous geographical areas. If not, the law requires that employees be placed in a single unit. Second, the ALRB should determine whether the farms are in the same agricultural production area. If they are, then the ALRB usually puts the employees in one unit in the exercise of its discretion. Third, the ALRB should compare the locations according to criteria adapted from those used by the NLRB. The recent trend of ALRB decisions indicates that it is moving toward an implied use of this three-stage analysis.

#### A. Step One: The Non-Contiguous Geographical Area

The ALRA requires the ALRB to put all of an employer's employees in one unit unless they work in "two or more non-contiguous geographical areas."<sup>65</sup> The Board must decide whether the employees actually do work in non-contiguous geographical areas. To make this determi-

---

62. The ALRB has decided several other cases during its three year existence that apply directly to the issues involving non-landowning farm operators, but which add little to the law on the subject. For the benefit of researchers, they include:

Ueki Ranch, 2 A.L.R.B. No. 63 (1976), in which the ALRB declared the farm operator to be a custom harvester and an employer, without explanation.

Tenneco West, Inc., 3 A.L.R.B. No. 92 (1977), in which the ALRB was forced by the complexity of the employer's operations to focus on the relationships between the business entities involved rather than on the structure or function of any of them. The analysis is not very applicable outside of the specific facts.

TMY Farms, 2 A.L.R.B. No. 58 (1976), in which the ALRB held that when a labor contractor is hired by a general partner to conduct partnership business, the partnership is the employer of the contractor's workers.

Freshpict Foods, Inc., 4 A.L.R.B. No. 4 (1978), had the potential to decide some very important issues as to who is the employer between different types of non-landowning farm operators, but the case reached the ALRB in such a way that the most interesting issues were mooted.

A reading of *Tenneco* and *Freshpict* is useful for an understanding of the ALRB's unwillingness to set down general rules or guides in cases involving non-landowning farm operators. Each case gives a hint of the many different types of relationships there can be among various business entities in agriculture.

63. CAL. LAB. CODE § 1156.2 (West Supp. 1978).

64. *Id.* § 1148.

65. *Id.* § 1156.2.

nation it must interpret the meaning of the phrase. The ALRB, however, has not always been consistent in its interpretation.

In both law and common usage, the word contiguous has traditionally meant adjoining or sharing a common boundary.<sup>66</sup> More recently it has also come to mean *nearby* though not necessarily *touching*.<sup>67</sup> The difference between the two usages is important. Two farms a few miles apart are near to one another; hence they are contiguous if the newer meaning of the word is used. Similarly, the Lompoc and Santa Maria Valleys, about thirty miles apart, might be considered contiguous geographical areas if the more recent definition of that word is accepted.

The second question which the Board must address in interpreting this phrase is whether the phrase "two or more non-contiguous geographic areas" refers to the contiguity of the farms themselves, or of broader geographic regions in which the farms are located. If the latter, then there is a question as to what broader area is meant.

Any attempt to interpret the meaning of the statute should begin by looking to the probable intent of the legislature that enacted it. Determining legislative intent for any California statute is difficult, since the California legislature does not publish the kinds of legislative records that are available at the federal level.<sup>68</sup> The task is especially difficult in regard to the Agricultural Labor Relations Act, since most of its provisions were written in a series of meetings in Governor Brown's office between representatives of various interest groups.<sup>69</sup> Of the few bits of legislative history that do exist, the only one applicable to this issue is a statement of legislative intent published in the Senate Journal.<sup>70</sup> Ac-

---

66. *Hauber v. Gentry*, 215 S.W.2d 754, 758 (Mo., 1949). "The word [c]ontiguous properly applies to objects which touch along a considerable part of the whole of one side."

67. "'Contiguous' means . . . also near, though not in contact; adjoining; near in succession", *Ehle v. Tenney Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212 (1941). See Words and Phrases, "contiguous", West 1960 170-181 for general history of legal constructions of this word.

68. For example, there is nothing equivalent to the Congressional Record and published committee reports or transcripts of regular committee hearings are rare.

