The Unionization of Farm Labor

I. FARM LABOR AND THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) constitutes the basic statutory framework for labor relations law in the United States.[1] The Act delineates the mutual rights and obligations of employers and employees to provide a uniform and systematic approach to the peaceful resolution of labor disputes. The important substantive rights of all employees covered by the Act are the right to organize or to refrain from organizing, the right to bargain collectively through representatives of the employees' own choosing, and the right to engage in other concerted activity for mutual aid and protection.[2] The Act lists five types of employer unfair labor practices which are deemed to interfere with these rights. One of the most important of these protections is found in § 8(a)(5) which declares that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees...."[3] Implicit in the duty to bargain is the employer's obligation to recognize a union that represents a majority of his employees.[4]

[1]National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), *as amended* 29 U.S.C. § 151 (1964).

[2]NLRA § 7, 29 U.S.C. § 157 (1964).

[3]NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

[4]"By reading the testimony, the debate, and the history of the times with a large measure of hindsight one can discern four purposes which entered into the enactment of section 8(5).

(I) The simplest and most direct purpose was to reduce the number of strikes for union recognition. Prior to 1935 the outright refusal of employers to deal with a labor union was a prolific cause of industrial strife. The cause could be eliminated by plac-

The National Labor Relations Board (NLRB) is the administrative agency created by Congress to enforce the NLRA.[5] The Board's principal functions are to conduct elections through which employees are to select bargaining representatives to resolve questions of representation and to investigate and adjudicate unfair labor practices prohibited by the Act. Although the United States Supreme Court has held that the jurisdiction of the NLRB extends to the full limits of the federal government's power to regulate interstate commerce,[6] the NLRB may, through established rules, decline jurisdiction over any labor dispute which in its opinion does not have a substantial impact on interstate commerce.[7] For the Board to assert jurisdiction under current standards,[8] the business must have a $50,000 outflow or inflow, directly or indirectly into interstate commerce.[9]

In addition to the limitations imposed by the Board, specified statutory exemptions remove certain cases from the jurisdiction of the NLRB. Since the enactment of the NLRA in 1935, "agricultural laborers" have been excluded from the coverage of the Act and consequently from the benefits and responsibilities it imposes.[10] "When used in this Act...the term 'employee'...shall not include any individual employed as an agricultural laborer."[11] Since the term "agricultural laborer" was not explained or defined in the Act, the courts and the Board have been inconsistent in applying the "agricultural laborer" exclusion.[12] In some situations the definition turned on the court's or Board's finding as to the likelihood that the labor dispute would disrupt interstate commerce. In other cases the standard was based upon the nature of the work being performed by the employees involved.[13] In recent years, appropriation acts funding the NLRB have defined "agricultural laborer."[14] A recent NLRB appropriation act provides:[15]

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ing an employer under a statutory duty to acknowledge as the legal representative of all his employees any union designated by the majority. In arguing that the act was constitutional the Government placed great stress upon this purpose." Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958).

[5]NLRA § 3, 29 U.S.C. § 153 (1964).

[6]Polish National Alliance of the United States of North America v. NLRB, 322 U.S. 643, 647 (1944).

[7]NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1964).

[8]S. REP. NO. 1006, 90th Cong. 2d Sess. 42 (1968).

[9]NLRB, 23d ANN. REP. 8 (1958).

[10]NLRA § 2(3), 29 U.S.C. § 152(3) (1964).

[11]*Id.*

[12]Annot., 28 A.L.R. 2d 391, 395—96 (1953).

[13]*Id.*

[14]3 CCH LAB. L. REP. ¶ 5550.

[15]82 Stat. 992 (1968).

> [N]o part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of... [the Labor Management Relations Act], and as defined in Section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203).

The definitional reference in the appropriation act is to the Fair Labor Standards Act (FLSA).[16] Section 3(f) of the FLSA states that as used in this Act:

> "[A]griculture" includes farming in all of its branches and among other things includes the cultivation tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing 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.[17]

This proviso has been held by the NLRB to incorporate by reference into § 2(3) of the NLRA the definition of agriculture as used in § 3(f) of the FLSA.[18]

The rationale for excluding the agricultural laborer is not clear, but probably can be explained in terms of political expediency. As originally introduced in the 73rd Congress, the Wagner Act would have applied to agriculture as well as any other industry in interstate commerce.[19] When the bill was later reported from the Committee on Education and Labor, however, the definition of "employee" had been re-drafted to exclude "agricultural laborers."[20] An examination of the legislative history does not clearly explain the exclusion.[21] A Senate report mentions one possible explanation: "For administrative reasons, the committee deemed it wise not to

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[16]Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201—19 (1964), *as amended* (Supp. III, 1967) [hereinafter cited as FLSA].

[17]FLSA § 3(f), 29 U.S.C. § 203(f) (1964).

[18]William H. Elliot & Sons Company, 78 NLRB 1078, 1079, 22 LRRM 1344 (1948); Shoenberg Farms (Edward P. Tepper) 132 NLRB 1331, 1334, 49 LRRM 2258, 2259 (1961).

[19]S. 2926, 73d Cong., 2d Sess., § 3(3) (1934); NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS Act 1—14, 2 (1949).

[20]S. REP. NO. 1184, 73d Cong., 2d Sess. 1 (1934).

[21]For an excellent study of the exclusion of agricultural labor from the NLRA, see A. Morris, *Agricultural Labor and National Labor Legislation*, 54 CAL. L.

include under the bill agricultural laborers...."[22] Other available information, however, indicates that political rather than administrative reasons were the cause of the exclusion.[23] Farmworkers were also excluded from the Social Security Act of 1935, leading one writer to conclude that political realities dictated Congress' course of action.[24] Senator Wagner recognized that the inclusion of agriculture might create widespread opposition from the strong farm lobby and thereby jeopardize passage of the NLRA.[25] Representative Connery, who directed the bill in the House, stated: "If we can get this bill through and get it working properly, there will be opportunity later... to take care of the agricultural workers."[26]

Although farmworkers are excluded from the jurisdiction of the NLRB, it is clear that this exclusion does not prevent agricultural workers from organizing.[27] The Supreme Court has recognized that employees have a fundamental right to self-organize through representatives of their own choosing.[28] In *National Maritime Union v. Herzog*, the federal district court for the District of Columbia stated:

> Quite apart from any statutory provision, employees have always had the right to organize trade unions, and through them to bargain collectively with employers concerning wages, hours, working conditions or any other appropriate subject.[29]

REV. 1939 (1966). The author states: "The Legislative history of the National Labor Relations Act demonstrates that neither Congress nor virtually anyone else was concerned with the problems of agricultural labor." *Id.* at 1951.

[22]S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935). NLRB, *supra* note 19, at 2306.

[23]Morris, *supra* note 21, at 1954—56. Alexander Morin, in writing on the exclusion of farmworkers, concluded: "The deliberate exclusion of the farmworkers from legislative shelter is due to their weakness in the political arena, to the very great strength of farm organizations, and to the inertia of the urban population in these matters." A MORIN, THE ORGANIZABILITY OF FARM LABOR IN THE UNITED STATES 69 (1952).

[24]Morris, *supra* note 21, at 1955.

[25]Senator Wagner, the father of the National Labor Relations Act, favored coverage of farmworkers, but candidly acknowledged in private that the opposition of the farm block made this impossible. *See Hearings Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare on S. 1864, S. 1865, S. 1866, S. 1867, S. 1868*, 89th Cong., 1st & 2nd Sess. 463 (1966) (testimony of Benjamin Aaron, Professor of Law and Director of the Institute of Industrial Relations, University of California at Los Angeles).

[26]NLRB, *supra* note 19, at 3202.

[27]National Maritime Union v. Herzog, 78 F. Supp. 146, 155 (D.D.C. 1948), *aff'd mem.*, 334 U.S. 854 (1948).

[28]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937); Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co. of New York, 309 U.S. 261, 263—64 (1940).

[29]National Maritime Union v. Herzog, 78 F. Supp. 146, 155 (D.D.C. 1948);

Other courts have also reached the conclusion that the right to organize existed before the NLRA was passed and would still exist if it were repealed.[30] Although farmworkers are thus free to organize, they must do so without either the benefits or responsibilities imposed by the NLRA. Agricultural laborers do not enjoy a federally enforceable right to organize and be recognized; growers are not required either to recognize or sit at the bargaining table with an organization that represents a majority of employees.[31] The NLRA does not prohibit a farm labor employer from discriminating against an employee with regard to hiring or terms of employment because of alleged union activity.[32]

The deliberate and continued exclusion of agricultural laborers is difficult to justify in view of the theory and philosophy underlying the enactment of the NLRA. At the time the NLRA was enacted it had long been recognized that one of the most serious impediments to the free flow of commerce was the strike for recognition and all of its accompanying disruptions.[33] The NRLA was based upon the belief that the refusal of an employer to bargain with the representative of his employees resulted in industrial strife, and that congressional protection of the right to organize would promote the free flow of commerce by removing some of the causes of this strife.[34] The introductory section of the Wagner Act, in an enumeration of "Findings and Policies," contains a declaration of this intent:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[35]

accord, Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co. of New York, 309 U.S. 261, 263—64 (1940).

[30]Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 237 Wis. 164, 295 N.W. 791, 797 (1941); *cf.* Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co. of New York, 309 U.S. 261, 263 (1940).

[31]The failure to bargain collectively with an organization that has been certified as the collective bargaining representative would be an unfair labor practice under § 8(a)(5). NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

[32]To discriminate against an employee because of his union activity would be an unfair labor practice under § 8(a)(3). NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

[33]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937).

[34]NLRA § 1, 29 U.S.C. § 151 (1964); C. GREGORY, LABOR AND THE LAW 229—30 (2d ed. 1961).

[35]NLRA § 1, 29 U.S.C. § 151 (1964).

The United States Supreme Court, in upholding the constitutionality of the NLRA, gave judicial notice to the disruptive effect of the strike for recognition:

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.[36]

Senator Wagner, in criticizing § 7 of the National Industrial Recovery Act, the forerunner of § 7 of the Wagner Act, testified that in his six months' experience as chairman of the National Labor Board, 70 percent of the disputes coming before the board were caused by the refusal of employers to deal with representatives chosen by their employees.[37]

The NLRA, by requiring the employer to engage in good faith bargaining with the representative chosen by his employees, has rendered the strike for recognition largely a problem of the past.[38] The only major exception has been the agricultural sector of our economy. Since agricultural unions cannot operate within the framework of the NLRA, they must resort to the traditional economic weapons of organization. As long as there are no procedures for deciding questions of recognition and representation, an organizational drive must almost of necessity begin with picketing and economic coercion. The agricultural industry, with its continued exclusion from the NLRA, today faces the same type of labor problems that the industrial sector of our economy faced thirty years ago.

