UNIVERSITY OF CALIFORNIA GIANNINI FOUNDATION

UPDATE

Agricultural and Resource Economics

VOL. 6 NO. 2 NOV/DEC 2002

Mandatory Mediation for Farm Workers: A New Era in Farm Labor?

by

Philip L. Martin and Bert Mason

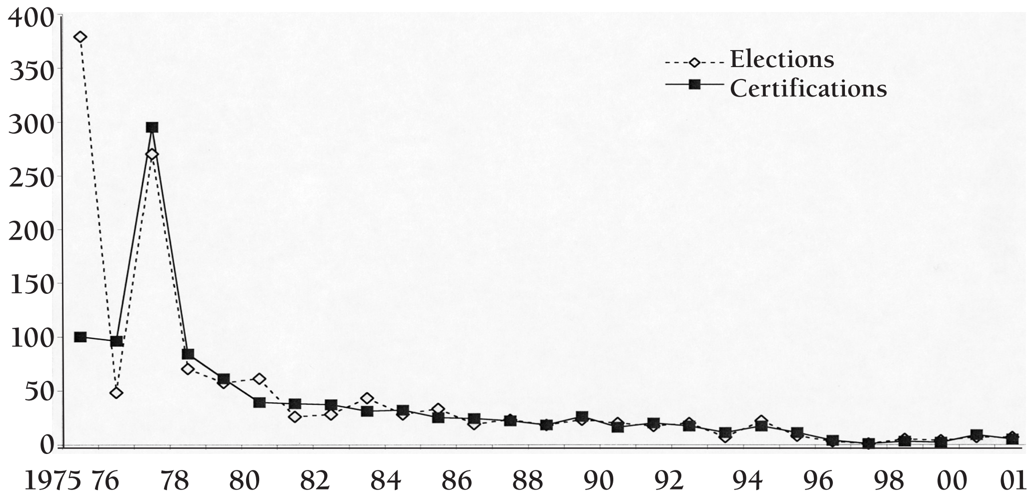
In September of this year, Governor Davis signed legislation that may fundamentally change the landscape of collective labor bargaining in California agriculture. The legislation compels mandatory mediation in certain instances. This article provides a historical perspective on the evolution of collective bargaining in California agriculture and discusses potential implications of the new legislation.

In September 2002, Governor Gray Davis signed into law SB 1156 and AB 2596, the first major amendments to the 1975 Agricultural Labor Relations Act (ALRA). If a farm employer and union are unable to negotiate an agreement after six or twelve months of bargaining, a mediator will be able to impose the terms of a collective bargaining agreement on the parties. Mandatory mediation will apply to farm employers with 25 or more workers, and will be limited to a maximum 75 labor disputes between 2003 and 2007. The purpose of the ALRA, enacted in 1975, is to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." This goal was to be accomplished by granting organizing and bargaining rights to farm workers and establishing a state agency, the Agricultural Labor Relations Board (ALRB), to supervise elections in which farm workers decided if they wanted to be represented by unions and to remedy unfair labor practices that employers and unions commit when they interfere with worker rights.

California has about 25,000 farm employers, and it appeared initially that many of the 600,000 to 800,000 workers employed on farms sometime during a typical year wanted to be represented by unions. Between 1975 and 2002, about 1,250 elections have been supervised by the ALRB, and two-thirds or 820 resulted in a union being certified to represent farm workers. Figure 1 on page 2 depicts the time path of elections and certifications from 1975-2001. But the number of collective bargaining agreements in California agriculture never exceeded 300, and is today about 225, and 80 percent of the current contracts cover three to four workers each under Christian Labor Association contracts with dairy and poultry farms. The UFW, Teamsters and other unions representing field workers have about 30 contracts covering fewer than 25,000 workers.

The United Farm Workers (UFW) asserted that, even when farm workers voted for unions, it was hard to negotiate contracts because employers dragged their feet in negotiations, and a remedy for unlawful bad faith bargaining was too cumbersome to encourage lawful behavior. The UFW's original goal was to have binding arbitration to settle farm labor disputes: the original bill, SB 1736 Section 1 (b), asserted: "extensive use of undocumented workers and farm labor contractors results in workplace injustice, and has greatly weakened the bargaining power of California farmworkers

Figure 1. ALRB Elections and Union Certifications, 1975-2001



Source: ALRB, Calendar years

contracts at only 185 farms. This 45 percent election-to-certification rate shows, according to the UFW, that make-whole does not "work" or encourage lawful bargaining. The ALRB agrees that procedures for determining whether make-whole is owed, the amount of make-whole owed, and the distribution of make-whole funds to workers are slow, so that "a remedy designed to act as a goad to bargaining often produces years of litigation."