69. Initially, Rose Bird of the Agriculture and Services Agency and members of her staff met periodically with each of the three major interest groups involved with the issue: the Teamsters, the UFW and other AFL-CIO unions, and the farmers, represented by several growers' organizations. Later Governor Brown and members of his staff met with each side. Through the state staffers, the three interest groups negotiated the language of the ALRA. For the final bargaining, the three groups met simultaneously while members of the Governor's staff worked with each of them to reach an acceptable compromise. Interview with former ALRB member Richard Johnsen, one of the principal grower representatives, Sacramento, Ca., June 6, 1978.

70. It is the intent of SB1 (Third Extraordinary Session) and AB1 (Third Extraordinary Session) that the Board, in exercising its discretion to determine bargaining units in non-contiguous geographic areas, may consider processing, packing and cooling operations which are not conducted on a farm as constituting employment in a separate or noncontiguous area for the purpose of Section 1156.2.

*Senate Daily Journal, Third Extraordinary Session, May 26, 1975.* Since off-the-farm

ording to this statement, packing plants and processing facilities located off the farm are to be considered non-contiguous to the farm they serve. Since the type of plants that would fall under ALRB jurisdiction are usually located quite close to the farms,<sup>71</sup> the legislature's specific reference to them indicates that the members envisioned a very narrow application of the word "contiguous."

Logic favors this apparent legislative intent. If "contiguous" is interpreted to mean "nearby", then there is nothing in the law to indicate what distance should be considered nearby. Similarly, if contiguity applies to some broad areas, rather than to the location of the farms themselves, then there are no guidelines indicating just what sort of area might be appropriate. However, if section 1156.2 is interpreted to mean that non-contiguity exists whenever the parcels of land are not adjacent, then that section has a clear meaning which is easy to understand and to apply consistently. In interpreting the law, the Board should avoid a construction which generates unnecessary confusion when another construction, both simpler and more plausible, is available.

Any unit determination which might be reached as a result of finding two locations contiguous can be reached just as easily by declaring the locations non-contiguous and exercising the discretion given to the Board in section 1156.2. Thus there is no advantage to finding contiguity anytime it may be avoided. The reverse, however, is not true. As one former member of the ALRB has noted, "The legal consequence of finding that employees work in a single geographical area is that further inquiry as to the appropriateness of the unit ceases, and the employees are included in the unit no matter how little they have in common."<sup>72</sup> Therefore, by defining "non-contiguous geographical areas" in such a way as to put as many cases as possible in that category, the Board will be able to use its discretion as broadly as possible. It thus will minimize the number of instances where it is foreclosed by law from choosing the unit which it finds most appropriate.

The first time the ALRB faced the contiguity issue was in the case of *Egger & Ghio*.<sup>73</sup> In this case the Board found two farms to be contiguous although they were about ten miles apart.<sup>74</sup> The Board either used

---

processing facilities are usually located close to the land they serve, the Senate's specific exemption of them is a strong indication that they envisioned the word "noncontiguous" as applying to any separate farming operations.

71. Packing plants which serve more than one farm or which are not owned by the farm they serve are under the jurisdiction of the NLRB. Packing plants associated with a particular farm are located as conveniently as possible to that farm.

72. Grodin, *California Agricultural Labor Act: Early Experience*, 15 IND. RELS. 275, 279 (1976).

73. *Egger & Ghio Company, Inc.*, 1 A.L.R.B. No. 17, (1975).

74. *Id.* at 6. The opinion appears to equate contiguity with being in a single agricultural production area. However, it may also be read as finding the ranches noncontiguous and opting for a single unit as a matter of discretion.

the word contiguous to mean "near" rather than "touching" or considered the contiguity of the general areas rather than of the farms themselves.

