March 1977

The NLRA Agricultural Exemption - A Functional or Mechanical Approach

Kirsten Zerger

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38K61K

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Since the National Labor Relations Act was enacted, there has been controversy as to the scope of its agricultural employee exemption. In 1946, Congress intensified the dispute by superimposing the Fair Labor Standards Act definition of agricultural work on the National Labor Relations Act through an appropriations rider. In this comment the author explores legislative history and case law surrounding this controversy, through the medium of a representation petition pending before the National Labor Relations Board. She determines that federal and state policies, as well as the needs of modern agriculture, will best be served by a broad, functional interpretation of the agricultural exemption of the National Labor Relations Act.

I

INTRODUCTION

Bloody strikes and national boycotts have earmarked California agricultural labor relations for decades. In 1975, the California legislature enacted the Agricultural Labor Relations Act (ALRA), through which it sought "[t]o ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations . . . [and] to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state." To promote peace and stability in the fields, California shaped the ALRA to conform to the structure and needs of modern agriculture. Bargaining units must include "all the agricultural employees of an employer." Smaller craft units are forbidden. Everyone who participates in the cultivation and harvesting of agricultural commodities—field hands, loaders, machine operators, and truck drivers—is included in the same collective bargaining unit.

The Agricultural Labor Relations Board (ALRB) began accepting petitions for representation elections on September 2, 1975. During September, the ALRB conducted nearly two hundred single-employer elections for units which were comprised of all the agricultural workers of an employer within the state or within a given geographical area. On October 14, 1975, Teams-
ter Locals 890, 912, and 274 filed a petition with Region 20 of the National Labor Relations Board (NLRB, Board), seeking a representation election for a multi-employer unit consisting of twenty-eight employer-members of the Grower-Shipper Vegetable Association of Central California (GSVA).

The ALRB had already conducted individual elections for most of these twenty-eight employers. The NLRB unit requested by the Teamsters is composed of workers engaged in farm-related activity who are arguably "agricultural laborers" exempted from the National Labor Relations Act: field-to-shed truck drivers, box stitchers, and harvest machine operators. A determination of the status of these workers is currently pending before the NLRB in Washington, D.C.

Satisfactory resolution of the questions raised by the Teamster petition will not be simple. Characterization of these workers as either "employees" subject to the NLRA or "agricultural laborers" exempt from the Act will require more than a mechanical application of Board precedent. A new factor, the California ALRA, has been added to the formula. The NLRB must examine the type of work performed and the economic relationships between the employer, the crop, and the job. Careful consideration must also be given to California's enunciated policy of requiring that units be comprised of all the agricultural workers of an employer, and to Congress' efforts to create a broad agricultural exemption to the NLRA. This comment will attempt to clarify these issues, and to suggest a resolution which both ensures predictability of outcome and fairly balances the competing state and federal policy considerations raised by the Teamster petition.

II

THE FACTUAL SETTING

The unit petitioned for by the Teamsters consists of all workers defined as "truck drivers" in section 2 of the 1973-76 Collective Bargaining Agreement between the GSVA and Teamster Locals 890, 912, and 274.

5. General Teamsters, Warehousemen and Helpers' Union Local 890; General Teamsters, Food Processors, and Warehousemen, Local 912; and General Teamsters, Sales Drivers and Helpers, Local 274.
6. Hereinafter referred to as the NLRB or the Board.
7. Hereinafter referred to as the GSVA.
9. Grower-Shipper Vegetable Ass'n, No. 20-RC-13100 (NLRB, filed June 1, 1976) [hereinafter Record].
10. Section 2 reads as follows:
   (a) The terms "truck driver" shall include only those employees engaged in driving equipment hauling produce between the fields and packinghouse, between the fields and railroad cars, including driver-stitchers, folder and gluer operators on trucks or trailers, drivers of all types of mechanical harvesting machines, mechanical loaders, field bugs and silver kings used exclusively in harvesting operations, and water wagons regularly used to supply water for vegetable packing machines. Cull haulers employed by the Company shall be covered by the terms of this agreement. Drivers of trucks or any equipment used to haul...
Since this unit has not previously been the subject of an NLRB election, its boundaries are not the result of Board scrutiny. As presently constituted, the unit consists of workers who are an integral part of various harvesting operations, for example, stitchers, folders, harvesting machine operators, and field-to-shed truck drivers in lettuce. However, the unit does not include other employees who are equally integrated in the harvesting operations, such as drivers of carrot diggers, wheat combines, or cotton pickers, stitchers in mustard, or truck drivers hauling supplies or machinery from field to field.

All but five of the employers included in the proposed unit grow, harvest, ship, or sell two or more crops, including head lettuce, celery, broccoli, cauliflower, prickly pears, black mustard, alfalfa, cotton, and wheat. The vast majority of jobs in the unit are performed in connection with the harvest of four crops: lettuce, celery, broccoli, and cauliflower. A brief description of the lettuce operation will set the factual stage upon which the issues raised by the Teamster petition play themselves out.

