

AGRICULTURAL LABOR RELATIONS BOARD

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October 21, 2014

The Honorable Kevin de León, Chair
Senate Rules Committee
State Capitol, Room 420
Sacramento, CA 95814-4900

Dear Senator de León:

I am deeply honored to be appointed Chairman of the Agricultural Labor Relations Board by Governor Edmund G. Brown, Jr. effective March 18, 2014.

In the following letter, please find my responses to Senator Steinberg's letter of September 29, 2014 (on October 9, 2014, I sent the requested updated Form 700 to Senator Steinberg).

Roles and Responsibilities

The ALRB is responsible for implementing, interpreting and enforcing California's Agricultural Labor Relations Act (ALRA). ALRB conducts secret ballot elections so that farmworkers in California may decide whether to have a union represent them in collective bargaining with their employers, and investigates, prosecutes and adjudicates unfair labor practice disputes.

1. What do you see as the major challenges facing the Board?

Informing indigenous populations of farm workers now toiling in the fields of California of their rights under the Agricultural Labor Relations Act (ALRA or Act). These workers come from the indigenous areas of Mexico, are mono-lingual (i.e., Mixteco, Zapoteco and Triqui) and do not speak English or Spanish. Moreover, many of these indigenous populations lack a formal written language or, if they do, the workers often do not have the ability to read. The inability to effectively communicate with this ever emerging group of workers through our current outreach material and staff resources presents enormous challenges as the Board seeks to inform the workers of their rights under the statute. Additionally, the Board will seek to partner up with organizations that administer to indigenous populations to help improve access to these communities in general and to farmworker populations specifically. Where necessary, we utilize indigenous

language interpreters from an interpreters service both during the investigation of a charge, the processing of an election petition and outreach efforts. The Board will continue to explore new opportunities to expand educational access to indigenous farmworker populations so that they will be informed of their rights under this law.

Second, an overwhelming majority of the estimated 800,000 agricultural employees in California are undocumented. Under California law, all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. (See Cal. Civ. Code § 3339(a); Cal. Gov't Code § 7285(a); and Cal. Lab. Code § 1171.5(a).) The Supreme Court of California has recently articulated a nuanced interpretation of this antidiscrimination law as it relates to the undocumented workers in *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407 (holding that these statutes are not preempted by federal immigration law except to the extent they authorize an award of lost pay damages for any period after the employer's discovery of an employee's ineligibility to work in the United States). My effort will be to enforce the law, consistent with the statutes and case law to protect the rights of such workers given their importance in the fields.

Third, the age-old problem of labor law, "justice delayed is justice denied," remains even under the ALRA, which mandates elections within seven days of a representation petition being filed. My view is that unfair labor practice charges as well as election objections should be expeditiously resolved.

Fourth, my view is that the enforcement of collective bargaining agreements as imposed upon the parties through the Mandatory Mediation and Conciliation (MMC) amendments of 2003 and 2011 must be expedited by the Board. This process also is unduly time consuming. (See *Ace Tomato Company* (2012) 38 ALRB No. 8; Cf. *Perez Packing*, (2014) 40 ALRB No. 1.)

Fifth, it is my intention to convene an advisory committee of labor and management representatives which will meet with the Board periodically. The purpose of the committee is to provide us general input on our procedures and relationship with the public and to provide advice and counsel on rulemaking initiatives. I created such a committee when I was Chairman of the National Labor Relations Board and my belief is that this was a great success.

Penultimately, though beyond our jurisdiction, I have initiated discussions with the Secretary of Agriculture about the lack of housing for farmworkers in the Coachella Valley. When I visited Mecca this summer, I saw many farmworkers living out of their cars, some alternating between the seats of the car and mats

spread on the pavement. Technically, this is beyond our jurisdiction, but I want our Board to call attention this disgraceful situation and be a catalyst for reform.