II. HOW FARMWORKERS ARE ORGANIZING WITHOUT THE HELP OF A NATIONAL LABOR RELATIONS ACT

Although California has one of the highest agricultural wage standards in the nation,[39] the most ardent effort to organize farm

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[36]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937).

[37]78 CONG. REC. 3443 (1934) (remarks of Senator Wagner); NLRB, *supra* note 19, at 16.

[38]NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) 1964; NLRA § 8 (b) (3), 29 U.S.C. § 158(b)(3). RASKIN AND DUNLOP, TWO VIEWS OF COLLECTIVE BARGAINING, CHALLENGES OF COLLECTIVE BARGAINING 161 (L. Ulman ed. 1967).

[39]CAL. DEP'T OF EMPLOYMENT, CAL. ANNUAL FARM LABOR

workers is being conducted in this state. Large farms with high concentrations of workers, have fostered the organizing effort in California. In recent years the trend in California farming has been toward large, composite business organizations termed "agribusiness." In 1959, 75 percent of California farm acreage was owned by 6.1 percent of the farms.[40] Today, an even greater percentage of the land is owned by a fewer number of farmers.[41] "Agribusiness" has been referred to as an extension and elaboration of the old plantation system.[42] It combines the new feature of heavy capital investment with the old feature of a large, cheap supply of labor.[43] It is this type of farm system that utilizes the highest concentration of workers.[44] Such concentrations are imperative if a nucleus on which to build a labor organization is to be formed. Effective organization of labor cannot take place when workers are so thinly dispersed that they can be reached only on an individual basis. The emergence of the very large farm has helped to alleviate this problem by providing a situation whereby large blocks of workers can be organized at one time.

Another factor making the California farm ideal for unionization is the type of worker being employed. The California farmworker no longer fits the migrancy stereotype that is characteristic of farm labor in most other states. Farm labor has traditionally been so widely and thinly dispersed that the natural forces of association and contiguity were virtually absent.[45] When labor organizers have been able to contact seasonal migrants they have proved relatively easy to organize but have neither supported their own organizations financially nor provided a base for continued union activity.[46] In California, even during the peak harvest season, an

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REPORT 23 (1967). The composite hourly wage in California is 42 percent above the national average. *Id.*

[40]U.S. BUREAU OF THE CENSUS, AGRICULTURE CENSUS, Vol. I, Part 48, at 4 (1959).

[41]The Sacramento Union, Jan. 31, 1969, at 3, col. 1. California now has 59,000 farms. This is a reduction of 40,000 in the last ten years. *See* U.S. BUREAU OF CENSUS, AGRICULTURE CENSUS, Vol. I, Part 48 at 4 (1959). Within 1968 the average size farm in the state grew from 581 to 627 acres. The Sacramento Union, Jan. 31, 1969, at 3, col. 1.

[42]THE NATIONAL ADVISORY COMMITTEE ON FARM LABOR, AGRIBUSINESS AND ITS WORKERS 10 (1963).

[43]*Id.*

[44]In 1959, 1.7 percent of the 99,232 farms in California paid 36 percentof the total cost of farm labor. Furthermore, 57.6 percent of all the workers employed were hired by only 2.8 percent of California's farms. U.S. BUREAU OF THE CENSUS, AGRICULTURE CENSES, Vol. I, Part 48, at 46; Vol II Gen. Rep. ch V at 267.

[45]A. MORIN, THE ORGANIZABILITY OF FARM LABOR IN THE UNITED STATES 31—36 (1952).

[46]*Id.* at 83.

average of three out of four workers are from a local labor supply.[47] With few migrants, except during the harvest, union organizers find that they are dealing with a less apathetic and more cohesive portion of the farm labor force, which, in turn, is more congenial to union organizing.

Union efforts to organize California farmworkers have localized in the farming community of Delano, situated in the Lower San Joaquin Valley. The grape, being a predominant agricultural product of that area, presents a greater opportunity for union organization than other seasonal crops.[48] The Delano area has a relatively stable farm labor force[49] because grapes require attention ten months out of the year by a worker who possesses a variety of skills.[50] The average Delano worker has been referred to as "The richest of the poor, . . .less apathetic than migrants whose overriding considerations are the next job, the next meal, and hence more susceptible to an organizing effort."[51]

A discussion of the Delano labor dispute and a comparison with farm labor disputes in Wisconsin, Florida and Texas illustrate the problems involved in unionizing the farm labor force. Two areas will be examined. First, the method and problems encountered in organizing farmworkers into viable units and the means, if any, of resolving these problems despite the lack of national labor legislation. Second, an in-depth study of the economic weapons used by farm labor unions to gain recognition and economic concessions.

A. The Method and Problems Encountered in Organizing Farmworkers

For the past thirty years there has been little, if any, success in organizing farmworkers into viable working unions. One reason for the failure is that when attempts were made to organize the workers the methodology or techniques used were invariably the traditional

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[47]REPORT AND RECOMMENDATIONS OF THE AGRICULTURAL LABOR COMMISSION FOR THE STATE OF CALIFORNIA at 60 (Jan. 31, 1963), (Testimony of Don Vial, Administrative Assistant to the Secretary Treasurer and Research Director of the California Labor Federation AFL—CIO).

[48]J. DUNNE, DELANO—THE STORY OF THE CALIFORNIA GRAPE STRIKE 14 (1967).

[49]*Id.*

[50]*Id.*

[51]*Id.*

business oriented approach.[52] The business approach, which concentrates its efforts on basic issues such as wages and job recruiting,[53] was applied to agriculture because the American Federation of Labor (AFL) in the 1930's felt that "vertical" unions were necessary if workers in all agricultural occupations were to wield a degree of bargaining power equal to that of employers.[54] Vertical organization was attempted in 1935 when the California Federation of Labor and its affiliates, who were already organized in the food processing industries, made an effort to unionize seasonal and migratory agricultural workers.[55] Since the workers generally had no experience in unionism and lacked knowledge about the trade union movement,[56] leadership came from professional union organizers rather than from the field workers themselves. Since the leaders were often of different cultural and ethnic backgrounds, little mutual respect or empathy developed. Often union organizers would approach the field hand wearing a white shirt and tie. Instead of creating a feeling of identification among the workers, the organizers by their very appearance created a climate of suspicion and mistrust. Using strictly economic issues as rallying points, the organizers frequently led the field workers on strikes before the workers were able to withstand its accompanying economic stress.[57]

Repeated failures heightened the adverse climate. A feeling of mistrust was evident in the early 1960's when the Agricultural Workers Organizing Committee (AWOC), operating in the Delano area, attempted to organize workers through labor contractors[58] rather than to deal with the field hands directly.[59] The AWOC's lack of success is characteristic of the dismal record of farmworker organization through traditional methods[60] and lends support to the

[52]*See* Cohen, *La Huelga! Delano And After*, MONTHLY LABOR REV. June 6, 1968, at 13. The Agricultural Workers Organizing Committee (AWOC), an affiliate of the AFL—CIO who began the strike in Delano, made use of the traditional business approach.

[53]*Id.*

[54]*See* U.S. DEPT. OF LABOR, BUREAU OF LAB. STAT., LABOR UNIONISM IN AMERICAN AGRICULTURE, Bull. 836, at 140 (1945).

[55]*Id.*

[56]MORIN, *supra* note 45, at 70.

[57]*See* U.S. DEPT. OF LABOR, *supra* note 54, at 174—92, 406.

[58]A labor contractor is one who contracts with growers to provide labor when needed. He thus acts as a middleman in meeting the demand for farm labor. In addition to worker recruitment, the labor contractor may handle crew transportation, supervision, payroll, and other bookkeeping functions. CAL. SENATE FACT FINDING COMMITTEE ON LABOR AND WELFARE, CAL. FARM LABOR PROBLEMS PART I, at 177—84 (1961).

[59]DUNNE, *supra* note 48, at 52.

[60]Koziara, *Collective Bargaining on the Farm*, MONTHLY LABOR REV. June 6, 1968, at 7.

inescapable conclusion postulated by labor economist Alexander Morin: "For an organization to remain continuously effective, it must be able to produce its own leaders at the lower levels of organization."[61]

The current labor dispute that began in Delano in 1965 has evolved a totally new concept in farm labor unionism. Cesar Chavez and the National Farmworkers Association (NFWA), a rival union of the AWOC before the two unions merged in 1966 to form the United Farmworkers Organizing Committee (UFWOC),[62] are primarily responsible for the new concept. Chavez has tried to avoid the traditional union image. His original organization, the NFWA, was intentionally termed an *association* rather than a union.[63] The purpose was twofold: (1) to ease the suspicions of both growers and workers who were distrustful of unions[64] and (2) to show that the organization was meant to be more than just a trade union. The new approach has also been carried over into the United Farmworkers Organizing Committee.