A. The Lettuce Workers

Before new seed is planted, the remains of the last lettuce crop are plowed under, the land is leveled, and new beds and furrows are formed. After the fields receive an initial treatment with fertilizers and herbicides, the new seed is sown. When the lettuce plants have reached a height of approximately one inch, a crew of workers "thins" the lettuce and removes weeds. One or two weeks later a second thinning and weeding is performed. Insecticides and fertilizers are applied to the plants directly or through the irrigation system. The ground is watered just before planting and approximately five times during the growing season. A crew of 35 to 40 people reaps the mature crop either by the "naked pack" method or with the aid of a lettuce wrap-machine. The harvest of a single field requires several cuttings. Depending upon the weather, the lettuce growing-harvesting operation lasts 60 to 100 days. The lettuce season begins in late April in the Salinas Valley, and moves in October to areas such as Fresno County and Bakersfield in
California, and Phoenix and Yuma in Arizona. The season ends in Southern California's Imperial Valley in February or March.14

1. The Naked Pack Method of Harvesting

The ground crew employed in the naked pack harvesting method consists of a stitcher, a folder, nine trios (two lettuce cutters and one packer), three closers, four loaders, and three truck drivers.15 Only the stitcher, folder, and truck driver are included in the NLRB petition.16 All crew members are paid on a per-carton basis and are supervised by the harvest superintendent.17 The folder separates and folds flat cardboard into boxes, the bottoms of which are stapled by the stitcher. The stitching machine is a small motor-driven apparatus mounted on the back of a flat-bed truck. Both the folder and stitcher spend ninety percent of their workday making boxes in the fields.18

Once stitched, the boxes are dropped to the ground where they are picked up by a member of the trio and distributed down the center furrow of the trio’s four rows.19 After the trio has cut, trimmed, and packed the lettuce into a box, the closer uses an aluminum frame to hold the flaps of the box down while stapling them shut with a large stapling gun.20 The stapled boxes are loaded onto Fabco trucks21 which are driven slowly down the furrows between the lettuce rows. Two loaders work together on each side of the Fabco, one lifting boxes from the ground to the truck bed while the other stacks the boxes on pallets covering the bed. Loading the Fabco takes between one-and-one-half and two hours.22

Once loaded, the Fabco is driven to a cooler or shed where it is unloaded in approximately fifteen minutes. The truckers then return to the field for another load.23 At the cooler, the head lettuce is vacuum cooled to prevent spoilage.24 The lettuce boxes are then loaded in refrigerated rail cars or semi-trucks for transportation to produce terminals and supermarkets.

14. See generally id.
15. See, e.g., id., vol. 4, at 633; vol. 5, at 689, 704, 805, 817.
16. See note 10 supra.
17. See, e.g., id., vol. 5, at 696, 720, 805, 817.
18. The remaining 10% is spent loading the truck with cardboard in the morning, driving to the fields, and performing minor maintenance on the stitching machines. See id., vol. 4, at 663; vol. 7, at 936. But see id., vol. 2, at 278.
19. Id., vol. 8, at 1051-54.
20. Id., vol. 1, at 130.
21. Fabco trucks were designed especially for the lettuce harvest with a wheel base exactly equal to the width between lettuce rows. Id., vol. 1, at 126-27.
22. Id., vol. 8, at 1050-54.
23. The time Fabco drivers spend in the field varies with the distance between field and shed, and with the cutting of the field; for instance, it takes longer to get a load during the second or third cutting. On the average, truckers spend approximately 50% of their workday in the field. Id., vol. 8, at 1064-66.
24. Id., vol. 1, at 97-98.
2. The Wrap-Machine Method of Harvesting

The second method of harvesting lettuce involves the wrap-machine and a crew of about 25 people. Ten crew members cut and trim the lettuce and place it on the conveyor-belt wings of a machine on which ten workers heat-seal the lettuce in plastic wrap. The wrapped heads are packed into cardboard boxes which are stapled closed, dropped to the ground, and loaded onto Fabcos as in the naked pack. The machine operator, the only member of the wrap-machine crew included in the NLRB petition, sets the wrap-machine's automatic pilot to drive down the lettuce rows at a very slow speed. While the machine steers itself through the field, the driver stitches boxes for the crew. The machine operator-stitcher spends the entire day in the fields working with the rest of the harvest crew, under the supervision of the harvest superintendent.

B. The Growers

None of the employers in the proposed unit is the "forty-acres-and-a-mule" farmer of yesteryear. Each employs between several dozen and several thousand people. Some own packing sheds and coolers, and many maintain a fleet of trucks and specialized machinery like tractors, caterpillars, cultivating implements, and harvesting equipment. Many have operations throughout California and Arizona. Perhaps most significant is the web of economic arrangements which links the individual corporate entities to one another. To understand this economic substructure, so critical to the NLRB definition of "farmer," it is necessary to trace the industrialization of agriculture.

Spurred by demands for more food at cheaper prices, agriculture developed both a rapidly expanding machine technology and new fruits and vegetables able to withstand mechanical harvesting and packing. Increased mechanization in turn generated fundamental changes in the way farming was organized. Individual farmers did not control enough acreage to accumulate sufficient capital to purchase or maintain expensive harvest equipment. Yet, without such sophisticated machinery, the small farmer's operating costs were so high and his output so low that many were driven off the land. The only way to stay in farming was to expand the number of acres cultivated and to grow crops on a year-round basis. For lettuce farming, this meant expansion to other geographic regions.

27. Id., vol. 8, at 1041.
28. Id., vol. 8, at 1041-42.
29. See id., vol. 1, at 22-29; see generally id.
30. Andrew Church, Counsel for the GSVA and recognized authority in the field of agriculture, testified at the NLRB hearing that "to stay in the lettuce business, you must have lettuce requirements 365 days a year and be able to supply your market on a year-round basis." Id., vol. 2, at 147-48.
To achieve this reorganization, some farmers became large corporate entities cultivating, harvesting, selling, and shipping produce only from land which they owned or directly leased. Others joined together under various economic arrangements to share the burdens of increased mechanization. The two most common contractual prototypes utilized in agriculture are the "pack-out" and the "joint-deal". Under the pack-out contract, the party owning the land is guaranteed a flat per-acre price for growing the crop. At harvest time, legal ownership of the crop shifts to the party who cuts, sells, and ships the produce. In addition to harvesting, this party often selects the seed, thins the crop, and determines planting and watering schedules.