In the case of *Bruce Church Farms*,<sup>75</sup> the Board was considering lettuce-growing operations located in five valleys throughout California. The opinion stated that "these valleys constitute separate and non-contiguous geographical areas in relation to each other."<sup>76</sup> In focusing on the contiguity of the valleys in which the farms were located, the Board again seemed to recognize a broad view of contiguity. However, since contiguity was not a critical issue in this case, it is difficult to infer solid principles from this holding.<sup>77</sup>

In two more recent cases involving contiguity, however, the ALRB adopted a narrower view of the concept, focusing on contiguity of the farms themselves rather than of the general geographic areas. In *Napa Valley Vineyards*,<sup>78</sup> the employer operated vineyards in the Napa and Sonoma valleys. These valleys are virtually adjacent, separated by a small range of hills. Under the standard used in *Egger & Ghio*, and probably under that implied in *Bruce Church* the employer's operations in the two valleys would *not* have been in "non-contiguous geographical areas." In this case, however, the Board stated that "when separate operations of an employer are not contiguous, we have the power to 'determine the appropriate unit or units.'"<sup>79</sup> It appears that the Board members examined the contiguity of the actual farming operations rather than the broader areas in which those operations were located. The ALRB placed the employees at the two locations in one bargaining unit, but they did so as an exercise of their discretion over non-contiguous areas, rather than as a result of a finding that the areas were contiguous.

The dissent also found that the Napa Valley Vineyards operated in "distinctly non-contiguous geographical areas."<sup>80</sup> Furthermore, the dissent explicitly advocated that the phrase "non-contiguous geographical area" be construed, wherever possible, in such a way as to permit the Board to exercise its discretion. Thus the entire ALRB seemed to be moving toward this interpretation of the phrase.

This trend continued in *John Elmore Farms*,<sup>81</sup> in which the ALRB again spoke of non-contiguous operations rather than areas in defining

---

75. *Bruce Church, Inc.*, 2 A.L.R.B. No. 38 (1976).

76. *Id.* at 4.

77. The ALRB went on to certify one statewide unit for all Bruce Church employees in California. *Id.* at 10. The Bruce Church ranches, located hundreds of miles apart, were non-contiguous by any definition of that term.

78. *Napa Valley Vineyards Co.*, 3 A.L.R.B. No. 22 (1977).

79. *Id.* at 13, quoting CAL. LAB. CODE § 1156.2 (West Supp. 1978) [emphasis added].

80. *Id.* at 18.

81. *John Elmore Farms*, 3 A.L.R.B. No. 16 (1977).



its jurisdiction under section 1156.2. This opinion explicitly differentiated between the concept of contiguity and that of a single definable agricultural production area. Thus it appears to be a more direct expression of the ALRB's change in opinion on the definition than was *Napa Valley*. The dissent in this case, by the same member who dissented in *Napa Valley*,<sup>82</sup> refers specifically to "two or more non-contiguous farms."<sup>83</sup> Thus all four participating Board members continued their shift toward the more limited definition of contiguity.<sup>84</sup>

A passing reference in the ALRB opinion in *Tenneco West*<sup>85</sup> might be interpreted as an implied reversal of this trend. The employer argued that a subsidiary had no "geographical contiguity, connection, or interdependence"<sup>86</sup> with the parent company's operations. In response, the Board noted that the subsidiary operated in the same agricultural production area as the parent, citing *Elmore* as to the importance of that fact, and that section 1156.2<sup>87</sup> precluded the ALRB from considering the structure of the company and forced it to put all of the employees in one unit. By implication, then, it appears that the ALRB was equating contiguity with the agricultural production area, despite the fact that it relied for authority on the one case where it had specifically rejected such an equation.

These cases indicate that the ALRB has not developed any firm answer to the query "What does the phrase 'non-contiguous geographical areas' mean?" In several instances the Board seems unwilling even to admit that it is facing the question. Perhaps the Board members are being deliberately vague in order to preserve their option to decide either way in future cases. If so, they are creating unnecessary confusion. As former Board member Joseph Grodin indicated,<sup>88</sup> the best way for the ALRB to preserve its flexibility is to find non-contiguity wherever possible, so it can use its statutory discretion.

### *B. Step Two: The Single Definable Agricultural Production Area*

As indicated in the preceding section, the ALRB has used "single definable agricultural production area" both as a standard for assessing contiguity and as a separate test, apart from the contiguity issue, for determining the appropriate bargaining unit. This article endorses the

---

82. Richard Johnsen. See note 59 *supra*.

83. *Elmore*, 3 A.L.R.B. No. 16, at 11 (1977); (emphasis added).

84. This view is reflected more recently by *Signal Produce*, 4 A.L.R.B. No. 3, at 3, n.2, 1978 which describes two ranches in the Imperial Valley as non-contiguous, and refers again to non-contiguous "operations"; the comment, however, was dicta.