Finally, though the ALRA does not make sexual harassment an unfair labor practice, employees who act in a concerted fashion to protest sexual harassment are protected against retaliation under the ALRA, and sexual harassment is properly characterized under the rubric of “onerous conditions” under which workers are not obliged to accept re-employment subsequent to any dismissal or change of status for a reason prohibited by the ALRA. I would like to have a Memorandum of Understanding with the Equal Employment Opportunity Commission (EEOC) and its California counterpart, the Department of Fair Employment and housing (DFEH) which would bring to their attention such cases that come before us. Though those agencies possess the expertise, we can play a secondary but important role in the eradication of such conduct. Sexual harassment in the fields is akin to slavery and we should address this issue in the above-referenced way and put the agricultural community on notice of our position.

2. How has your experience prepared you to lead the Board in effectively administering the ALRA?

The early years of my life have instilled a belief that all work is dignified. In the world of work I have been a laborer for a utility company, working with pick and shovel to break the concrete of the roads and dig below. In the fields I have worked with a scythe to cut high grass, an experience which has also taught me this lesson. The same holds true of slightly less physically demanding jobs such as my work in supermarkets stacking shelves and heavy boxes in the warehouse. Similarly, I have maneuvered large mowers— so-called “mountain climbers”— up the hills of the Garden State Parkway in New Jersey. I have picked up trash in the same venue.

From the earliest days of my childhood I have seen the most demeaning racial ostracism and discrimination inflicted on members of my own family, and my belief is that this gives me an understanding of those who are forgotten today. In this connection, I have spoken to farmworkers in Mecca of my great-grandfather’s escape from slavery in the hope that this will inspire all who are, in the words of the Book of Common Prayer, “heavy laden.”

For more than a half century, I have represented unions, employees and employers in the private practice of labor law and for the past forty-nine years have acted as an impartial arbitrator, fairly resolving disputes between labor and management in all sectors. As an arbitrator and Chairman of the National Labor Relations Board (NLRB) I have resolved complaints in the agricultural sector emanating from those who are non-agricultural employees. Finally, as NLRB Chairman I handled many disputes involving workers “dispersed over many

miles,” and promoted postal ballots to test employee sentiment under such circumstances and expedited the resolution of election disputes where a substantial number of the ballots are challenged—a problem that my Board confronts today

Language Access

A majority of farmworkers working in California agriculture are undocumented immigrants. Over the last decade, the share of indigenous farmworkers from the Mexican states of Oaxaca, Guerrero and other relatively isolated areas of Mexico has increased. Many of them are monolingual, non-English and non-Spanish-speakers who speak Mixteco, Zapoteco or Triqui.

3. *What efforts has the Board undertaken to ensure farmworkers are aware of their rights under the ALRA?*

My colleagues and I have visited the Coachella Valley and I have given a speech to more than 100 farmworkers there explaining the content of the ALRA to them.

Currently, the Board has one field investigator with indigenous language capabilities (Mixteco) and is actively seeking to expand our staff with these capabilities through an active recruitment program. For example, the ALRB's job announcements for Regional Office staff now include a statement that proficiency in indigenous languages is a desirable quality.

I have met with stakeholders in Mecca with a view toward future contact and cooperation.

4. *Do you have additional proposals to address these unique circumstances?*

See response to Question 1.

Farm Labor Market

California is in the third consecutive year of an unprecedented drought, and the California Department of Agriculture reports that cutbacks of water delivery to agricultural users will result in the loss of thousands of farmworker jobs in the State. Some other factors affecting the demand side, as well as the supply side, of the evolving farm labor market include labor-saving mechanization, an increasing demand for FVH (fruits, nuts, vegetables and horticultural specialties, such as mushrooms and flowers) commodities and immigration policy reform.

5. *What do you see these and other factors having on labor relations in California's agricultural industry, both in the near- and long- term future?*

An important backdrop of any discussion of future labor relations in agriculture is that the term "labor relations" frequently assumes a relationship between a union and employer or employers. The most recent annual report of the ALRB (covering fiscal years 2011/2012 and 2012/2013) chronicles the filing of eight representation petitions¹, and as of this writing, there is only one representation matter before the Board— involving a decertification petition. (see *Gerawan Farming Inc.* (ALRB case no. 2013-RD-003-VIS, above.) Under the ALRA, in contrast to the National Labor Relations Act (NLRA), petition filing is the surrogate for union representation or the lack thereof inasmuch as recognition and bargaining can only be triggered through the certification process exclusively. There have been virtually none or very few notices of intent to take access filed since I became Chairman seven months ago. However, no sure predictions can be made as to any future election activity should the drought continue in 2015 with it reductions in the need for employees.