The joint-deal contract differs most significantly from the pack-out contract in that the crop is usually jointly owned from the outset, and the price to be paid each party depends upon the market instead of a predetermined formula. Usually the grower (the party owning the land) cultivates and irrigates the crop, while the grower-shipper (the party sharing a legal interest in the crop) harvests the mature crop. The remaining cultural operations, such as providing seed, fertilizing, weeding, and thinning, are shared by the parties, and the delegation of responsibilities assumed by either party varies from contract to contract, crop to crop, and year to year. Generally, however, the grower-shipper oversees the entire growing operation, inspects the crop for disease or pests, schedules the last watering, and has overall responsibility for the crop. Under the joint-deal both parties are "engaged in the truest sense, in the business of 'farming.'"

Another solution to the economic problems of agricultural modernization has been the cooperative. Co-ops were formed by groups of small growers banding together to share harvesting costs and to maximize the efficient use of expensive equipment. These co-ops, which have expanded into multi-crop and multi-area operations, bear a strong resemblance to grower-shippers and serve the same functions vis-a-vis individual growers.

The employers involved in the proposed unit include three co-ops, fifteen companies which grow five percent or less of their lettuce under contract, six companies which grow all their lettuce under contract, and nine companies which grow from ten to eighty percent of their lettuce under contract.

Although this synopsis depicts only the lettuce operation, most of the other crops grown by the employers in the proposed unit require similar

31. See, e.g., id., vol. 4, at 602; vol. 5, at 690, 747, 835.
32. See id., vol. 2, at 300-22.
33. Id., vol. 2, at 209, 327.
34. Id., vol. 2, at 147-51.
35. Abramson, Grower-Shipper Agreements, in CALIFORNIA FARM AND RANCH LAW 183 (California Continuing Education of the Bar 1967).
36. See Record, vol. 1, at 119-21; vol. 2, at 165-68.
37. Post-hearing Brief for United Farm Workers, app. F, Grower-Shipper Vegetable Ass'n, No.20-RC-13100 (NLRB, filed June 1, 1976). It should be noted that this breakdown varies with the crop. Some companies which grow all their own lettuce might grow all their broccoli under contract.
work and are cultivated under similar economic arrangements. The integration of the truckers, stitchers, and machine operators into the larger harvesting operations is evident from this limited review. Finally, this sketch of the evolving production methods and economic structures of modern agriculture reveals the complexity and interrelation of tasks, responsibilities, and ownership in farming.

III

THE NATIONAL LABOR RELATIONS ACT AND ITS AGRICULTURAL EXEMPTION

Underscoring Congress' decision to provide certain protections for the collective activities of workers, the National Labor Relations Act regulates the organization of groups of workers for extended periods of time. The NLRB will not certify single-person units, and most collective bargaining agreements last from one to three years. Applying equally broad strokes to NLRB exemptions, Congress excluded all agricultural laborers from regulation by the Act: "For purposes of this Act, 'employee' shall not include any person engaged in agriculture . . ." Nowhere in the NLRA is "agriculture" defined. This failure cannot have been due to oversight, and permits the inference that Congress intended to vest the National Labor Relations Board with sufficient discretion to develop an interpretation of the agricultural exemption which would serve the goals of the NLRA. For nearly fifteen years, the NLRB exercised this discretion without significant opposition to the manner in which it fleshed out the skeletal language of section 2(3). In 1946, however, Congress attached a rider to the NLRB appropriations, forbidding the use of any funds: "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers . . . as defined in section 3(f) of the [Fair Labor Standards Act] . . .." This rider has been part of each subsequent Board appropriation.

Section 3(f) of the Fair Labor Standards Act (FLSA) defines "agriculture" as:

[F]arming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural, or horticultural commodities, . . . raising of livestock, bees, furbearing animals, or poultry, and any practices . . .

41. It is significant that the Act has a rather extensive definitional section detailing the precise meaning of key terms like "employer," "commerce" and "labor dispute". NLRA §§ 2(2), (6) and (9), 29 U.S.C. §§ 152(2), (6) and (9) (1970 & Supp. V 1975).
42. 92 CONG. REC. 9514 (1946).
performed by the 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.\footnote{44}

As the courts have noted, the section 3(f) definition has both a primary and a secondary meaning.\footnote{45} In its primary meaning, agriculture encompasses "farming in all its branches."\footnote{46} Included, but not limited thereto, are those farming operations enumerated in section 3(f), such as cultivation and tillage of the soil, growing and harvesting agricultural commodities. Any person engaged in such activity is performing agricultural work regardless of who the employer is or where the work is performed. The secondary branch of agriculture embraces all farming operations which do not fall within the primary meaning.\footnote{47} Thus, work which by itself may or may not be farming is considered agricultural when performed by a farmer or on a farm as an incident to or in conjunction with the farming activities of that farmer or farm.

The structural clarity of the FLSA definition has proven to be deceptively simple. Any distillation of a uniform standard from NLRB applications of section 3(f) is easily frustrated by a labyrinth of holdings which would baffle even the Minotaur. However, a rough grouping of the cases suggests two cognizable tests which the Board has used to determine which persons will be classified as agricultural workers.