Essentially, the main goals of unionism have always been the same: (1) recognition of the union, (2) better wages, and (3) better working conditions. The UFWOC has retained these goals. The important change has been in the means of attaining these objectives. Instead of emphasizing the goals directly as the sole issue, Chavez has instituted a complete social action program, a form of community unionism.[65] The program is a new means of rallying worker support because it is religious in nature, non-violent in philosophy, and patterned after the civil rights movement.[66]

The current movement possesses a means of securing worker support different than other agricultural trade union movements: Cesar Chavez. He is a man with whom the majority of farmworkers can identify. He is a charismatic leader capitalizing on common cultural and ethnic bonds and has given the movement the necessary "grass roots" leadership that has been lacking in the history of the agricultural trade union movement.[67] Since the membership of his organization is predominately Mexican-American,[68] it is important that its leader be of similar descent. He is never dressed in a suit and tie, but in clothes common to the average farmworker. Although

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[61]MORIN, *supra* note 45, at 71.
[62]Koziara, *supra* note 60, at 7.
[63]*Id.*
[64]*Id.*
[65]Cohen, *supra* note 52, at 13.
[66]*Id.*
[67]*See* MORIN, *supra* note 45, at 71.
[68]Cohen, *supra* note 52, at 13.

perhaps overstating the point slightly, a grower was quoted as saying "[Chavez] has the utter loyalty of the Mexican workers."[69]

Besides simply being someone for farmworkers to identify with, Chavez utilizes techniques of community organizing learned from Saul Alinsky, the professional organizer of the poor.[70] These techniques require a leader who possesses an ability to understand and capitalize on the emotions of the farmworker, one of Chavez' many talents. Chavez organizes mass meetings during which he emphasizes common ethnic bonds and the Catholic Church.[71] For example, at a mass meeting of field workers, just prior to calling for a strike vote, Chavez stated "One hundred fifty years ago in the state of Guanajuato in Mexico, a padre proclaimed the struggle for liberty."[72]

Another new and effective means of gaining farmworker support has been to appeal to "la causa" through the use of *El Teatro Compesino*, the "farmworkers' theatre."[73] Essentially, El Teatro is a traveling theatre satirizing the grape strike. Skits help explain the strike and boycott to the many workers who can neither read nor write.

The most significant departure from traditional organizing methods, however, was the farmworkers' march from Delano to Sacramento in the spring of 1966. The purpose of the march was to publicize the plight of the farmworker and to gain support for the union from the general public. By taking their grievances to a seat of government in the form of a non-violent mass march, the farmworkers and their union became allied with the civil rights movement, thus rejecting traditional unionism more than ever before.

A major problem in past organizational drives has been the securing of necessary financing.[74] Few young unions are financially prepared to withstand the severe economic strains of a lengthy strike. An agricultural union, especially one that is still in its infancy, cannot hope to rely on high dues or large reserve funds. The agricultural workers cannot afford to pay the amount needed to adequately maintain a strong union. More importantly, there is a fear that if the worker pays large dues without receiving an immediate return he may quickly alienate himself from the union. Consequently, an agricultural union must look elsewhere for the needed financial help. Although the current union effort has far from solved

[69]New York Times, March 11, 1968, at 22, col. 1.
[70]New York Times, Oct. 2, 1967, at 43, col. 1.
[71]New York Times, March 11, 1968, at 22, col. 1.
[72]DUNNE, *supra* note 48, at 79.
[73]Wall Street Journal, July 19, 1967, at 12, col. 3.
[74]MORIN, *supra* note 45, at 72.

the financing problem, it has made significant advances by securing volunteer help from civil rights and social action groups such as the Migrant Ministry, Student Nonviolent Coordinating Committee (SNCC), and the Congress of Racial Equality (CORE).[75] These groups have provided indispensable leadership in organizing, picketing, and raising money.[76] In the early days of the Delano grape strike, for example, members of SNCC and CORE served as picket captains in place of local Mexican-Americans who had no conception of how to set up an effective picket line.[77]

The influx of outside groups into Delano resulted in the grape strike becoming the subject of the fourteenth report of the California State Senate Factfinding Committee on Un-American Activities.[78] The committee concluded that the majority of the membership of the AWOC and the NFWA was in no way connected with the "subversive" organizations that swarmed to Delano. The report stated, however, that many outsiders came to Delano to further personal interests and that the leaders of the unions were "carried away" with the prospect of achieving the power necessary to dictate terms to the growers.[79]

Another problem that has plagued organizational drives in the past is inter-union conflict.[80] A temporary achievement of the Delano strike has been to reduce competition between the UFWOC and the Western Conference of Teamsters. The latter organization, which holds contracts for most shed and food processing workers, has sought to control field workers to prevent a successful rural union from engaging in work stoppages harmful to their own members. Teamster success in organizing domestic field workers seems to be mainly confined to the Salinas Valley of California.[81] After losing an election to the UFWOC in Delano, to determine representation of field workers,[82] the Teamsters and the UFWOC

[75]DUNNE, *supra* note 48, at 120.

[76]*Id.*

[77]*Id.* at 24.

[78]CAL. SENATE FACT FINDING SUBCOMMITTEE ON UN-AMERICAN ACTIVITIES FOURTEENTH REPORT UN-AMERICAN ACTIVITIES IN CALIFORNIA (1967).

[79]*Id.* at 77.

[80]U.S. DEPT. OF LABOR, *supra* note 54, at 24—27, 149—92.

[81]In 1961, the Teamsters entered into a contract covering domestic field workers with Bud Antle, Inc., the largest grower in the Salinas Valley. The contract was not the result of an organizational drive. Bud Antle Inc. actually approached the Teamsters preferring them to the AWOC. Apparently it was the feeling of the company that they could deal more easily with the Teamsters. J. Glass, *Organization in Salinas*, MONTHLY LABOR REV. June 6, 1968, at 26.

[82]DUNNE, *supra* note 48, at 166.

reached an agreement delineating jurisdictional rights. The Western Regional Organizer for the Western Conference of Teamsters conceded that traditional methods of organizing were not applicable to field workers.[83] The Western Conference, therefore, agreed to refrain from organizing field workers, but it retained the right to organize those persons working in farm-related processing plants.[84]

As noted previously, however, this agreement represents at most a temporary success in reducing inter-union conflict. The accord provided that workers who do not fall into either category could be organized by either union.[85] The resulting gray area may include those workers directly involved with labor saving machines, such as those who work on the newly developed tomato harvester. As mechanization in the field begins to play a larger role in agriculture, stoop labor obviously will become less important. The gray area will increase in importance and become the focal point for renewed hostility between the unions.

Another problem facing the farmworkers union has been the Reclamation Act of 1902.[86] Under this Act, no right to the use of federally subsidized water for land in private ownership may be sold to any one landowner for a tract exceeding 160 acres. The Act further provides that "no such excess lands so held shall receive water from any project...if the owners...shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of Interior...."[87] The organizing efforts of the UFWOC received a setback in December of 1968 when the union lost a labor contract with Di Giorgio Corporation by virtue of its sale of a 5,900 acre vineyard at Arvin, California.[88] The reason for the sale was primarily to comply with the provisions of the Reclamation Act.[89] The loss was particularly distressing because the contract had been the culmination of union bargaining efforts and had been used to stimulate other organizing attempts.

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[83]Interview with Bill Grami, Western Regional Organizer for the Western Conference of Teamsters in Burlingame, California, Sept. 19, 1968.

[84]*Id.*

[85]Cohen, *La Huelga! Delano and After*, MONTHLY LABOR REV. June 6, 1968, at 14.

[86]32 Stat. 388 (1902), 43 U.S.C. § 372 (1964). This Act is now found at 43 U.S.C. §§ 372, 373, 383, 391—92, 411, 416, 419, 421, 431—32, 434, 439, 461, 491, 498.

[87]43 U.S.C. § 423(e) (1964).

[88]The Sacramento Bee, Dec. 6, 1968, at 2, col. 4. The contract between the UFWOC and Di Giorgio did not contain a transfer clause. *Id.*

[89]43 U.S.C. §§ 423(e), 431 (1964). *See* The Sacramento Bee, Dec. 6, 1968, at 2, col. 4.

To the extent the acreage limitations of the Reclamation Act are enforced, there inevitably will be profound effects on large landholding interests and unions alike. The theory of the 160 acre limitation, an anti-monopoly policy,[90] was to protect against speculation in under-developed land made valuable by reclamation project water.[91] Today, however, the limitation is unrealistic in view of the economies of scale present in modern agriculture.[92] The 160 acre limitation severely cripples the landed estates, which are, for practical purposes, the only type of farming enterprises capable of paying union wages to employees.

Although union organizers must and should be concerned primarily with current problems, they cannot afford to ignore the future. With only limited resources available, a union must be extremely cautious in deciding what type of worker should be given the major portion of its time and effort. This decision is particularly critical in agriculture because of the effects of technological advancement on the composition of the work force. Automation hinders the unionization of farmworkers by reducing the duration of many of the remaining field jobs.[93] With the duration of farm work becoming shorter, there has been an increase in the proportion of "casual" workers.[94] Casual workers are not fully dependent on agriculture for a livelihood, and with no permanent commitment to farm work, they show less interest in unionization.[95] Although technology tends to decrease the overall numbers of workers and changes their composition, it also produces a more skilled laborer, an individual prone to organization. Thus, it is possible that those few non-casual workers who can survive the machine will be in a stronger bargaining position than ever before.

If their efforts are to be successful, farm unions must shape their long-term policy goals and direct an increasing portion of their resources toward the kind of worker who is likely to be a permanent part of the farm labor force. In Hawaii, where farm labor unions are already fairly well developed, the problem of automation has been partially met by securing a retirement age of 55 as part of the employment contract.[96] The Hawaiian situation, however, is atypi-

[90]Comment, *Acreage Limitation: Imperial Valley's New Challenge*, 2 CALIF. WEST. L. REV. 99, 100 (1966).

[91]*Id.*

[92]*See* text accompanying note 203 *infra.*

[93]Koziara, *Collective Bargaining on the Farm*, MONTHLY LABOR REV. June 6, 1968, at 4.

[94]*Id.* at 9.

[95]*Id.*

[96]*Hearings on S. 8, S. 195, S. 197, S. 198 Before the Subcomm. on Migratory*

cal because farmworkers on the mainland do not have equivalent bargaining power. In areas of limited bargaining power, a more feasible approach would be for the union itself to establish apprenticeship or training programs so that those employed in stoop labor today will be taught to use the machines of tomorrow. A union may not be the best provider of skills, but the need is too urgent to wait for colleges, universities or government agencies to do the job for it.

Despite the problems of organization, lack of financing, the 160 acre limitation and automation, farm labor unions have enjoyed a measure of short-term success. As of March 1, 1968, the UFWOC had secured contracts with ten growers in the Delano area,[97] although as yet no agreements have been reached with California's largest table grape grower, Guimarra Corporation. The momentum of the Delano effort also has been carried into other parts of the nation. Wisconsin, Florida, and Texas have all experienced farm labor strikes.