85. *Tenneco West, Inc.*, 3 A.L.R.B. No. 92 (1977).

86. *Id.* at 17.

87. CAL. LAB. CODE § 1156.2 (West Supp. 1978).

88. Grodin, note 70 *supra*.

latter use of the term, as one part of the proposed three-stage analysis of multi-location bargaining unit cases.

When the ALRB first used the phrase, in *Egger & Ghio*,<sup>89</sup> the Board defined the production area in terms of common water supply, labor pool, climate, and other growing conditions, though it indicated that it would consider other factors in appropriate circumstances.<sup>90</sup> Each of these factors, especially the first two, implies geographical proximity. These factors, taken together, define a region in which any agricultural operations of an employer would be likely to involve similar crop types, seasonal employment needs, and methods of operation.

In later cases, the ALRB focused more directly upon the latter considerations. In *John Elmore Farms*<sup>91</sup> the Board looked at "seasons, climate, harvest and planting times, need for labor, kind of crops grown and growing conditions."<sup>92</sup> In both *Elmore* and *Napa Valley Vineyards*,<sup>93</sup> the ALRB applied these factors to two nearby valleys<sup>94</sup> and found them to be one agricultural production area. Most recently, in *Tenneco West*, the Board, while citing *Elmore*, appeared to return to the *Egger* criteria. It attempted to apply two of these criteria to the facts in the case despite the irrelevance of both.<sup>95</sup>

Though the criteria used in the cases may differ superficially, their thrust remains the same. Farming operations located near one another in a single region that is homogenous in terms of growing conditions and labor situation are likely to have enough in common to justify putting the employees of both into one unit.

Though in *Elmore* the ALRB stated that the location of an employer's operations in a single agricultural production area would be a "significant factor" in its unit determination,<sup>96</sup> it has always been treated as completely determinative whenever used. This can be reconciled by viewing the presence of two groups of employees in one production area

---

89. *Egger & Ghio Company, Inc.*, 1 A.L.R.B. No. 17 (1975).

90. *Id.* at 7.

91. *John Elmore Farms*, 3 A.L.R.B. No. 16 (1977).

92. *Id.* at 5.

93. 3 A.L.R.B. No. 22 (1977).

94. Member Johnsen, dissenting in *Elmore*, argued that the two valleys involved in that case, Lompoc and Santa Maria, were not really nearby because the range of hills separating them, which was not agriculturally similar to the valleys themselves, was nearly thirty miles wide. Johnsen argued that, because of this intervening area, the two valleys, however similar they might be to one another, could not be considered a single production area. In the *Napa Valley* case, although the employer's operations were 40 miles from one another, the valleys themselves adjoined each other.

95. Once the Board determined that the agricultural operations involved were all in one moderately-sized valley, declaring that the climate does not vary significantly between them was redundant. The fact that irrigation water for the entire valley comes from the Colorado River does little to establish that the valley is a single production area; millions of acres in at least five states share Colorado River water.

96. *Elmore*, 3 A.L.R.B. No. 16, at 5.

as creating a strong presumption that they have enough interests in common to warrant placing them in one bargaining unit.

In each of the cases so far decided by the ALRB, the similarity to the employer's operations at each of its locations served to reinforce that presumption. It is possible, however, to imagine a situation where the nature of the employer's activities would rebut the presumption. For example, few crops are more dissimilar, in terms of growing operations and labor needs, than tomatoes and roses, yet an employer could grow both on nearly adjacent plots of land. Where one party alleges that an employer's operations, though located in a single definable agricultural production area, are so dissimilar that it would be inappropriate to put them in one unit, the argument would have to be judged by the same tests the ALRB uses in evaluating proposed units larger than an agricultural production area. These tests are discussed in the following section.

### *C. Step Three: The NLRB/Bruce Church Criteria*

A third standard is needed to analyze those cases where the employer's operations are so widespread that neither contiguity nor a single agricultural production area is involved. In such an instance the ALRB, following its ALRA mandate,<sup>97</sup> looks to the National Labor Relations Board for guidance. The NLRB has developed a set of factors it uses in determining the appropriate unit or units for a particular group of workers.<sup>98</sup> In the *Bruce Church* case, the ALRB, after noting the NLRB's policy of deciding unit questions on a case-by-case basis rather than establishing rigid standards, outlined some of the factors the NLRB does consider. This section compares the ways the two boards have used these factors.