\textit{A. Standard I}

The broad discretion with which the NLRB has been vested is firmly established,\footnote{48} and many of the Board’s decisions, which for the purposes of this article shall be labeled "Standard I" decisions, reflect a recognition that

\begin{itemize}
  \item \footnote{44} Id. § 203(f).
  \item \footnote{45} Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949).
  \item \footnote{46} Id. at 762.
  \item \footnote{47} Id. at 762-63.
  \item \footnote{48} See, e.g., Office Employees Int’l Union, Local 11 v. NLRB, 353 U.S. 313 (1957), and NLRB v. Marinor Inns, Inc., 445 F.2d 538 (5th Cir. 1971), affirming the Board’s power to decline to assert jurisdiction over various employers.
  \item See also Int’l Ass’n of Machinists v. NLRB, 311 U.S. 72, 82 (1940), holding that the NLRB has broad discretion to adapt remedies to the needs of a particular situation. Accord, NLRB v. Local 3, IBEW, 477 F.2d 260 (2d Cir.), cert. denied, 414 U.S. 1065 (1973). Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651 (1961) (dictum).
  \item The power of the Board’s General Counsel to make a discretionary decision refusing to issue a complaint where an unfair labor practice has been charged, was the subject of early litigation. Upholding such discretion, the court in NLRB v. Barrett Co., 120 F.2d 583 (7th Cir. 1941), concluded that "Section 10(b) does not require the Board to issue a complaint . . . . [T]he Board has a discretion—it acts judicially." Id. at 586. The Supreme Court affirmed this view in Vaca v. Sipes, 386 U.S. 171, 182 (1967): "[T]he Board’s General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."
  \item Finally, the Board has been held to have discretion to dismiss an unfair labor practice complaint issued by its General Counsel, on the grounds that asserting jurisdiction would not effectuate the purposes of the NLRA since the employer involved is so small that a labor dispute would have only an insubstantial effect on commerce. Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951), denying review of 86 N.L.R.B. 1166 (1949).}
\end{itemize}
this discretion extends to defining the scope of the Act’s agricultural exemp-
tion. Although it is not always expressly articulated in the decisions, Standard I is based on the conclusion that the 1946 Rider bestowed a grant of permissive jurisdiction, establishing a minimum definition of “agricultural laborer,” an outer limit on the Board’s otherwise unfettered discretion to interpret section 2(3). In other words, persons falling within the section 3(f) definition can never be classified by the NLRB as non-agricultural employees. This limitation, however, does not preclude categorizing persons whose work does not fit within a strict reading of section 3(f) as agricultural laborers for purposes of the NLRB section 2(3) exemption. Considering agriculture as an integrated and complex whole, the critical inquiry for Standard I has focused upon the function of a particular job, its interrelation with the larger farming enterprise, and the fundamental agricultural or non-agricultural nature of an employer’s operations.

Under this functional approach, the NLRB has interpreted “harvesting” (primary agricultural work) to include cutting and loading crops by machine, and hauling cut crops to a point of concentration in the field. The Board has also used the rationale behind this standard to categorize as “farmers” entities which enter into contractual growing and harvesting arrangements with other growers or shippers.

49. While paying lip-service to the requirements of the 1946 Rider, all of the Board’s Standard I cases have produced results impossible under a strict application of section 3(f) of the FLSA. See, e.g., Lee A. Consaul, Inc., 192 N.L.R.B. 1130, enforcement denied on other grounds, 469 F.2d 85 (9th Cir. 1972); D’Arrigo Bros., 117 N.L.R.B. 22 (1968); Holtville Alfalfa Mills, Inc., 198 N.L.R.B. 1183 (1952); Allied Mills, Inc. 96 N.L.R.B. 369 (1951); Grower-Shipper Vegetable Ass’n., 107 N.L.R.B. 953 (1954).

50. See, e.g., In re Salinas Valley Vegetable Exch., 82 N.L.R.B. 96 (1949):
The Board has previously held that employees performing duties, similar to those involved in this case, for the employers involved herein, were not “agricultural laborers” within the meaning of section 2(3) of the Act. However, when these earlier cases were decided by the Board, the definition of “agricultural laborer” set forth in the FLSA of 1938 had not been incorporated by reference into the NLRA.

51. See, e.g., Grower-Shipper Vegetable Ass’n., 107 N.L.R.B. 953 (1954), where the NLRB noted the degree to which lettuce box-stitchers were part and parcel of the harvesting operations. In as much as the stitching truck moved through the field at a pace geared to that of the cutters and the packers, the stitchers and field workers were under common supervision, and harvest hands were on the same payroll, stitching fell squarely within the NLRA agricultural exemption. The Board also concluded that the members of the Association, some of which were farming cooperatives and growers operating under joint deals, were farmers for purposes of determining the status of secondary agricultural workers.


54. In In re Burnett & Burnett, 82 N.L.R.B. 720 (1949), the Board concluded that packing shed workers performed work incidental to the farming operations of a farmer and were therefore exempt from the Act as secondary workers. The “farmer” in this instance packed produce grown under partnership deals; in fact, 50% of the produce was purchased as a growing crop from other growers. Accord, D’Arrigo Bros., 117 N.L.R.B. 22 (1968); In re Salinas Valley Vegetable Exch., 82 N.L.R.B. 96 (1949). See also, Lee A. Consaul, Inc., 192 N.L.R.B. 1130, enforcement denied on other grounds 469 F.2d 85 (9th Cir. 1972); John Maurer & Sons, 127 N.L.R.B. 1459 (1960).
B. Standard II

The second NLRB agricultural exemption "standard" rests upon a premise almost wholly antithetical to that of Standard I. While under the first standard the Board has acknowledged its discretionary power to make an independent evaluation of the scope of section 2(3), under the second test ("Standard II") the Board has concluded that the scope of section 2(3) should be exactly coterminous with that of section 3(f) as interpreted and applied by the Administrator of the FLSA. Viewing its jurisdictional grant as both mandatory and coextensive with that of the FLSA, the Board has determined that only those persons who would be agricultural workers for purposes of the FLSA will be excluded from NLRA coverage under the section 2(3) exemption. To understand fully the significance of this approach, a brief review of the policies and administrative procedures of the FLSA is in order.