In Wisconsin, a union effort to organize farmworkers has been directed at the field employees of Libby, McNeill and Libby.[98] Wisconsin has helped workers overcome some of the barriers that are normally encountered in conducting an organizational drive in other states, since the law of that state does not categorically exclude agricultural workers from its provisions.[99] As a result, farm employees were able to petition the Wisconsin Employment Relations Board to determine a collective bargaining representative.[100] Through an election ordered by the Board in 1967, the employees' union won the right to be recognized as the exclusive bargaining representative with the Libby company.[101]

Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 2nd Sess., pt. 4, 935 (1968) [hereinafter cited as 1968 *Hearings*].

[97]Cohen, *supra* note 85, at 14. As of March 1, 1968, growers who have signed contracts with the UFWOC are: (1) Schenley Inc., (2) Di Giorgio Fruit Corp., (3) E. and J. Gallo Winery, (4) Christian Bros., (5) Goldberg Ranch, (6) Almaden Vineyards, (7) Paul Masson, (8) Novitiate, (9) Perelli-Minetti and Sons, and (10) Franzia. *Id.* Also on April 1, 1970, three California table grape growers, David Freedman, Charles Freedman, and the Wonder Palms Ranch of Indio, signed union contracts with the UFWOC. These three growers, from Riverside County's Coachella Valley, were the first table grape growers to sign union contracts. These contracts, however, account for only about 1.4 percent of the State's total output of table grapes. Sacramento Bee, April 2, 1970, at D9, col 1.

[98]M. Erenburg, *Existing Legal Machinery in Some States Enables Farm Workers to Overcome Cultural and Economic Barriers to Unionization*, MONTHLY LABOR REV., June 6, 1968, at 21—22.

[99]17 WIS. STAT. ANN. § 111.02 (1957).

[100]17 WIS. STAT. ANN. § 111.05 (1957); WIS. ADM. CODE § ERB 3.01.

[101]Erenburg, *supra* note 98, at 21—22.

Another union drive has been underway in the Belle Glade area of Florida, home of that state's winter vegetable and citrus crop. This organizational drive has been plagued with a lack of internal discipline and cohesion, however, and has not met with any meaningful success. Irving J. Cohen, of the Bureau of Employment Security, suggests that the lack of cohesion may be due to the absence of "grass roots" leadership of the caliber of Cesar Chavez.[102] Cohen, however, is optimistic. He feels that if the union can maintain membership it may be able to confront the citrus industry in the near future.[103]

Success in Delano is to be contrasted with the failure of organizational attempts in Texas. Union efforts in Starr County, Texas, have been hampered because of the close proximity of the county to the Mexican border. Recent testimony before the United States Senate Subcommittee on Migratory Labor showed that growers in Starr County are making effective use of "green-card" holders, Mexican nationals who commute to the United States under visas granting them permanent residence status in the United States. Each day growers go to the international border, pick up Mexican nationals holding green cards, take them to their farms, and return them in the afternoon.[104] By using Mexican nationals as a substitute for the strikers, growers have been effective in blocking union objectives. The "green-carders," as they are called, have been unsympathetic to the union and its cause. Farm laborers who work in the United States but return each evening to Mexico spend a large portion of their earnings in Mexico, thus realizing an economic advantage over the Mexican-Americans residing in the United States. Given this economic advantage, the union can expect little support, continued hostility, and strike-breaking activity from the green-carders. The situation might be somewhat alleviated by a regulation now in effect that would invalidate a cardholder's permit if he seeks re-entry into the United States with the intention of working where the Secretary of Labor has certified that a labor dispute exists.[105]

There has also been substantial testimony that the Texas Rangers and the local police have been used to curtail the strike

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[102]Cohen, *supra* note 85, at 15.

[103]*Id.*

[104]*Hearings on S. 8, S. 195, S. 197, S. 198 Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare,* 90th Cong., 1st Sess., pt. 2, at 344, 361—72 (1967) [hereinafter cited as 1967 *Hearings*].

[105]8 C.F.R. § 211.1(b)(1) (1967). Form I-151, the Alien Registration Receipt card may be invalidated if the holder of such a card seeks entry into the United States

effort. State Senator Joe Bernal testified that at least one picketer was arrested and held in custody for up to fifteen hours before being brought before a magistrate.[106] A local attorney testified that some of a grower's regular employees were also special deputy sheriffs of Starr County.[107] The Chief Deputy Sheriff of Starr County admitted that although the population of the county was overwhelmingly comprised of farmworkers, not one had been appointed a Special Deputy Sheriff.[108]

B. The Tactics

The UFWOC uses two methods in seeking union demands: a strike aimed directly at the growers, and a nationwide boycott of the growers' products. Both are designed to achieve the same result, recognition of the union by the growers. Although neither federal nor state law prohibits farmworkers from organizing, the workers are denied the legal sanction and encouragement other workers have under the NLRA.[109] Thus, the farmworker must first strike for the right to bargain with his employer.

1. Implementing the Strike

For a strike to be effective there must be picketing. This is especially true in agriculture where striking workers are easily

with the intention of working on a farm at which the Secretary of Labor has certified the existence of a labor dispute. *Id.*

Although it is not apparent from the regulation itself, only labor disputes within commuting distance of the border (100 miles) are reported. As each green-carder crosses the border he is handed a list of the current locals where the labor disputes exist. If it is known that he plans to work at one of the locals, he is immediately excludable. If he crosses the border and thereafter seeks work at a struck farm he is subject to deportation as having violated a condition of his re-entry.

Immediately after the implementation of this regulation in June of 1967, a total of fourteen agricultural labor disputes were certified in Texas, Arizona, and California. As of October 21, 1968 there were 45 certifications in California, six in Texas, and none in Arizona. Despite these certifications, the effectiveness of this regulation in preventing the use of green-carders on struck farms is very much in doubt. The United Farm Workers Organizing Committee feels that the Immigration and Naturalization Service has failed to use the regulation effectively. In addition, one study indicates that this regulation has had virtually no effect on the California table grape strike. Letter from T. Potter, Director of the Office of the Farm Labor Service, United States Dep't of Labor, Nov. 13, 1968, on file with the *U.C.D. Law Review; Hearings on H.R. 12667 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess., at 10—14 (Hearings held in Wash. D.C. July 16, 1969).

[106] 1967 *Hearings, supra* note 104, at 421—22.

[107] *Id.* at 400.

[108] *Id.* at 531.

[109] *See* text accompanying note 10 *supra.*

replaced. More than in any other industry there must be some contact at the worksite between strikers and potential strikebreakers to discourage the latter's entry. The logistics of when and where to place pickets when striking a farm, however, are nearly insurmountable. Rather than having a few well defined work sites as in the case of urbanized industry, the agricultural industry is scattered over hundreds of square miles, with the actual work site varying from day to day. "Its [sic] like striking an industrial plant that has a thousand entrance gates and is four hundred square miles large."[110] The UFWOC in Delano has coped with this particular problem by sending out "scout cars" early in the morning to look for indications of the particular vineyards which will be picked that day.[111]

The situation in Texas is further complicated by the restrictions against mass picketing. Texas law forbids any picketing where there are "more than two...pickets at any time within either fifty...feet of any entrance to the premises being picketed, or within fifty...feet of any other picket or pickets."[112] The statute is not an idle threat to organizational efforts. Texas law enforcement agencies have used its provisions on numerous occasions to arrest pickets. Between December 28, 1966, and June 1, 1967, there were approximately 119 arrests involving strikers, of which at least 35 were for mass picketing.[113] Bail for this offense was $100 prior to May 31, 1967, and $400 thereafter.[114]

Since the United States Supreme Court decision of *Thornhill v. Alabama* it has been acknowledged that the constitutional right of free speech renders a state powerless to prohibit absolutely all peaceful picketing without regard to purpose and circumstances; however, the right of a state to enjoin picketing to prevent violence and property damage cannot be questioned. Thus, a state may forbid mass picketing as an exercise of its police power to prevent violence and overt threats of violence.[116]

If one acknowledges that a state may forbid mass picketing to prevent violence, the problem becomes one of determining what is meant by "mass picketing." No United States Supreme Court decision has limited picketing to a specific number of persons, although

[110]J. DUNNE, DELANO—THE STORY OF THE CALIFORNIA GRAPE STRIKE 24 (1967).

[111]*Id.*

[112]VERNON'S TEXAS ANN. CIV. STAT. art. 5154d § 1(1) (1962).

[113]1967 *Hearings, supra* note 104, at 396—97.

[114]*Id.*

[115]310 U.S. 88 (1940).

[116]Allen-Bradley Local v. Wisconsin E. Rel. Bd. 315 U.S. 740 (1942); Hall v. Hawaiian Pineapple Co., 72 F. Supp. 533 (D.C. Hawaii 1947).

Justice Reed's dissent in *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies In.*[117] indicates that pickets could be limited to two or three individuals at a time. The United States Supreme Court has associated mass picketing with obstructing an entrance to and egress from a company's factory, and obstructing the streets and public roads surrounding the factory.[118] Some state courts have associated mass picketing with the use of large numbers of pickets whose presence has resulted in coercion and physical intimidation of persons seeking entrance to the picketed property.[119] Thus, under appropriate factual situations state courts have limited the number of pickets that may be placed at an entrance to premises being picketed,[120] but only when the courts have determined that the pickets, because of their large numbers, were actually intimidating, threatening, and molesting those persons seeking entrance to the picketed property.[121]

The Texas statute absolutely prohibits more than two pickets within fifty feet of any entrance or of each other. The statute on its face does not require that the picketing result in an obstruction to the entrance of the premises being picketed. The constitutionality of the Texas statute was upheld in 1967 by the Texas Civil Court of Appeals. The Court held that the number and distance formula of the statute was neither unconstitutionally vague nor violative of freedom of speech or assembly.[122] The Texas case involved the picketing of a cafe—conditions quite unlike the picketing of a farm. Given this particular fact situation, three pickets within fifty feet could actually obstruct the entrance to the premises. In a farm labor context, however, the practical effect of this statute may eliminate picketing altogether. The statute applied to its logical conclusion would prevent any picketing by more than two persons on farm property bordering a public road, since it could be argued that the place of "any" entrance is one continuous stretch of roadside property. Since the United States Supreme Court and other state courts have associated illegal mass picketing not with an absolute number

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[117]312 U.S. 287, 318—19 (1941).

[118]*Cf.* Allen-Bradley Local v. Wisconsin E. Rel. Bd., 315 U.S. 740, 748 (1942), *cf.* International Union ETC. v. Russel, 356 U.S. 634, 638—39 (1957).