One of the most important factors is the bargaining history of the workers involved. An existing successful bargaining relationship, whether involving one location or many, is a good indication of the unit size that will best serve the interests of all parties. However, the NLRB does not give any substantial weight to a bargaining history that arose solely from an agreement between employer and union; it only considers itself bound by history if the Board itself played a role in the initial unit determination<sup>99</sup> because of the possibility of collusion between an employer and one union to the detriment of another union.

---

97. CAL. LAB. CODE § 1148: "The Board shall follow applicable precedents of the National Labor Relations Act, as amended."

98. Metropolitan Life Insurance Co., 156 N.L.R.B. 1408 (1966), "the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of various parts of the employer's operation." *Id.* at 1412.

99. Grand Union Co., 176 N.L.R.B. 230 (1969).

The ALRB is also reluctant to give significant weight to any bargaining history where it played no role in the initial unit selection. It is especially reluctant where the bargaining relationship appears in fact to be collusive. For the reasons discussed earlier, the ALRB has decided that much of the bargaining history before the enactment of the ALRA is tainted.<sup>100</sup>

Perhaps the most important single factor in the unit determination decision is "community of interest." This factor is also the vaguest and hardest to define. At times the NLRB has seemed to use this factor as an umbrella to encompass some or all of the others. Generally the term is used to mean a similarity in wages, benefits, hours, or other terms and conditions of employment, or in the method of determining those terms and conditions.<sup>101</sup> Where the wages and conditions are the same or similar at two or more locations, the employees at those locations will generally be joined into a single unit;<sup>102</sup> where they are not similar, the employees will usually be placed in separate units unless other considerations prevail.<sup>103</sup>

The ALRB has relied on the community of interest factor. In the *Bruce Church* case, it stated that "[c]onditions of employment were virtually identical at all locations, and all employees worked generally the same hours, were paid on the same basis, and progressed along the same lines of promotion."<sup>104</sup> As a result, the ALRB certified one unit for all Bruce Church employees. In *Napa Valley*, the dissent, arguing against combining two operations into a single unit, pointed out that the employees at one plant were paid on an individual piece-work basis while those at the other were paid on the basis of the joint output of a work crew. This opinion argued that workers who were paid on a different basis would have less common interest in the outcome of the negotiating process and should therefore not be placed in the same bargaining unit.<sup>105</sup>

The NLRB also considers employee transfers between two or more plants when deciding whether the employees in those plants should be

---

100. In order to avoid organization of their workers by the U.F.W., many employers signed contracts with the Western Conference of Teamsters. These contracts have generally been held to be collusive. See note 41 *supra* and accompanying text. See also Eugene Acosta, 1 A.L.R.B. No. 1 (1975) and *Englund v. Chavez*, 8 Cal. 3d 572, 105 Cal. Rptr. 521, 504 P.2d 457 (1972). However, in *Bruce Church, Inc.*, 2 A.L.R.B. No. 38 (1976) and *Bud Antle, Inc.*, 3 A.L.R.B. No. 7 (1977), the Board did consider, at least indirectly, the statewide bargaining history.

101. *Continental Baking Co.*, 99 N.L.R.B. 777 (1952).

102. *American Brass Co.*, 6 N.L.R.B. 723 (1938).

103. *Zenite Metal Corp.*, 5 N.L.R.B. 509 (1938).

104. *Bruce Church, Inc.*, 2 A.L.R.B. No. 38, at 9 (1976), *quoting* the NLRB opinion in *Vacuum Cooling Co.*, 107 N.L.R.B. 611 (1953). The ALRB then stated that the same circumstances existed and the same factors were controlling in its own case. It described the fact patterns as "strikingly similar."