The Fair Labor Standards Act was designed to insure individuals "a fair day's pay for a fair day's work." To effectuate this goal, Congress, the courts, and the FLSA Administrator have decided that all employees in interstate commerce, so far as is reasonably possible, should be made subject to the provisions of the FLSA. Thus, FLSA exemptions are not blanket exclusions but rather serve as restrictions on the wage and hour protections which a person can claim in any given week. FLSA exemptions are narrowly drawn and extensively and specifically delineated by Congress. They apply to individuals rather than to industries as a whole, and persons

55. See, e.g., Decoster Egg Farms, 223 N.L.R.B. No. 123, 92 L.R.R.M. 1120, at 1122-23 (April 13, 1976): "While the Board makes its own determination as to the status of any group of employees, as a matter of policy it gives great weight to the interpretation of Section 3(f) by the Department of Labor, in view of the agency's responsibility and experience in administering the FLSA." In Decoster, the Board determined that section 3(f) "must be read as limiting the exemption [§ 2(3)] to those processors who deal exclusively with their own goods." Id. at 1123. Compare Decoster with In re Bumett & Burnett, 82 N.L.R.B. 720 (1949).

There is no single, integrated Department of Labor interpretation of section 3(f). Individual bulletins have issued in response to requests for advisory opinions, court decisions, or Congressional amendments. The first published interpretations of the agricultural exemptions to the FLSA were printed in the 1940 Wage and Hour Manual, Interpretive Bulletin No. 14. Revisions were printed in 1947, 1949, 1956, 1961, and 1972. The latest version may be found in 29 C.F.R. § 780 (1975).

56. Message of the President to Congress urging passage of wage and hour legislation 81 CONG. REC. 4960 (1937).


58. FLSA exemptions are enumerated in 29 U.S.C. § 218 (1975). The application of section 218 has been elaborated and codified in the Dep't of Labor's Interpretive Bulletins. 29 C.F.R. § 780.2 (1975). In the introductory sections of section 780, subpart A, the Administrator explains that:

[The details with which the exemption in this Act have been made preclude their enlargement by implication. . . .] [N]o matter how broad the exemption, it is meant to apply only to [the particular specified activity]. . . . Exemptions provided in the Act are to be narrowly construed against the employer seeking to assert them; and their application limited to those who come "plainly and unmistakably within their terms and spirit."

59. The coverage of the Act's wage and hours provisions . . . does not deal in a blanket way with industries as a whole. Thus . . . it is provided that every employer shall pay the statutory minimum wage to "each of his employees who is engaged in commerce or in the
who don’t qualify for the overtime pay protections may be able to claim the minimum wage. Similarly, a laborer may be covered by the FLSA one week and not the next. If an individual performs any amount of non-exempt work during a given work week he or she is covered for that entire week and receives FLSA protection for hours worked in both exempt and non-exempt work.

In keeping with this scheme, the FLSA provides no broad exemption for agricultural workers. Persons who engage in activities which fall within the section 3(f) definition of agriculture are not automatically denied wage and hour protections. Instead, the exemption of persons working in agriculture depends upon their age; their familial relations to their employer; the number of man-days of agricultural labor utilized by their employer during each calendar quarter; whether they receive piece rate pay; whether they commute from a permanent residence; and how long they have worked in agriculture each year. Other agriculture-related exemptions refer to the production of goods for commerce. It thus becomes primarily an individual matter as to the nature of the employment of the particular employee. Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act and not others; still other employers in the industry may have all their employees within the Act’s coverage.

29 C.F.R. § 776.2(a) (1975).

60. E.g., 29 U.S.C. § 213(b) (1970 & Supp. V 1975) exempts from the overtime pay provisions persons engaged in cotton ginning, working on shade-grown tobacco, or tending trees. None of these groups of workers are exempt from the minimum wage provisions.

61. The workweek is the unit of time to be taken as the standard in determining the applicability of an exemption. An employee’s workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods . . . . If in any workweek an employee does only exempt work, he is exempt from the wage and hour provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek . . . . An employee may thus be exempt in one workweek and not in the next.

29 C.F.R. § 780.10 (1975).

62. If in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the Act for all the time worked in that week, unless exempted therefrom by some specific provision of the Act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the Act.

29 C.F.R. § 776.4(a), (b) (1975).


(A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred mandays of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer’s immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally rec-
specific agricultural activities, such as forestry, and exclude workers in these fields only from the overtime pay provisions of the FLSA. Additionally, the section 3(f) definition of agriculture has itself been carefully confined to its narrowest reading so that more persons may be protected. For example, the FLSA Administrator does not include as farmers those employers that harvest crops grown under contract and does not classify the transportation of crops harvested under a pack-out deal as secondary agricultural work.

In strict compliance with the FLSA applications of section 3(f), under Standard II, the NLRB has refused to characterize entities growing crops under various economic arrangements with other growers as farmers for purposes of the Act’s agricultural exemption. Consequently, persons engaged in activities like hauling poultry are not secondary agricultural workers when employed by large-scale poultry-raising entities that raise some chickens through contracts with smaller farmers.


65. One who merely harvests a crop of agricultural commodities is not a “farmer” although his employees who actually do the harvesting are employed in “agriculture” in those weeks when exclusively so engaged. The mere fact that an employer harvests a growing crop, even under a partnership agreement pursuant to which he provides credit, advisory or other services, is not generally considered to be sufficient to qualify the employer so engaged as a “farmer.” 29 C.F.R. § 780.131 (1975). See also 29 C.F.R. §§ 780.132, 780.136, 780.140 (1975).

66. When a packer of vegetables buys the standing crop from the grower, harvests it with his own crew of employees, and transports the harvested crop to his off-the-farm packing [shed] employees are clearly not agricultural employees. 29 C.F.R. § 780.143 (1975).