[119]*E.g.*, Southern Bus Lines v. Amalgamated Ass'n ETC., 205 Mis. 354, 38 So. 2d 765, 768—69 (1949); U.S. E.L. Motors v. United E., R., & M. Workers, 166 P.2d 921, 922—23 (Cal. Super. Ct. 1946).

[120]U.S.E.L. Motors v. United E., R., & M. Workers, 166 P.2d 921, 922, 925 (Cal. Super. Ct. 1946); General Electric Co. v. Peterson, 61 N.Y.S.2d 813, 816, 817, 821 (Sup. Ct. 1946).

[121]*Id.*

[122]Geissler v. Coussoulis, 424 S.W.2d 709 (Tex. Civ. App. 1967).

of persons but with the coercion and intimidation resulting from the mere force of numbers, it is suggested that Texas cannot apply its statute without first establishing that violence is imminent or that such picketing will obstruct the entrance to the property.

In addition to state legislation directly regulating picketing, other state laws of general application limit the ability of farm unions to implement an effective strike. On many of the larger farms, especially in California, it is common for workers to live on the grower's property. Any labor organizer who attempts to reach these workers, however, risks violating California Penal Code § 602, the general trespassing statute. In *Cotton v. Superior Court*[123] it was argued that prosecution of farm labor organizers under § 602 was prohibited by Penal Code § 552.1(a), which purports to exempt labor organizers from prosecution as trespassers if their purpose in entering private property is to engage in an organizational effort on behalf of a labor organization. The California Supreme Court, however, held that the exemption did not apply to a farm labor camp.[124] The court reasoned that § 552.1(a), as an exception to § 602, applied only to certain types of industrial property mentioned in Penal Code § 554, not including a farm labor camp.[125] Accordingly the court concluded that § 552.1(a) failed to protect farm labor union organizers.

2. Proposed Regulation of Strike Activity

Although there have been numerous proposals to regulate farm union strike activity, the two most often suggested are legislation to prevent strikes at harvest time and to require compulsory arbitration.[126] Growers have strongly advocated legislation outlawing any strike during peak harvest times.[127] The rationale of their position is simple. A strong union could put a grower in a weak bargaining position because a strike during the harvest season could render an entire year's crop unmarketable. The grower thus risks the loss of

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[123]56 Cal.2d 459, 364 P.2d 241, 15 Cal. Rptr. 65 (1961).

[124]*Id.* at 463, 364 P.2d at 243, 15 Cal. Rptr. at 67.

[125]It has been suggested that if a particular farm has multi-uses and contains any one of the facilities listed in § 554 such as oil wells, reservoirs, pumping plants or canals, it might be possible to include the farm within § 554. Labor organizers would then be exempt from the trespass law by virtue of § 552.1(a); however, as long as the farm's major activity remains farming and other activities are collateral, it is unlikely that a farm would fall within the exception.*See* Note, *Privileged Entry onto Farm Property for Union Organizers*, 19 HAST. L.J. 413, 417—18 (1968).

[126]CALIFORNIA SENATE FACT FINDING COMMITTEE ON AGRICULTURE, SPECIAL REPORT ON FARM LABOR DISPUTES 16 (1967).

[127]*Id.*

an entire year's income, while the workers risk only a few week's wages.[128]

Although the growers' rationale has some validity, it fails to consider several effects of a strike on the laborer. First, farmworkers also suffer a significant loss of income by refusing to work over the short harvest season. Second, unlike employees in many other industries, they cannot work overtime to make up lost income; they, too, must wait for the next season. Third, by refusing to work they are thrown back into the residual pool of farm workers and risk being replaced by those who are willing to work.[129] Growers have dealt with labor organizations in the packing sheds and food processing plants, industries only slightly removed from farm work, without anti-strike legislation. Furthermore, growers in Hawaii have proved that it is possible to live without anti-strike legislation, even though under a sophisticated union contract and an extensive labor relations act.[130] In fact, strikes seem to be somewhat less frequent in Hawaii than on the mainland.[131]

The California State Grange has proposed compulsory arbitration as a possible solution to farm labor disputes.[132] Compulsory arbitration is designed to resolve disputes by forcing the adversaries to accept the decision of an independent third party. Collective bargaining and compulsory arbitration cannot co-exist in any meaningful sense since they are competitive of one another. All too often when the parties realize that failure to reach an agreement will result in a third party making one for them, the negotiating process becomes perfunctory in nature.[133] As bargaining becomes inflexible neither party is willing to give up anything for fear the arbitrator will "cut the cake down the middle."[134] Arbitration ultimately may be the only viable means of solving farm labor problems, but collective bargaining should not be rejected before it is given an opportunity to work.

3. The Boycott

The second tactic used by union organizers to gain recognition has been the use of a nationwide boycott of the growers' products.

[128]REPORT AND RECOMMENDATIONS OF THE AGRICULTURE LABOR COMMISSION FOR THE STATE OF CAL. 126—29 (Jan. 31, 1963).

[129]Koziara, *supra* note 93, at 5.

[130]*See generally* 1968 *Hearings*, *supra* note 96, at 931—42.

[131]*Id.* at 939—42.

[132]CAL. SENATE FACT FINDING COMMITTEE ON AGRICULTURE, SPECIAL REPORT ON FARM LABOR DISPUTES 16 (1967).

[133]NORTHRUP AND BLOOM, GOVERNMENT AND LABOR 400 (1963).

[134]*Id.* at 400—01.

The boycott, conducted in 40 major U. S. cities in the fall of 1968,[135] consists of stationing pickets at major retail food outlets to discourage consumers from purchasing the boycotted products and to discourage food store employees from handling them. The boycott has been used primarily because of the limited success of the strike. A United Farm Worker officer has been quoted as saying, "The union switched emphasis from picketing selected growers to a boycott this year [1968] because of the legal difficulties incurred through the strike and picket method of organizing farm workers."[136] The ultimate purpose of the boycott is to arouse a nationwide awareness of the strike and the workers' plight in the hope that the general public will exert economic pressure on the growers.

a. Effect of the Boycott

The use of the boycott to discourage consumers from buying products of struck growers is a subject more controversial than the strike itself. To the extent the boycott has brought knowledge of "la causa" to the American public it has been a success. By exposing the problem on a nationwide basis, the boycott furthers the effort to obtain federal legislation sought by farm unions. The possibility of the boycott affecting the economic position of the growers is real, but it is difficult to do more than speculate. Success will depend on convincing the stores to stop selling boycotted products, which in turn depends on whether the stores can make a profit selling them.

Since the principal subject of the boycott is table grapes, the union has a greater opportunity for success than it would if the boycott was aimed at another food product. The demand for table grapes is more elastic than for other foods because most people can do without this particular food product. A spokesman for the Cali- had fallen off 20 percent as of late summer, 1968.[137] The decline continued throughout the rest of the 1968 crop year. As of the week ending January 25, 1969, the total grape auction sales to date were 25 percent below the 1968 sales figure and 68 percent below the total auction sales for 1967.[138] The pressure from the boycott appears to be significant, but whether it can elicit the desired response from the

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[135]The Valley Farmer, Sept. 1968, at 19, col. 1.

[136]*Id.*

[137]Wall Street Journal, Aug. 27, 1968, at 4, col. 2.

[138]U.S. DEP'T OF AGRICULTURE—CAL. DEP'T OF AGRICULTURE, FEDERAL-STATE MARKET NEWS SERVICE, WEEKLY GRAPE SUMMARY NO. 36, (week ending Jan. 25, 1969).

growers is uncertain, since real success can only be measured in the number of labor contracts secured.

Although the boycott may prove to be a successful weapon for the farm labor union, it may ultimately cause the union to become the victim of its own boycott when contracts are signed with the table grape growers. The boycott was originally directed against the brand name products of companies such as Di Giorgio Corporation and Schenley Industries, both of whom were particularly susceptible to the boycott.[139] Most of Di Giorgio's revenue comes from processing and selling canned goods while Schenley deals mainly in distilled spirits.[140] Brands of both companies are easily identified. Neither company thought it wise to resist farm union pressure because the boycott was affecting their major sources of revenue while the actual controversy concerned the grape pickers, a minor part of the total operation of both companies. The boycott during the 1968—69 season, however, was directed against the growers of table grapes, only three of whom have signed contracts with the union. Boycotting table grapes presents a much greater problem because the grapes are sold in retail outlets without any means of identifying them with their respective grower. Absent any identification of the grapes, the boycott could hurt uninvolved growers after they agree to the provisions of a union contract.[141] When individual growers realize that even though they enter into a contract with the union their products may still be boycotted, they will become much more reluctant to enter into negotiations with the union.

b. Legality of the Boycott

The principal argument lodged against the boycott is its alleged illegality and unfairness. It is often urged that the boycott is illegal because it is secondary in nature. The ill-sounding "secondary boycott" is loosely defined as union pressure aimed at forcing any person, other than the employees of the person with whom the union has the primary dispute, to cease using, selling, handling, transporting or otherwise dealing in the products of the struck employer. The courts of California have recognized no legal difference between primary and secondary activity, and have upheld both as lawful.[142]

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[139]Wall Street Journal, Aug. 29, 1967, at 12, col. 4.

[140]DUNNE, *supra* note 110, at 127.

[141]Wall Street Journal, Aug. 29, 1967, at 12, col. 4.

[142]Pierce v. Stablemen's Union, 156 Cal. 70, 77, 103 P.324, 327 (1909); McKay v. Retail Automobile Salesman's Local 16016, 16 Cal. 2d 311, 319, 106 P.2d 373, 378 (1940).

California Labor Code §§ 1131-36, which made secondary boycotts illegal, were declared unconstitutional by the California Supreme Court.[143] The decision, however, was handed down before the provisions of the NLRA, also forbidding secondary boycotts,[144] were upheld as constitutional by the United States Supreme Court.[145] In any case, Labor Code §§1131-36 have now been repealed, and it would appear that the legality of a secondary boycott would depend on whether the NLRA is applicable to farm union activities.