With regard to the short run (hopefully) the consequences noted by *Rural Migration News* are substantial. For example, "...429,000 acres or five percent of California's eight million acres of irrigated land would be fallowed in 2014 due to lack of water including 10,000 acres that would normally be planted to vegetable and melon crops. About 40 percent of California crop land, some 3.2 million acres, are planted to trees and vines, 'hardening' the demand for water in the sense that perennial crops must be watered each year. The University of California, Davis study estimated that \$810 million in lost crop revenue in 2014, including \$47 million from reduced vegetable and melon production, and 6,920 fewer farm jobs on crop farms, both seasonal and year round." (*Rural Migration News*, Vol. 20 No. 4 October 2014) Where unions exist, there is some role for collective bargaining. (*Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203; but see, *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666; *NLRB v. Pan American Grain Co.* (1st Cir. 2005) 432 F.3d 69; *International Assoc. of Firefighters, Local 188 v. Public Employment Relations Board* (2011) 51 Cal. 4th 259.) Bargaining must address the effects of lay-offs where there is a union.

The trends identified in question five translate, it seems to me, into less seasonality and more permanent employment with one employer at least in the short run "... so that farm employers are assured of sufficient workers." Both mechanization, and the "sharp slowdown in new entrants from Mexico" as well as "...continued exits of experienced farmworkers..." are the main contemporary

¹ Two of these petitions were withdrawn by the union.

developments. (Rachael Goodhue and Philip Martin, *Labor, Water and California Agriculture in 2014*.)

Second, it is possible that in the longer run new guest worker programs will induce employers to “shift them from one farm to another” so that the requisite work can be done with fewer workers. This could mean the development of multi-employer associations to facilitate this process. (*Id.*)

Another development—which in some respects may be viewed as a blast from the past in California—is possible pressure on retailers to require agricultural farmers to abide by labor standards. (Goodhue and Martin, *Labor, Water and California Agriculture in 2014* at p. 6.) This appears to be a tactic employed with some measure of success in other jurisdictions.

Impact of SB 126

SB 126 (Steinberg), Chapter 697, Statutes of 2011, increased the Board’s authority to certify union representation elections when it is determined that employer interference prevents “free and fair” elections and facilitates the Board’s ability to seek preliminary injunctions.

6. What effect has this statute had on the Board’s ability to conduct elections, complete investigations and resolve disputes in a timely manner?

First, it is apparent to me that SB 126 has no impact on the Board’s ability to conduct elections as its provisions only concern the processing of representation matters *after* an election is held. There has only been one case in which a labor organization has asserted that an employer’s misconduct rendered slight the chances of a new election reflecting the free and fair choice of employees and requested that the Board certify the union as the collective bargaining representative pursuant to ALRA §1156.3(f). (*Corralitos Farms, LLC* (2013) 39 ALRB No. 8.) There, the union failed to make an appropriate showing of employer misconduct warranting certification of the union and, accordingly, the result of the election (no union majority vote) was upheld. Neither the employer nor the petitioning union sought review of the Board’s decision and that decision became final though the union is now seeking to collaterally attack the Board’s decision in a companion ULP proceeding now currently before the court of appeal. With respect to the General Counsel’s investigation of election-related unfair labor practice (ULP) allegations, through the Board’s delegation, the General Counsel was able to obtain preliminary injunctions in several cases. While the timelines set forth in SB 126 have expedited the Board’s evaluation of both challenged ballots and election objections—the Board has met the

deadlines in the overwhelming number of instances---², the need to hold matters in abeyance pending the General Counsel's exclusive authority to investigate ULPs overlapping with election objections continues to pose significant delays in the processing of election cases in some cases.

Mandatory Mediation and Conciliation

In accordance with Labor Code Section 1164, the Board may issue an order directing an employer and the exclusive collective bargaining agent to Mandatory Mediation and Conciliation (MMC) of their issues. If the parties are unable to agree on all terms of the collective bargaining agreement, a Mediator issues a report fixing the disputed terms. The Board may then adopt the Mediator's report as its final order, which can be enforced in Superior Court. Such orders and decisions have increased significantly over the past couple of years.