105. *Napa Valley*, 3 A.L.R.B. No. 22, at 22-23 (1977).

placed in one unit. The number of transfers is often indicative of the degree to which the conditions at the plants are interrelated. In addition, like bargaining history, frequent transfers will often operate to generate a community of interest among the employees whether or not one existed before.<sup>106</sup>

Employee transfers are especially relevant in agriculture, because of the presence of migrant workers, a form of employment unique to this industry. Migrant workers usually work full-time for a brief period during the harvest, after which they are laid off and must seek employment with another grower whose crop matures at a different time. Growers with more than one farming operation often schedule their plantings so that the harvests will follow one another and the same migrant workers may be transferred to each location.<sup>107</sup>

One of the few times that the NLRB has dealt with agricultural migrant workers was in the case of *Vacuum Cooling Company*,<sup>108</sup> which involved a produce-packing company whose workers followed the harvest along with the employees of the farms the company served. Equipment, supervisors and some workers moved from location to location with the harvest season. Relying largely on this pattern, and on the similarity of wages and other conditions which arose from it, the NLRB placed all of the employer's operations in one unit.

The ALRB reached a similar result in two cases involving statewide lettuce growers.<sup>109</sup> Each of these employers had operations in several different regions with different harvest periods, and each used many of the same employees at more than one location. This interchange of workers was a major factor behind the ALRB's decision to place the employees of each in a statewide unit.

The NLRB traditionally relies substantially on the amount of common supervision over different plants and the level of management at which personnel policies and labor relations are handled.<sup>110</sup> The degree of centralization which the employer has found practical in its own labor affairs provides some indication of what might be a workable unit.

---

106. Some unions have expressed a fear that giving substantial weight to a factor wholly within the employer's control will enable the latter to manipulate the unit size to its own advantage. Transfers could be scheduled to support the unit size most favorable to a "no union" vote or to a union favored by the employer. However, besides the fact that the NLRB would discount such an obvious ploy in making its decision, it would be too impractical for the employer to transfer employees solely for the slight impact such transfers might have on the bargaining unit decision. The disruption would be too great in comparison to the possible advantage.

107. For example, Bruce Church grows lettuce in four different areas of the state. Of his 1700 regular employees, 1450 work in only one step of the lettuce-growing process, and 70% of these work at two or more of Church's ranches each year. Bruce Church, 2 A.L.R.B. No. 38, at 7 (1976).

108. *Vacuum Cooling Co.*, 107 N.L.R.B. 611 (1953).

109. Bruce Church, 2 A.L.R.B. No. 38 (1976), and Bud Antle, Inc., 3 A.L.R.B. No. 7 (1977).

110. *Twenty-First Century Restaurant*, 192 N.L.R.B. 881 (1971).

In addition, having the unit coincide with the employer's administrative divisions provides both convenience and stability to the bargaining relationship.

The ALRB used this factor in *Bruce Church*, where the Board noted that the decision-making was highly centralized and that local supervisors were often moved among several growing locations. In *Napa Valley*, the dissent, which advocated separate units for employees at two different locations, relied strongly on the fact that the management at the two locations seldom consulted with one another.<sup>111</sup>

There are a number of other factors which the NLRB has used on occasion, but most of them are only marginally applicable to the decisions facing the ALRB. For example, the NLRB has in the past used the extent of union organization to determine the unit.<sup>112</sup> Though section 9(c)(5) of the Taft-Hartley Act<sup>113</sup> theoretically forbade using that factor, the NLRB has held that it could consider the factor as long as it does not rely exclusively on it.<sup>114</sup> Since the ALRA has no provision equivalent to section 9(c)(5), the ALRB is free to use this factor. The ALRB mentioned extent of organization in *Napa Valley*<sup>115</sup> but did not seem to treat it as important.<sup>116</sup> The NLRB also considers physical distance between locations. ALRB use of this criterion is largely mooted by the fact that the ALRB only uses the NLRB criteria when the proposed unit is too geographically widespread to be evaluated in the context of an agricultural production area.<sup>117</sup>

When the ALRB first announced its intention to use the NLRB criteria, in *Bruce Church*, it indicated that these criteria provided its sole test for proposed multi-location cases. However, in *Elmore*, it cited *Egger*, where it first discussed the agricultural production area, and *Bruce Church* as representing alternative approaches. Except in *Bruce Church* and *Bud Antle*, both of which involved statewide units where the agricultural production area test was inapplicable, the ALRB has al-

---

111. 3 A.L.R.B. No. 22, at 22 (1977).