Negotiating collective bargaining agreements has been slow for many reasons, including wide gaps between union demands and employer offers in an industry that remains largely untouched by collective bargaining. For example, in 1979 the UFW demanded increases in wages and benefits that employers argued would raise their labor costs by more than 100 percent over three years. Employers countered with offers of wage increases of 20-25 percent, declared that bargaining was at an impasse, and made unilateral changes in wages. The UFW charged these vegetable producers with bad faith bargaining and the ALRB agreed in the *Admiral Packing* case [7 ALRB 43 (1981)]. The Court of Appeals, in dismissing the bad faith bargaining charge, concluded the employers were engaged in lawful hard bargaining, and cited the gap between the union's demands that would raise labor costs 123 to 190 percent, and the employer offer of a 21 percent wage increase, to justify the impasse (*Carl Joseph Maggio, Inc., et al., Petitioners, v. Agricultural Labor Relations Board, Respondent.* Court of Appeal of California, Fourth Appellate District. 154 Cal. App. 3d 40; April 2, 1984).

Even when it is clear that the employer has engaged in bad faith bargaining, the ALRB must decide what wages and benefits would have been if the employer had bargained lawfully, calculate the

MEDIATION - *Continued on page 10*

since the passage of the Agricultural Labor Relations Act….Binding arbitration will promote comprehensive collective bargaining agreements, and further peace and stability in labor relations in California's most vital industry."

Make-whole Remedies

Farm workers were excluded from the National Labor Relations Act of 1935. The ALRA, which was enacted 40 years later to cover excluded farm workers in California, included several features to accommodate unique agricultural circumstances, including quick elections, a make-whole remedy for bad faith bargaining, and more extensive rights for unions vis-à-vis their members. In 1975, when the ALRA was drafted, Congress was considering a bill that would have allowed the NLRB to issue make-whole remedies for bad faith bargaining. The ALRA granted the ALRB authority to order that employers who fail to bargain in good faith "...take affirmative action including...making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain" (ALRA Section 1160.3). Make-whole was intended to encourage employers to bargain in good faith by transferring any monetary savings from unlawful bad faith bargaining to the affected workers.

The make-whole remedy was expected to lead to contracts soon after unions won elections. This has not happened; the UFW says it was certified to represent workers on 428 farms, but it negotiated

MEDIATION - *Continued from page 2*

difference between "good faith" wages and benefits and actual wages and benefits, collect the funds from the employer, and then distribute them to workers—a process that can take years. These calculations are complicated by several factors. First, there can be delays in determining how much an employer owes because a 1987 Court of Appeals ruling allows employers, after the ALRB determines there was bad faith bargaining, to present evidence that, even with good faith bargaining, there would not have been an agreement negotiated with higher wages, and thus no make-whole is owed (*Dal Porto and Sons v. ALRB.* 191 Cal. App. 3d 1195, Third Appellate District, 1987). Second, there are no reliable data on wages and benefits of union and nonunion workers. The ALRB often proposes a comparable contract to set the amount of make-whole, and the employer counters that the contract is not comparable because it covers a different commodity mix, is in a different region, or covers a different size farm, which produces litigation and delays.

Finally, after the employer has exhausted appeals to the courts, the ALRB collects make-whole monies and distributes them to workers. However, in a farm labor force with ten percent annual turnover and that is more than 50 percent unauthorized, it is easy to see why make-whole may seem to be a hollow remedy. Since 1975, the ALRB ordered employers to pay $34 million in make-whole, but workers received only $4.5 million or 13 percent of the amount found owing. Many of the growers ordered to pay make-whole went out of business, while others settled for a fraction of the original remedy, because the ALRB knew that more litigation would make it harder to locate the workers owed money. For example, Abbatti Farms, whose $1.6 million make-whole payment was 35 percent of the entire make-whole paid in the past 27 years, was originally assessed $19 million.

Mandatory Mediation

Despite a steady erosion of contracts and members since 1980, the UFW has been reluctant to push for amendments to the ALRA, fearing that they may open the door to pro-grower amendments as well. However, the UFW pushed for SB 1736, introduced by Senate Majority Leader John Burton (D-SF), citing the 45 percent election to contract rate and asserting that the only way to level the playing field at the bargaining table would be to "replace [make-whole] litigation with mediation and arbitration."

The UFW first pushed for binding arbitration. SB 1736 would have added Section 1164 to the California Labor Code to provide for binding arbitration for a first contract if a certified union and farm employer could not reach agreement within 90 days, and a mediator was unable to help the parties to reach agreement in another 30 days. The arbitrator would hold a hearing and then "establish the terms of a collective bargaining agreement and direct specific performance of that agreement."