Although agricultural laborers are expressly excluded from the benefits granted to statutory employees in §§ 7, 8(a) and 9 of the NLRA,[146] it is nevertheless possible for a farm workers' union to be in the anomalous position of being subject to § 8(b)(4), which prohibits secondary boycotts. The courts have held that as long as a farm union is exclusively composed of agricultural laborers, it is not a "labor organization" under the NLRA and may legally engage in a secondary boycott.[147] In certain other situations, however, it may be an unfair labor practice for a national farm labor union or one of its locals to initiate secondary activity against an employer.[148]

Under the NLRA only a labor organization or its agents can be held liable for a violation of the secondary boycott provisions of § 8(b)(4).[149] The term "labor organization" as used in § 8(b), is defined in § 2(5) to mean "...any organization...in which employees participate...."[150] The term "employees" is defined in § 2(3) to exclude any person employed as an agricultural laborer. Thus, it might be argued that if a union local engaged in conduct prohibited by § 8(b) but is composed entirely of persons not within the statutory definition of employee, then the local is not a union in which employees participate and, therefore, not a labor organization for the purpose of § 8(b).

The NLRB and the courts have held, however, that if a national union in addition to having members who are excluded from the NLRA definition of "employee" (such as supervisory personnel or agricultural laborers) also contains some members within the statutory definition, then the national may be deemed a

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[143]In re Blaney, 30 Cal.2d 643, 184 P.2d 892 (1947).

[144]NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964).

[145]International Bhd. of Electrical Workers v. NLRB, 341 U.S. 694 (1951).

[146]*See* text accompanying note 11 *supra.*

[147]Di Giorgio Fruit Corp. v NLRB, 191 F.2d 642 (App. D.C. 1951), *cert. denied*, 342 U.S. 869 (1951).

[148]*Hearings on H.R. 4769 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 162—63 (1967).

[149]NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964).

[150]NLRA § 2(5), 29 U.S.C. § 152(5) (1964).

"labor organization" for purposes of the secondary boycott provisions.[151] If, therefore, a national labor organization, which includes "employees," participates in secondary activity with a local which is composed solely of members excluded from the Act, the local can be held in violation of § 8(b)(4) as an agent of a labor organization.[152] It is irrelevant that no one in the labor dispute in question meets the statutory definition of employee.[153] Thus, the NLRB in *International Organization of Masters, Mates, and Pilots of America* held that "[t]he status of individuals involved in an organization's 'dispute' is not one of the requirements set forth in the statutory definition of a labor organization. The requirement is merely that it be an organization in which 'employees participate.'"[154] In *National Marine Engineers Beneficial Ass'n. v. NLRB* the Federal Court of Appeals for the Second Circuit held that the test of whether a union, charged with an unfair labor practice under § 8(b), is a "labor organization" depends on whether "employees participate" in the organization charged with the unfair labor practice. If employees are found to participate, the union is a labor organization although all the workers of the particular employer whom it is seeking to represent are supervisors[155] and therefore not employees.[156] The court further stated:

> There is no inconsistency in looking to the identity of the workers of the particular employer when the issue is whether an election must be held..., but to the entire composition of the union being charged, local or national, where the issue is whether it is a "labor organization" and therefore guilty of an unfair labor practice. The questions arise under different sections of the statute, with different wording and purpose.[157]

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[151]International Organization of Masters, Mates, and Pilots of America, Inc. v. NLRB, 351 F.2d 771, 774—75 (D.C. Cir. 1965); National Marine Engineers Beneficial Association v. NLRB, 274 F.2d 167, 173 (2d Cir. 1960).

[152]International Organization of Masters, Mates, and Pilots of America Inc. v. NLRB, 351 F.2d 771, 777 (D.C. Cir. 1965); National Marine Engineers Beneficial Association v. NLRB, 274 F.2d 167, 170—71 (2d Cir. 1960).

[153]International Organization of Masters, Mates, and Pilots of America Inc. v. NLRB, 125 NLRB 113, 132, 45 LRRM 1059, remanded to the Board and modified, 144 NLRB 1172, 54 LRRM 1209 and 146 NLRB No. 19, 55 LRRM 1265, *aff'd.*, 351 F.2d 771 (D.C. Cir. 1965).

[154]International Organization of Masters, Mates, and Pilots of America Inc. v. NLRB, 125 NLRB 113, 132, 45 LRRM 1059 (1959).

[155]Section 2(3) of the National Labor Relations Act also excludes from the definition of "employee" anyone employed in the capacity of a supervisor. 29 U.S.C. § 152(3) (1964).

[156]National Marine Engineers Beneficial Association v. NLRB, 274 F.2d 167, 173 (2d Cir. 1960).

[157]*Id.*

The United States Supreme Court has held that the task of determining what is a "labor organization" in the context of § 8(b) must begin, in any doubtful case, with the National Labor Relations Board.[158] In that respect the Board has stated:

> In International Organization of Masters, Mates and Pilots of America (Chicago Calumet Stevedoring Co., Inc.) the respondent international union, whose membership was composed predominantly of supervisors, and the respondent local, whose membership comprising pilots was entirely supervisory, engaged in secondary picketing activity against foreign shipowners to compel them to use the services of pilot members of the local. The Board held that both the international and its local had unlawfully engaged in secondary boycott activities, notwithstanding that such activities were in support of individuals who were not statutory employees and of a labor union—the local—which was not a statutory labor organization.
>
> The Board found that the international was a labor organization because a small number of its total membership, about 2 percent, who, however, were not involved in the dispute, were statutory "employees." The Board also found the local, although not a statutory "labor organization" because its membership was entirely supervisory, jointly responsible for the illegal secondary activity as an agent of the international. The Board regarded as immaterial the fact that the individuals immediately involved in the dispute were not "employees."[159]

Certain secondary pressures may legally be initiated by a labor union, regardless of whether it is a "labor organization." For example, a proviso to § 8(b)(4) of the NLRA protects "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers" that a product is being produced by an employer with whom the union has a labor dispute. This proviso is not applicable if the union conduct induces work stoppages or interferes with deliveries at the site of the secondary employer.[160] Although the publicity proviso does not extend its protection to

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[158]Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U.S. 173, 182 (1962).

[159]International Brotherhood of Electrical Workers (B.B. McCormick and Sons, Inc.), 150 NLRB 363, 370—71, 57 LRRM 1526, 1528—29 (1964).

[160]NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964).

"Provided further, That for the purposes of this paragraph... only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of

picketing, the United States Supreme Court has held that Congress in enacting the amendments to § 8(b)(4), did not intend to prohibit all peaceful consumer picketing at the site of a secondary employer.[161] Thus, a union may picket the premises of a neutral employer to advise the consuming public that a particular product was produced by a primary employer with whom the union has a labor dispute, provided that the picketing is not intended to cause the consumer to completely cease trading with the secondary employer.[162] Union publicity or peaceful consumer picketing for the purpose of persuading the public not to buy the particular product of the primary employer is not the type of conduct proscribed by the NLRA.

The effect of placing "informational" pickets in strategic positions at retail outlets has sometimes resulted in a refusal by other unions to cross UFWOC picket lines. The NLRB has held that such action by other unions is an illegal boycott and has forced four New York trade unions to sign an agreement not to refuse to handle California grapes in the course of their employment.[163] Thus, it seems that the farm union may not seek to prevent delivery of grapes to the retail outlets but will have to concentrate its activity strictly on the consumer in the hope that he will not purchase them.

The NLRA's interpretation of what is a "labor organization" in the context of § 8(b) has already had an impact on the organizing efforts of the UFWOC in California. The UFWOC, which is made up almost entirely of exempt "agricultural laborers," also has organized some packing shed workers who meet the statutory definition of "employee." After the union's petition for a representation election was denied by the NLRB, it brought secondary economic pressure against Mayfair Markets in an effort to force the grower to the bargaining table. The neutral employer, Mayfair Markets, lodged a complaint with the NLRB. The UFWOC ultimately agreed to a two week "cooling-off" period when the general counsel of the NLRB threatened to seek an injunction against the union activities.[164]

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his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." *Id.* Congress' apparent intent in enacting this provision was to protect handbilling near the premises of neutral employers who are selling the product of the employer with whom the union has a labor dispute.

[161]NLRB v. Fruit and Vegetable Packers Local 760, 377, U.S. 58 (1964).

[162]*Id.*

[163]As reported in the Bakersfield News Bulletin, Aug. 12, 1968, at 1 col. 1.

[164]*Hearings on H.R. 4769 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 70—71, 162—63 (1967).

4. Legislative Proposals to Include Farmworkers within the Scope of the NLRA

The current instability of employer-employee relations in agriculture is directly related to the lack of this industry's coverage under the NLRA. The 1968 Report of the Senate Committee on Labor and Public Welfare found that "mounting evidence confirms the fact that the lack of established procedure for communication, elections, negotiations, [and] arbitration...leads to costly strikes and disruption of interstate commerce."[165] The Committee found that current agricultural strife reveals that the same considerations which led Congress to enact the Wagner Act in 1935 are applicable to agriculture today and are a "compelling reason to include agriculture within the scope of the NLRA."[166] Without a history of bargaining in agriculture, farmers and farmworkers alike are inexperienced in matters of collective bargaining. Thus, there is an added need for orderly legal procedures to guide farmers and farmworkers in settling their differences.

Cesar Chavez, testifying on the proposed extension of the NLRA to agricultural laborers, described the main issue of conflict in agricultural labor relations as that of recognition.

> We are convinced that if we have the protection of the National Labor Relations Act that out of the 40 growers that were being struck in Delano maybe even less than half would have resisted the attempts of the union to organize. So, the fact that we do not have legislation has brought about more strikes than if we had legislation.
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> ....
>
> Also, because the main issue of the union at this point is recognition, and because there are no procedures, of course the only avenue open to us is to strike them or to force them into some recognition procedure. So, I would say that if we get the coverage of the law, that strikes would be lessened.[167]

Under existing law, farmworkers cannot achieve a collective bargaining relationship with their employer except to the extent that the employer is willing to grant recognition to the union, or is compelled to do so by the union's economic strength. The Delano grape strike and boycott clearly illustrate that economic pressure and force are the obvious alternatives to an orderly procedure of determining whether employees want to be represented by a union.

[165] S. REP. NO. 1006, 90th Cong., 2d Sess. 41 (1968).

[166] *Id.*

[167] *Hearings on H.R. 4769 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 66 (1967).

As the California experience has demonstrated, collective bargaining has occurred only in those instances where farmworkers, through strikes, boycotts or other economic activity, have forced employers to the bargaining table.