67. E.g., Norton & McElroy Produce, 133 N.L.R.B. 104 (1961); Green Giant Co., 223 N.L.R.B. No. 37, 91 L.R.R.M. 1468 (March 29, 1976). In Norton & McElroy (a predecessor company of one of the employers included in the Teamster petition) the company grew and harvested crops under four different arrangements, often retaining up to a one-half interest in the crop. In Green Giant the company grew, harvested, and marketed crops on a contract basis with other farmers. Green Giant provided the seed, determined the time of planting, supervised weed and insect control, as well as harvested the mature crop.
IV

APPLICATION OF NLRB STANDARDS
TO THE PROPOSED UNIT

The Teamster petition requires that the NLRB choose which of its two agricultural laborer tests to apply. In disposing of this petition the Board can act in one of three ways. First, it can follow Standard I and classify the unit members as agricultural workers beyond the reach of NLRA jurisdiction. Second, the Board can apply Standard II, find the unit to be composed of non-agricultural employees, and extend NLRA jurisdiction to the furthest extreme of its statutory grant. Third, the NLRB can follow Standard II, classify the unit members as non-agricultural, but refuse to assert jurisdiction on the ground that declination best effectuates the policies of the Act. Each of these options has distinct advantages and disadvantages. Before making a choice among the three, the Board must consider the results of applying each option and the policies which each choice would advance.

A. Applying Standard I And Finding The Unit
Members Exempt From NLRA Jurisdiction

Application of Standard I to the proposed unit would permit the Board to classify the unit members as agricultural laborers beyond the reach of the NLRA. Driver-stitchers of the lettuce-wrap machines and at least some Fabco drivers would be classified as primary agricultural workers. Furthermore, the fact that particular employers grow some crops under contract would not defeat the agricultural exemption for the remainder of truckers and stitchers who would still be exempt as secondary workers employed by a farmer or on a farm.

Although Board application of Standard I would result in a broader range of unit members falling within the NLRA section 2(3) exemption than would be included under the FLSA definition, authority for such Board action is supported by the legislative history of the 1946 Rider which first directed the NLRB to use the section 3(f) definition of agriculture. The administrative simplicity of this option and its compatibility with both federal and state labor policies are persuasive arguments favoring its adoption. However, these advantages must be balanced against the fact that these workers would be subject to multifarious state labor laws if the NLRB were to apply Standard I.

1. Legislative History of the 1946 Rider

A Rider to the 1946 NLRB Appropriations Bill prohibited the Board from using any funds in relation to any persons engaged in agriculture as

69. See notes 52 & 53 supra.
70. See note 54 supra.
71. 92 CONG. REC. 9514 (1946).
defined in section 3(f) of the FLSA. The Rider did not expressly confine the Board’s definition of agricultural workers to those falling within the section 3(f) language, and the legislative history of the Rider indicates that Congress did not intend to so restrict Board discretion in this area.

As originally reported out of committee, the Appropriations Bill for the Department of Labor (H.R. 6739) included no rider to its NLRB funding provision. During the House debate, however, several amendments were proposed. The first came from Rep. John Taber, New York, who argued that no money should be given to the NLRB, in part because of “[its] incursions into the agricultural labor field.” The amendment was defeated. Immediately thereafter, Rep. Alford Elliot, California, offered the following amendment:

\textbf{Provided further}, That no part of the funds appropriated in this title shall be used in connection with the investigation, hearings, directives, or orders concerning bargaining units composed in whole or in part of agricultural laborers as that term is defined in the Social Security Act in section 409, title 42, United States Code.

---

72. \textit{Id.}
73. \textit{Id.} at 6683.
74. \textit{Id.} at 6688.
75. \textit{Id.} at 6689. The text of the Social Security definition reads:

The term “agricultural labor” includes the service performed

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in managing timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple syrup or maple sugar or any commodity defined as an agricultural commodity in section 1141j(g), title 12, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for the market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term “farm” includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural and horticultural commodities, and orchards.
Ostensibly proposed to provide a uniform definition of agriculture for all federal labor laws, the amendment was really an attempt by representatives of agricultural states to modify the NLRB practice of defining processing and packing sheds as non-agricultural operations.\textsuperscript{76} Despite heated debate, the House passed the controversial amendment.\textsuperscript{77}

The Elliott Amendment did not fare well in the Senate, where the Appropriations Committee recommended that the "proviso in reference to packing-shed workers" be struck.\textsuperscript{78} The amendment was eliminated, and no substitute was offered. Thus modified, the House Appropriations Bill passed the Senate.\textsuperscript{79}

The Senate expressed two principal objections to the Elliott Amendment. First, the workers affected by the Elliott Rider would be employees of highly mechanized, industrial packing and processing sheds whose organizational rights had been protected by the NLRA for nearly ten years.\textsuperscript{80} To exclude these employees would disrupt what had become a stable collective bargaining pattern and would ensure violent and bitter strikes.\textsuperscript{81} Second, the wording of the Rider ["composed in whole or in part of agricultural laborers"] would permit anti-union employers to contaminate a bona fide NLRB unit by moving several agricultural workers into the same unit.\textsuperscript{82} Thus, the benefits of the Act could be withdrawn from thousands of employees in contravention of the intent of Congress in passing the NLRA.\textsuperscript{83}

After three Conference Committees had been convened, both Houses agreed to replace the Elliott Amendment with language incorporating the FLSA definition:

\begin{quote}
No part of the funds appropriated in this title shall be available to organize or assist in organizing agricultural laborers, or used in connection with investigations, hearings, directives, or orders concerning laborers as referred to in section 2(3) of the Act of July 5, 1935 (49 Stat. 450), and as defined in section 3(f) of the Fair Labor Standards Act of June 25, 1938 (52 Stat. 1060).
\end{quote}