112. J. ABODEELY note 12 *supra*, at 79.

113. National Labor Relations Act § 9(c)(5); 29 U.S.C. § 159(c)(5).

114. *Thalhimer Bros., Inc.*, 83 N.L.R.B. 664 (1949). The Board's use of this factor was upheld by the Supreme Court in *N.L.R.B. v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

115. *Napa Valley*, 3 A.L.R.B. No. 22, at 14.

116. There are political difficulties inherent in any straightforward use of this criterion. In the highly charged political atmosphere which surrounds the farm-labor situation, the Board avoids any decision which appears to exhibit favoritism to one party. The problem has eased somewhat since the agreement between the Teamsters and the United Farm Workers, but anyone involved in the situation must still be sensitive to charges of bias. Therefore the Board, if it considers extent of organization at all, must do so extremely carefully.

117. If, however, the ALRB ever considers a case in which the proposed bargaining unit lies entirely within one agricultural production area, but a party argues that the locations are too dissimilar to include in one unit, then geographical proximity might be an appropriate criterion.

ways used that test. It can be inferred, therefore, that the ALRB intends to use the NLRB criteria only after a finding that the proposed unit is not contained within a single definable agricultural production area.

#### D. Summary

The ALRB has used three different standards in cases involving multi-location units: non-contiguous geographical areas, the single definable agricultural production area, and the NLRB criteria. Though the ALRB's definition and use of these standards has sometimes been haphazard, the Board has established the usefulness of all three in evaluating multi-location units in California agriculture. By using all three in the manner proposed by this article, the ALRB could use the best features of each standard and have, for the first time, a logical, clear structure to its bargaining unit decisions. Adoption of such a structure would enable parties and their attorneys to better understand and predict ALRB actions, but it would not limit the Board's future discretion. In fact, adoption of the proposed interpretation of the phrase "non-contiguous geographical areas" will prevent the possibility of the ALRB slipping into a definition which may severely limit its discretion in the future. Even if no one seriously considers adopting this proposed three-step analysis, however, it will serve its purpose if it enables practitioners to better understand past ALRB decisions and present trends.

Once again, the three steps in the analysis are as follows:

First, decide whether the employees work in non-contiguous areas. Here the ALRB should define contiguity narrowly, so any work locations not directly adjacent will fall within the scope of the Board's discretion.

Second, determine whether the locations are in a single definable agricultural production area. The ALRB should emphasize the *Elmore* definition of agricultural production area over that in *Egger*, because the former refers more directly to the factors which make the production area an appropriate test. A finding that two or more work locations are in one production area would establish a strong but rebuttable presumption that they belong in a single bargaining unit.

Third, evaluate the locations by the criteria borrowed from the NLRB in *Bruce Church*.

#### IV. CONCLUSION

This article has attempted to survey the ALRB's decisions in three areas, all related to bargaining unit determination, during the first three years of its existence. These decisions provide some clue as to what is likely to transpire during the next few years.

The multi-employer issue will probably remain in a dormant state. Voluntary multi-employer bargaining is unlikely to become an issue for a few years, and a comparison of the single-employer doctrine cases gives a good picture of what relationships between employers will cause the ALRB to invoke the doctrine.

The question of whether a non-landowning farm operator, who conducts activities falling into both the definition of employer and the labor contractor exception, is exempt from employer status, is closed. The process of distinguishing between different types of farm operators, and determining who is properly the employer of particular groups of workers, will go on. Given the number of possible relationships among the many types of business entities involved in farming, the ALRB will be called upon to make decisions on this issue for as long as the Board exists.

It is harder to predict what will happen with regard to multilocation units. There are two major unsolved questions in this area. First, just what does "non-contiguous geographical areas" mean? Second, is the agricultural production area standard a replacement for the *Bruce Church* criteria, or does the Board still plan to use the latter when appropriate to analyze cases where the production area standard seems inappropriate? This article has attempted to synthesize possible answers to these questions from existing decisions. However, the ALRB can probably, if it chooses, largely avoid both questions in future opinions.

*Brian R. McDonald*