With Governor Davis widely expected to veto SB 1736, mandatory mediation became the last-minute compromise. Under the bills signed into law, SB 1156 and AB 2596, unions and employers would bargain for 180 days for a first contract (for negotiations beginning after January 1, 2003), and then a mediator would try to help the parties reach agreement for another 30 days. If mediation failed, the mediator would, within 21 days, recommend the terms of a collective bargaining agreement to the parties and provide reasons for his wage recommendations. Either the employer or the union could petition the ALRB within ten days to modify the recommendations, and the ALRB would review them, and either allow the recommendations to go into effect or modify them. Either side could appeal the agreement imposed on them to the state Court of Appeals and eventually to the California Supreme Court.

Mandatory mediation would apply to a maximum 75 contract disputes in five years, and apply to farms covering 25 or more workers. Relatively few farm employers, but most farm workers, are potentially covered by mandatory mediation (See Table 1). There were 3,770 agricultural employers with 20 or more workers during the third quarter of 2001—normally the period of peak farm employment. Farm labor contractors (FLC), who are included with agricultural support activities (ASA), are not considered employers under the Agricultural Labor Relations Act, so a farm that hires five workers directly, and has a FLC bring a crew of 20 to a farm, may be eligible for mandatory mediation. ASA employers tend to be larger—a third had 20 or more employees—and they accounted for 45 percent of the 470,000 agricultural employees in September 2001. Most farm workers are employed by employers who qualify for mandatory mediation: 83 percent of all workers employed in agriculture, and 94 percent of those employed by ASA employers, were employed by reporting units with 20 or more employees in the third quarter of 2001.

We see three potential issues with mandatory mediation. First, it seems easy to imagine that, with the prospect of mandatory mediation, a union might push for very high wages in negotiations and during mediation, while an employer might counter with reasons why it is not possible to pay what the union demands and survive. Instead of negotiating behind closed doors to narrow differences, hard positions in private negotiations could become public debates in mediation hearings, which could become the scenes of rallies and demonstrations.

Table 1. California: Employers and Employees by Size of Firm, 3rd Quarter, 2001

	Number of Employers by Firm Employment-Size Categories					
	All Employers	Less than 20	20-99	100-999	1000+	20 or more
CA Total	1,075,523	941,566	110,687	22,359	911	133,957
Agriculture	22,626	18,856	2,875	870	25	3,770
Crop Production	14,221	12,090	1,744	265	10	2,131
Ag Support Activities	3,934	2,675	769	475	15	1,259
	Number of Employees by Firm Employment-Size Categories					
	All Employees	**Less than 20**	**20-99**	**100-999**	**1000+**	**20 or more**
CA Total	14,997,165	3,284,794	4,587,853	4,958,800	2,165,718	11,712,371
Agriculture	451,039	78,755	119,385	212,091	40,808	372,284
Crop Production	223,306	48,367	70,909	40,251	18,714	129,874
Ag Support Activities	193,173	11,947	35,777	123,355	22,094	181,226

Source: www.calmis.cahwnet.gov/htmlfile/subject/INDSIZE.HTM

Second, the mediator will be handicapped by the same lack of data that has impeded quick resolution of make-whole compliance hearings. What data will the mediator use to establish the terms of a collective bargaining agreement? Should the mediator rely on the available data on farm worker wages in the region, or on comparable contracts? What weight should be given to assertions that an employer cannot pay more than is being offered and stay in business? The mandatory mediation law includes no guidance to the mediator. Mediators may have credibility problems, since they will first try to mediate farm labor disputes, and then recommend the terms of a collective bargaining agreement.

Mandatory mediation is expected to ensure that workers who vote for union representation will soon work under contracts. However, there may be unanticipated effects that slow progress toward contracts. For example, election campaigns may become more contentious if a contract can be imposed by a third party, and employers who now delay bargaining by refusing to bargain could continue to delay bargaining by filing objections to the election that the ALRB must resolve before certifying the union and starting the mandatory mediation clock.

Conclusion

Collective bargaining has not become widespread in California agriculture. There are about 225 contracts between unions and the state's 25,000 farm employers, representing less than one percent of the state's farm employers. There are perhaps another 250 farms on which workers voted for union representation, but there has been no contract. Mandatory mediation is aimed at getting contracts for certified unions within a relatively short period of time.

The purpose of collective bargaining is to allow the parties closest to the work place, employers and unions, to establish "fair" wages and benefits in private negotiations, with both sides using the economic leverage they have under government-set rules. A cardinal principle of collective bargaining has been that the government does not look to the content of the agreements negotiated, only the procedures used to reach agreement. The make-whole remedy for bad faith bargaining required the ALRB to impinge on this hands-off-the-content-of-bargaining rule. Mandatory mediation goes further, and puts unions and employers in front of an arbitrator to make their case.

Philip Martin is a professor in the ARE department at UC Davis. He can be reached by telephone at (530)752-1530 or by e-mail at plmartin@ucdavis.edu. Bert Mason is a professor in the agricultural economics department at California State University, Fresno. He can be reached by phone at (559)278-5685 or by e-mail at: bert_mason@csufresno.edu.