In recent years there have been renewed legislative efforts to bring farmworkers within the scope of the NLRA.[168] The President's Commission on Rural Poverty recommended that agricultural employees be covered under the NLRA.[169] The dramatic events of Delano and the grape boycott have kept the unionization issue in public view. One writer has suggested that increased public awareness of the farmworker's plight may have helped in the passage of the amendment that brought agricultural laborers under the protection of the Fair Labor Standards Act.[170] These factors indicate that congressional action may be forthcoming in the near future.

A proposal to extend the NLRA to the agricultural industry was introduced in the Senate in early 1969.[171] First, the bill would end the exclusion of farmworkers by amending the definition of "employee" to include agricultural employees. Second, the proposed legislation would provide for coverage of the agricultural industry under § 8(f) of the NLRA, now applicable only to the building and construction trades. Section 8(f) permits certain agreements concerning union security and seniority in these industries, and if amended to apply to agriculture would permit the employer and union to enter into an agreement before the majority status of the union is established under § 9(c) of the NLRA.[172] An agricultural union would also be allowed to bargain for a hiring hall, and a "union shop" provision requiring union membership of all employees seven days after being hired.[173] If such a bill is passed, the NLRB

[168]S. 1866, 89th Cong., 2d Sess. (1965); S. 8, 90th Cong., 1st Sess. (1967); H.R. 4769, 90th Cong., 1st Sess. (1967); H.R. 16014, 90th Cong., 2d Sess. (1968).

[169]S. REP. NO. 1006, 90th Cong., 2d Sess. 39 (1968).

[170]Cohen, *supra* note 85, at 16.

[171]S. 8, 91st Cong., 1st Sess. (1969).

[172]This type of agreement in the absence of a provision like proposed § 8(f) would amount to an employer unfair labor practice. International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

[173]In the absence of a special provision, a union shop agreement can only require union membership "on or after the thirtieth day following the beginning of such employment or effective date of such agreement whichever is later." NLRA § 8(a)(3) . A seven day union shop provision is considered vital to the leaders of the UFWOC. *Hearings on H.R. 4769 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 72 (1967). The contract that the UFWOC signed with Schenley Industries in 1966 included among its terms a provision for a hiring hall, a union shop, and check-off of union dues. Particularly important to the union was the establishment of a union shop and check off of dues. "The

is expected to apply its minimum jurisdictional standards to an agricultural labor dispute;[174] thus, the proposed legislation would cover only 3.5 percent of the nation's farms.[175] Although the small family farms would thereby be excluded, a significant percentage of the nation's hired farmworkers are employed on the farms that would be covered by the Act.[176]

There are many who doubt that the NLRA can operate effectively in the agricultural sector.[177] The right of agricultural laborers to be covered by the NLRA, however, should not obscure the many problems which might arise if this industry is brought within the scope of the Act.[178] In the past, collective bargaining agreements between farmers and farmworkers have shown a heavy reliance on the established procedures of the NLRB in settling disputes.[179] Mr. Ronald Haughton, the mediator and coarbitrator of the UFWOC labor dispute with Di Giorgio Corporation, which resulted in a collective bargaining agreement, testified that:

> The professional can see that throughout there was a heavy reliance upon the tried and tested procedures of the NLRB as established by statute and by case law. I can say without reservation that the... [Di Giorgio contract] could not have been put together, and could not have been effectively administered if it had not been for the fact, in the main, the way had already been chartered by the work of the NLRB in administering the NLRA over the years.[180]

The same view was expressed by Mr. Ogden Fields, the Executive Secretary of the NLRB in a statement prepared for subcommit-

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high mobility characteristic of most agricultural workers creates many administrative problems. Without the union shop stipulation, membership turnover could make the union ineffective as a bargaining agent." Cohen, *supra* note 85, at 15.

[174]S. REP. NO. 91—83, 91st Cong., 1st Sess. 22 (1969); 115 CONG. REC. 243 (daily ed. Jan. 15, 1969).

[175]*Id.*

[176]"[I]t is estimated that over 45 percent of the total farm wage work force is employed on these 3.5 percent of farms which would be included under the legislation." S. REP. NO. 91—83, 91st Cong., 1st Sess. 22 (1969).

[177]*Id.* at 143—49; H.R. REP. NO. 1274, 90th Cong., 2d Sess. 119 (1967).

[178]One of the basic obstacles to the establishment of effective collective bargaining in agriculture is the determining of appropriate bargaining units. The problem is due to the seasonality of the industry, with its scattered units and employees who work for many different growers. Other suggested difficulties relate to the conducting of representation elections under § 9 due to the flexibility in size of crews, lack of fixed work sites, and high turnover in labor force. *See generally* Note, *Agricultural Labor Relations—The Other Farm Problem*, 14 STAN. L. REV. 120, 144 (1961); S. REP. NO. 91—83, 91st Cong., 1st Sess. 147—48 (1969).

[179]*Hearings on H.R. 4769 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 119 (1967).

[180]*Id.*

tee hearings considering the extension of the NLRA to agriculture.[181] Mr. Fields believes that many of the principles, procedural practices, and techniques developed in related or analogous industries would be readily applicable to agricultural employees.[182] "The field of labor-management relations is dynamic and ever-changing, and for 32 years now the Board has proved that it has the needed flexibility and resourcefulness to cope with the uncertainties of our ever-changing economic patterns."[183]

III. CONCLUSION

It cannot be assumed that merely amending the NLRA to include agricultural workers will create meaningful bargaining over the terms of employment. The National Labor Relations Act only provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.[184] To comply with the Act, the employer need only sit at the bargaining table and "bargain" in good faith concerning his employees' demands and grievances; the Act itself does not force the parties to reach an agreement.

For there to be effective bargaining, each party must be able, "[t]o force upon the other some concession, some abandonment of a preferred position."[185] The chances of a bilateral determination of the terms of employment in agriculture are diminished by the fact that a farm labor union has traditionally lacked two essentials of bargaining power: (1) some degree of scarcity of the skills being sold and (2) sufficient resources to withstand protracted negotiations or strikes.[186] So long as there exists a residual pool of workers from which growers can continue to draw "scab" or substitute labor, it is going to be difficult for a farm labor union, even with NLRA help, to approach the degree of bargaining power enjoyed by unions in urbanized industry. However inadequate the bargaining power of

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[181] *Id.* at 147.

[182] *Id.* at 148—49.

[183] *Id.* at 155.

[184] NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964). For a discussion of the duty to bargain in good faith, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

[185] Frey, *The Logic of Collective Bargaining and Arbitration*, 12 LAW AND CONTEMP. PROB. 264, 265 (1947).

[186] *Id.*

farm labor may be, the experience of the UFWOC in Delano has demonstrated that at least some bilateral determination of the terms of employment is possible in agriculture. In much the same way it has utilized the nation-wide boycott for purposes of achieving recognition from the growers, the UFWOC might use the boycott to obtain economic concessions such as wages, and better hours and working conditions.

Assuming that farmworkers are in a position to realistically bargain with growers, the problem then becomes one of determining what should be the objectives of organized labor in the farm sector of the economy. Given the peculiarity of the market for farm products, the objectives of organized farm labor may have to be shaped somewhat differently than those of organized labor in urbanized industry. The major incentive offered to the farmworker to join a union and work for its development has been increased earnings. The composite hourly wage for all farmworkers in California during 1967 was $1.59.[187] In comparison, the lowest paid field hand who came under the agreement signed by the UFWOC and Schenley was paid $1.75 per hour or $1.60 per hour plus 50 cents per box of grapes picked.[188] The basic hourly wage under the Di Giorgio contract was $1.65 per hour between April 3, 1967, and April 2, 1968; thereafter, the wage was raised to $1.70 per hour.[189]

The issues unresolved are: (1) is it realistic and wise for a farm labor union to adopt a policy that significantly affects prevailing wage rates, and (2) would union efforts be better utilized by concentrating mainly on the decasualization of farm labor. Decasualization is defined as all actions taken to reduce the uncertainty of the relationship between temporary labor needs and the workers who meet these needs, whether undertaken by individuals or by groups of growers or workers.[190]

A. The Argument Against Higher Wage Rates

Farm employers continue to resist unions and their demands for higher wages primarily because of the price-cost squeeze in agriculture. The prices the farmer receives for his products have not kept pace with rising production expenses. Although realized gross

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[187]CAL. DEP'T OF EMPLOYMENT, CAL. ANNUAL FARM LABOR REPORT 23 (1967).

[188]Contract reprinted in 1968 *Hearings, supra* note 96, at 841.

[189]*Id.* at 850—51.

[190]University of California Agricultural Extension Service, Decasualization of Seasonal Farm Labor, No. 68—1, at 3, (Jan. 1968).

farm income[191] has risen from $33.5 billion in 1947—49 to $50.8 billion in 1968, production expenses have more than doubled for the same time period.[192] The increase in production expenses have been due primarily to taxes and the increased use of fertilizers and machinery[193] These costs are largely beyond the farmer's direct control. Expenses for hired labor have also risen but less rapidly.[194]

Once a crop has been planted, the farmer must often decide whether it is economically feasible to harvest the crop at all.[195] In making this decision, the farmer will primarily concern himself with those costs directly related to harvesting. If the gross return from crop sales covers the cost of the harvest, the crop will be harvested. Assume, for example, that the farmer's cost up until the time of the harvest is $1,000. If the cost of harvesting the crop, mainly labor, is $500, his total cost of producing the crop for market will be $1,500. If he receives $600 from his sales, he will assume a net loss of $900. If he chooses not to harvest at all, his preharvest costs of $1,000 will become his loss. The farmer, therefore, will choose to harvest his crop to minimize his loss. Since a main cost of the harvest is labor, it becomes of prime importance to the farmer that he keep this cost as low as possible. With the price of the farmer's crop fixed and labor the only cost within his control, the profit he receives becomes the reciprocal of the wages he must pay.[196] The farmer argues that if he cannot control the price he receives for his crop, he should not be forced to bargain over wages, the one variable that has traditionally been under his control. The farmer's economic justification for this attitude is that, in the short run, a union might force the cost of the harvest to approach revenue without any loss in employment.[197] There would be no loss in employment because as long as harvest costs (mainly labor) remain below the price the farmer receives, he will at least minimize total loss by harvesting.