Presenting the Conference Committee Report, Sen. Joseph Ball, Minnesota, explained that:

\begin{itemize}
\item \textsuperscript{76} Id. at 6689-93.
\item \textsuperscript{77} Id. at 6694.
\item \textsuperscript{78} Id. at 7945 (remarks of Sen. Ball).
\item \textsuperscript{79} Id. at 7949.
\item \textsuperscript{80} See, e.g., North Whittier Heights Citrus Ass'n, 10 N.L.R.B. 1269 (1939), 92 CONG. REC. 8741 (1946) (remarks of Sen. Tunnel). \textit{See generally,} testimony of Sen. Morse before the Senate Appropriations Committee: "Apart from the merits or the demerits of the social-security definition of agricultural labor, it may be stated as a simple fact that hundreds of thousands of employees engaged in performing industrial operations are designated as 'agricultural laborers' under that definition." 92 CONG. REC. 8738 (1946).
\item \textsuperscript{81} 92 CONG. REC. 8736 (1946) (remarks of Sen. LaFollette).
\item \textsuperscript{82} Id. at 8736 (remarks of Sen. Aiken).
\item \textsuperscript{83} Id. (remarks of Sen. Murdock).
\item \textsuperscript{84} Id. at 9514.
\end{itemize}
Instead of using the definition of agricultural laborer contained in the Social Security Act—the definition is a very broad one, covering . . . a great many processing employees, packing shed workers, and so forth—this change substitutes the definition of "agriculture" contained in the Fair Labor Standards Act, which is a much narrower definition. 85

The foregoing analysis permits several conclusions of significance to the present inquiry. First, the impetus behind the 1946 Rider was not a broad disapproval of Board definitions of agricultural laborers. Rather, a strong agricultural lobby, composed largely of California growers, agitated for reform in one specific area: packing and processing sheds. It is irrefutable that Congress expanded the NLRA agricultural exemption by placing an outer limit on those workers who might be drawn under the Act: no person engaged in activities encompassed by section 3(f) could invoke the processes of the NLRB. 86 However, Congress did not require that the section 3(f) limit be reached at all times under all costs. The legislative history of the '46 Rider contains no absolute prohibition of additional expansions of the NLRA's section 2(3) agricultural exemption beyond the section 3(f) minimum, at least so long as those expansions fall short of the Social Security definition.

Second, in choosing which definition of agriculture would be included in the Appropriations Rider, Congress was careful to select one which the NLRB found workable, and which conformed to prior Board and court decisions. 87 By this process, Congress was implicitly approving NLRB discretion to define the scope of section 2(3), subject only to either the FLSA or Social Security definition.

85. Id.
86. See, e.g., Judge Friendly's comment about the effect of the 1946 Rider, NLRB v. Kelly Bros. Nurseries, 341 F.2d 433, 435 n.2 (2d Cir. 1965): "'About all one can be sure of is that Congress wished some expansion in the agricultural exemption . . .'"
87. Reporting on the final Conference Committee compromise, Sen. Ball stated:
   We conferred with one of the members and the counsel of the National Labor Relations Board who said that it [the FLSA definition] might require a few minor changes in their present procedure and definition, but they would be very minor, and they felt they would get along under it very well.
This report should be contrasted with testimony of NLRB Chairman Herzog urging rejection of the Elliott Rider:
   The courts have held that our decisions on that subject are correct interpretations of the agricultural employee exemption in the Wagner Act. The Board has often refused to take jurisdiction over people whose activities are in our opinion agricultural. The courts have agreed with the distinctions we have drawn.
   We think, again, that if this rider were adopted the employees would have no recourse but the use of self-help.
   There is nothing in the record or in the history of the Board's interpretation of the agricultural employee exemption in the National Labor Relations Act which would justify attaching this rider to our appropriation bill.
   Id. at 8740-41.
2. Standard I, and Federal and State Policies

Designed to regulate the labor relations of groups of employees, the NLRA includes or excludes entire classes of persons with a community of interests. For example, all agricultural workers are exempted.\(^8\) Furthermore, the NLRB is vested with wide discretion to interpret the Act’s provisions.\(^9\) Grounded in a recognition of both the Board’s competence to define the scope of section 2(3) and the nature of modern agriculture, Standard I conforms closely to the policies and structure of the NLRA. Rather than fragmenting agriculture into its component parts, some subject to the Act and others exempt, Standard I allows the Board to exclude agriculture as an evolving and organic whole, regardless of business size, economic structures, or mechanization.\(^9\)

This broad exemption from federal regulation permits full implementation of state agricultural labor laws. Were Standard I applied to the Teamster petition, the unit members would be found to be agricultural workers subject to the California Agricultural Labor Relations Act. The ALRA requires one “industrial” unit for all the agricultural workers of a given employer,\(^9\) in effect complementing the broad NLRA exemption. The ALRA’s industrial unit requirement promotes several important state policies. First, it protects the agricultural employer from many paralyzing peak season strikes. A well timed strike by field hands or truck drivers could destroy an entire year’s lettuce crop in a few days. Consecutive strikes by different units at the peak of harvest could hurtle the entire industry into chaos. Under the ALRA, the employer deals with only one union, one unit, and one collective bargaining agreement for all its agricultural workers. Second, the industrial unit concept provides greater potential for securing significant upward mobility for unit members, which in turn creates workforce stability for employers. The

---

8. The two legislative acts which might qualify as modifications of the agricultural exemption have both lent themselves to a broad reading of section 2(3). The first “amendment” was the 1946 Rider which expanded the Board’s definition of agriculture to include packing sheds. The second “amendment” was another appropriations rider, first attached in 1953. N.L.R.B. Appropriations Act, 1954, Pub. L. No. 170, 67 Stat. 257 (1953). Expressly disapproving a contrary Supreme Court decision, Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949), this Rider expanded “agriculture” to include persons maintaining and operating irrigation ditches used exclusively for farming.