7. What is your assessment of the effectiveness in using MMC to facilitate collective bargaining agreements between the parties?

The results are mixed. One encouraging sign is the recent withdrawal of a MMC petition by the UFW in light of their negotiation of a comprehensive CBA in the matter of *Perez Packing* (Case No. 2014-MMC-002). To the extent that the statute encourages collective bargaining as well as working as a surrogate for it, it is successful.

However, there are substantial delays in the process attributable to: 1) the small number of acceptable mediators; 2) the fact that the parties and the mediators are feeling their way, so to speak, dealing with statutory and regulatory language which is still being tested for the first time; and 3) the fact that the machinery may be invoked after a specific time period— a factor which always makes the

² The Board has met the deadlines set forth in SB 126 in all election cases since the legislation took effect, with the exception of the following: 1) in *Gerawan Farming, Inc.* (2013-RD-003-VIS) the parties collectively filed 52 election objections which the Board had to evaluate. Due to the large number of objections filed, the Board extended the time limit for the issuance of the Board's Decision by 15 days as permitted by ALRA section 1156.3 (i)(C)(3). As noted above, the *Gerawan* matter did not proceed to hearing before an IHE within 28 days because the Board held objections overlapping with ULP charges in abeyance until the General Counsel completed her investigation; 2) in *Dole Berry North* (2013-RD-001-SAL) the matter did not proceed to hearing before an IHE within 28 days because the Board held objections overlapping with ULP charges in abeyance. The UFW later withdrew both its exceptions and ULP charges; 3) finally, in *Corralitos Farms, LLC* (2012-RC-004-SAL), the ALJ decision issued within 75 days instead of 60 days because the parties stipulated to an extension of time to file their post hearing briefs as permitted by ALRA section 1156.3 (i)(C)(3).

process more narcotic-like in that a specific period of time to trigger the process is a disincentive to negotiations and an incentive to simply wait for arbitration. The certain knowledge that the machinery can be triggered after a time period has lapsed thus diminishes the potential for negotiations and makes the time period a crutch to be relied upon to get to mediation and arbitration. (see (2009) 70 La. L. Rev. 1, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, William B. Gould IV; and (2008) 43 U.S.F. L. Rev. 291, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, William B. Gould IV.) The Board itself can and is expanding the supply of mediators through conferences, outreach and the like.

Because the MMC process must be initiated, in the first instance, by the parties themselves the overall impact of MMC on collective bargaining has become self-limiting in that parties are not availing themselves of the process as a mechanism to achieve collective bargaining agreements.

Staffing and Resources

At one time, there were five regional ALRB offices, with a staff of 300 employees. Today, there are four regional offices, including one in Oxnard that was reopened in 2012 after being closed for most of the previous 30 years. Over the past several years, the number of budgeted positions increased from 37 to 41.4. Additional increases in staff and resources also are included in this year's budget.

8. *What is your assessment of the ALRB's staffing level and what additional efficiencies can you identify that would help the Board fulfill its mission?*

The recent increases in staffing within the ALRB have occurred in the General Counsel's Office and do not support the operation of the Board. The 2014-15 Budget includes an additional \$2.0 million for the ALRB, of which \$500,000 is specific to the operations of the Board and the Executive Secretary and is enabling the Board to begin to address some staffing and operational deficiencies.

Workload within the ALRB has been increasing dramatically in recent years. In addition to the increasing volume of cases, the Board's Administrative Law Judges and the non-legal staff are confronting changes in the size and the complexity of the cases. The Department of Finance's Office of State Audits and Evaluations is currently conducting a workload study to collect data about the ALRB's operations and changing workload needs. The workload study will assist the ALRB in quantifying and requesting additional resources for 2015-16 and beyond.

Honorable Kevin de León
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Thank you for the opportunity to respond to these questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "William B. Gould IV". The signature is fluid and cursive, with the last name "Gould" being particularly prominent and stylized.

William B. Gould IV
Chairman