B. The Argument For Higher Wage Rates

The union's argument for higher wages tends to look more at farms individually rather than at the agricultural economy as a

[191] Realized gross income includes cash from marketings, government payments, value of home consumption, and the rental value of dwellings. HOUSE COMM. ON AGRICULTURE, 91ST CONG., 1ST SESS., FOOD COSTS-FARM PRICES 32 (Comm. Print 1969).

[192] *Id.*

[193] *Id.* at 31.

[194] *Id.*

[195] L. FISHER, THE HARVEST LABOR MARKET IN CALIFORNIA 95 (1953).

[196] *Id.*

[197] *Id.* at 96.

whole. They acknowledge depressed farm prices but claim that this does not excuse payment of low wages. Unions maintain that they are only interested in organizing the very large integrated enterprises. At the beginning of the strike in Delano, Di Giorgio Corporation had an estimated annual revenue of $232 million, although less than ten percent of this resulted from its farming operations.[198] In fact, Di Giorgio suffered a loss on its farming operations in three out of the five years preceding the strike.[199] The unions argue, however, that the vertically integrated enterprise has a cushion to absorb losses and still realize a profit.[200] Although the small farmer cannot escape these losses in similar fashion, the unions contend that he also will be benefited by wage increases. The argument assumes that labor costs will be passed to the public by the larger enterprises through increased prices. Smaller farmers would benefit from this increase while realizing little or no increase in expenditures since labor represents a small portion of their production costs.[201]

The union's position would lose some validity if the large producer could not influence the price he receives for his products. Many scholars, however, are of the opinion that the farmer commands more control over the price he receives than he admits or even realizes. Lloyd Fisher, an agricultural economist, agrees:

> It certainly is not true that the California farmer is without influence upon the price he receives for his commodity. Through both statutory and voluntary marketing quotas on one hand, and political influence reflected in price supports on the other, the California farmer has a greater power to affect the price he receives than have many nonagricultural trades in which the issue has never been raised.... The immunity which the farmer seeks from a wage higher than he believes he can afford is not guaranteed by the absence of labor organization so much as by the proliferation of employers' organizations. In any case, there is nothing unique about an employer's desire to have his labor at a cost which he can afford, and so universal a motive can scarcely be employed to justify a special case.[202]

The price-cost squeeze is definitely a reality, but it is less of a problem for the large-scale, integrated farmers. There is a direct relationship between efficiency, adequate income, and farm size. An

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[198]DUNNE, *supra* note 110, at 127.

[199]*Id.*

[200]State of California, *Hearing on Farm Labor*, Supp. A, at A—2, Sacramento, March 13, 1964.

[201]*Id.* at A—3.

[202]FISHER, *supra* note 195, at 93—94.

empirical study conducted in Yolo County, California, revealed definite economic reasons in favor of expanding the size of the traditional family farm.[203] The study indicated significant economies of scale up to about 600 to 800 acres. There was then a general leveling off of economies indicating there may not as yet be a strong efficiency incentive to expand to extremely large farms. In response to this study, the California State Senate Fact Finding Committee on Labor and Welfare concluded:

> [t]he evidence substantiates the common belief that attaining maximum efficiency in the utilization of labor and other inputs primarily through an increase in the scale of farms provides an amelioration if not a solution to the price-cost squeeze.[204]

Although the unions have argued that the small farmer would be benefited by wage increases, this study indicates that there is no place in California agriculture for the very small farmer. It seems, therefore, that adequate wages for the farm laborer and the farmer can only be achieved by allowing a phasing out of such farms in favor of large "agribusinesses."

C. A Proposal: Decasualization

In addition to concentrating on increasing the average hourly wage of the farmworker, a major union effort should be aimed at decasualizing[205] farm labor, which in turn would increase the average annual wage. Given the seasonal nature of his work, the farm laborer's annual wage must be earned in a far more concentrated period of time than is normal for workers in other segments of the economy. There are, however, a number of hurdles, frequently involving the widespread wastage of human resources, which prevent the attainment of this objective. First, haphazard means of finding employment and time wastages in assembling workers and in preparing the fields for harvesting cut heavily into the work day. Second, the failure of child care centers to open early in the morning frequently delays an entire crew. Third, poor directions often create difficulty in finding the correct fields. Fourth, busses used to transport workers often break down or do not even start.[206] The wastage of human resources, which may be as high as

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[203]CAL. SENATE FACT FINDING COMMITTEE ON LABOR AND WELFARE, CAL. FARM LABOR PROBLEMS PART I 39 (1961).

[204]*Id.*

[205]*See* text accompanying note 190 *supra.*

[206]These examples are illustrative of only a few of the numerous failures of the

25 percent of the work time, is placed directly on the worker; at no time is he compensated for the amount of time lost.[207]

A farm labor union can and must help in alleviating these problems. One function of a union should be to bring some structure to a chaotic labor market by reducing insecurity of employers toward availability of workers and employees toward the availability of work. There is currently no effective means of allocating farm labor. In 1935, California instituted the Farm Labor Service. Both farmers and farm employees, however, have criticized the service as being almost totally inadequate.[208] To begin with, a great number of workers never utilize the service, preferring to approach the growers themselves.[209] Workers and growers share the same conclusion, namely, that workers who utilize the government service are probably of poor quality. The bad reputation of the service tends to keep good workers away. Many workers also feel that the service will refer them only to the undesirable jobs.[210] There is also a significant number of workers who are referred but never show up. One can only conclude that government placement has resulted in little reduction of labor wastage and has failed to alleviate the hit-and-miss scheme of finding employment.

Workers who fail to utilize the placement service or attempt to find employment on their own are likely to work for a labor contractor.[211] Guided essentially by the profit motive,[212] the contractor places his own interests ahead of the worker and does not see his function as one of alleviating problems of labor wastage. In fact, instead of alleviating labor wastage, the contractor system serves as a device for transferring the risk of agricultural employment to the workers. In order to meet the demand of employers for prompt delivery of the workers, contractors frequently bring workers into a labor camp weeks before there is employment for them.[213] Such a system of labor allocation victimizes farmworkers, who can least afford to insure the farmer against the possibility of an inadequate supply of labor at harvest time.

The greatest efficiency in the pooling and allocation of manpower can be achieved by the workers themselves. A labor organi-

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agricultural sector to economically utilize hired labor resources. *See generally* 1968 *Hearings, supra* note 96, at 993—96.

[207] *Id.* at 996.

[208] CAL. SENATE FACT FINDING COMMITTEE ON LABOR AND WELFARE, CAL. FARM LABOR PROBLEMS PART I 142—44 (1961).

[209] *Id.*

[210] *Id.*

[211] *See* note 58, *supra.*

[212] University of California Agricultural Extension Service, *supra* note 190, at 12.

[213] 1968 *Hearings, supra* note 96, at 998.

zation can significantly reduce labor wastage through the use of hiring halls, stand-by pay, and seniority plans. Many of the contracts recently signed with growers include these provisions.[214] A hiring hall would help to insure the growers an adequate supply of labor and would provide a central source of job information and employment needs. The workers are much more likely to utilize this service because it would be run by the workers themselves. The halls would reduce the independent search for work that is characteristic of many migrants.[215] A clause providing for a hiring hall has been included in the limited number of union contracts that have been negotiated.[216] Under this clause the union must provide enough workers within 72 hours of a grower's demand or the grower is free to look elsewhere. Although the hall is too new to judge its effectiveness, it appears that the union had little difficulty in filling job orders during the 1968 season.

Another important means by which the union has helped to reduce labor wastage has been the securing of stand-by pay. Typical contract provisions call for a minimum of four hours pay for merely reporting to work, absent an "Act of God."[217] Such provisions help to insure that growers will not solicit workers weeks in advance of the scheduled work. The employer is forced to share some of the financial costs of inefficiency and thereby becomes motivated to more effective management.[218]

A sophisticated seniority system would further help to decasualize the labor force by promoting job security. Many of the contracts between the UFWOC and the growers provide that seniority will begin on the date hired, or be retroactive to that date.[219] Common provisions provide that when filling vacancies or making promotions, transfers, reclassifications or demotions, preference is to be given to employees with the greatest accumulated seniority.[220] Thus, as a worker gains seniority he would be practically assured employment on predetermined farms. Seniority would not only help to reduce the hit-and-miss scheme of finding work but would also help to reduce the work load of the hiring hall, assuming that workers would return each

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[214]Contracts between the UFWOC and Schenley Industries Inc., Di Giorgio Fruit Corp., E. & J. Gallo Winery, and Novitiate of Los Gatos contain all three of these provisions. *See* 1968 *Hearings, supra* note 96, at 835—37, 848—52, 858—63, 898—02.

[215]*See* U.S. Dept. of Agriculture, *The Migratory Farm Worker*, MONTHLY LABOR REV., June 6, 1968, at 11—12.

[216]*See* note 214 *supra*.

[217]1968 *Hearings, supra* note 96, at 851—52, 887, 902.

[218]1968 *Hearings, supra* note 96, at 999.

[219]1968 *Hearings, supra* note 96, at 836, 848, 862, 883, 899.

[220]*Id.*

season to the farms on which they held seniority. A potential danger in a seniority system, however, is that it could result in an overstabilization of the work force. For example, some of the agreements between the growers and union provide that upon recall from a layoff seniority will be lost if the worker fails to report within five days after being notified in writing to report.[221] Such a clause is both unrealistic and unwise. Workers who may have to travel many miles to report are placed at a considerable disadvantage. Even accounting for unforeseen forces of nature, a grower should be able to determine most of his labor needs far in advance of five days before harvest. To the extent seniority becomes meaningful to the workers, they may feel reluctant to leave the immediate area in search of work elsewhere for fear they may lose seniority. Consequently, such a clause as written may promote labor wastage rather than reduce it.

While wages obviously cannot be ignored, a union policy geared mainly in terms of a hiring hall, stand-by pay, and seniority provisions is an illustration of how a responsible union can serve its members without significantly increasing the economic problems confronting the growers. Such a policy, at least initially, would improve the social and economic welfare of the worker without radical increases in wages, thus promoting the acceptability of a farm labor union among both farm labor employers and the general public.

Robert F. Schauer
Dennis G. Tyler

[221] Contracts printed in 1968 *Hearings, supra* note 96, at 824—25, 862, 883.