9. See note 48 supra.

90. Arguably, industrialization has so fundamentally altered the nature of agriculture that the original rationale for its exclusion—that “agricultural labor was not subject to the usual evils of sweatshop conditions”—is no longer valid. Bowie v. Gonzalez, 117 F.2d 11, 18 (1st Cir. 1941). Perhaps contemporary agriculture should not enjoy an NLRA exemption, but the fact is that it does. Congress has not moved to change agriculture’s exempt status, even though numerous bills have been introduced in the past few years either to amend the Act’s definition of “employee” or to establish a national agricultural labor law. See, e.g., H.R. 4011, 93d Cong., 1st Sess., 119 CONG. REC. 3748 (1973); H.R. 4007, id.; H.R. 4304, id. at 3956; H.R. 4408, id. at 4541. None were reported out of committee. Certainly the NLRB has no authority to lift the Act’s agricultural exemption, and until modified or repealed, the language and intent of section 2(3) must be given effect.

certainty of subjecting all similarly employed workers to single units and identical regulations is key to preserving the much-sought peace in California's fields, and an application of Standard I to the proposed unit is critical to attaining that goal.

It is true that few states now have comprehensive labor legislation covering agricultural workers. Only a handful have attempted, successfully or otherwise, to pass such laws: e.g., Arizona, California, Colorado, Connecticut, Florida, Idaho, Kansas, Massachusetts, New York, Oregon, and Pennsylvania. The disparate treatment of farmworkers' labor relations and their fight to organize in the various states is thus a potentially powerful argument against the application of Standard I to the Teamster petition.

3. Multiformity Among the States

A determination that the NLRB had no jurisdiction over these truckers, stitchers, and machine operators would apply nationwide, irrespective of the existence of state laws comparable to the NLRA. States like California, whose ALRA closely parallels the NLRA in language, structure, and policy, would present few difficulties. But states with no agricultural labor laws, with laws less comprehensive than the ALRA, or with laws based upon principles different from those of the NLRA, could pose problems. The agricultural labor laws of Kansas and Arizona are good examples of the last category.

Both the Kansas agricultural relations law and the Arizona Agricultural Employment Relations Act are based on the assumption that employers need protection from unions. Theoretically, the Arizona law permits a union to strike if an employer refuses to bargain. However, the strike must be approved by a majority of the workers in the unit (not just a majority of those voting), and striking without such approval constitutes an unfair labor practice. Units may consist of both permanent and seasonal workers; most of the latter are employed on a given ranch (i.e., unit) for

   95. Id. § 23-1385(B)(13).
   96. Id. § 23-1389(B).
extremely short periods of time. "Many of these workers will be hired only during the peak of the harvest, which may be as short as 10 days." Thus, by manipulating units, an employer can restrict valid agricultural strikes to ten days a year. Even when a proper strike vote is secured, an employer can halt the work stoppage for ten days by agreeing to binding arbitration. By permitting an employer to avoid strikes during peak season, the time of greatest vulnerability to economic pressure, the Arizona law in effect strips farmworkers of their most powerful weapon.

Kansas law places even tighter restraints on the agricultural strike. When parties to a labor dispute reach impasse, the state provides a fact-finding and mediation service to promote a voluntary settlement. If mediation fails, the parties must go to binding arbitration. Calling a strike during "[a] critical period of production or harvesting," during the livestock marketing period, or during mandatory mediation and arbitration is an unfair labor practice under the Kansas Act. If the right to strike exists for Kansas' farmworkers, it is ephemeral.

Congress has had several opportunities to consider such multiformity among state laws in the area of labor relations, and has rarely found it a controlling factor in formulating legislation. Knowing full well that it was delivering the regulation of agricultural labor up to the vagaries of the states, Congress nevertheless adopted a broad agricultural exemption to the NLRA. In a sense, the very enactment of the agricultural exemption was a statement by Congress that non-uniform regulation (or even non-regulation) of farmworkers' labor relations was insignificant. This view was apparently reaffirmed by the passage of NLRA section 14(c), which permits state action when the NLRB declines to assert jurisdiction. Many senators and representatives opposed this provision primarily because the majority of states had no labor laws comparable to the Act. Some warned that section 14(c) would protect the "1890 labor laws" of the South. Others protested that "[i]n some States which have strong antilabor legislation, picketing might be stopped in one hour without giving the union any chance. In States with more liberal labor laws, the picketing may continue many months beyond the time provided in the Federal law." Still, section 14(c) was approved, multiformity among the states notwithstanding. As Sen. Allott, Colorado, noted:

102. Id. § 44-826(d).
103. Id. § 44-828(c)(7).
It seems to me lack of uniformity is not enough of an argument, because the National Labor Relations Board has said to certain litigants, "You have no Federal interest." When such cases do not involve any Federal interest, why should not the State courts or State boards decide those cases? Why should the States not handle the problems in this area which are basically State problems.

Given this Congressional disregard of lack of uniformity among the states, especially relating to agricultural labor relations, multiformity should not prohibit the Board from choosing Standard I.

B. Applying Standard II And Asserting NLRB Jurisdiction

Application of Standard II, which adopts FLSA section 3(f) as a jurisdictional mandate for the NLRB, would result in a finding that many of the proposed unit members are "employees" subject to the Act. The Standard II approach has gained favor with the Board in recent years but has been almost uniformly rejected by the circuit courts, especially in the poultry raising cases. The most important effect of Standard II lies in its extension of NLRA protections to the absolute limit of the Act's statutory grant. To the extent that Standard II permits the Board to regulate the labor relations of persons employed in agriculture, the NLRA can serve as a national, albeit limited, agricultural labor relations law. The positive aspects of extending NLRA coverage to the workers in the Teamster petition, however, could well be outweighed by severe administrative problems and conflicts with federal and state labor policies.

1. Administrative Problems

Agricultural laborer status under Standard II depends both upon the primary or secondary nature of the work, and upon the amount of agricultural work performed in a given year. Administration of this standard in the


On Jan. 11, 1977, the Supreme Court upheld both the Board and the First Circuit in Bayside Enterprises, Inc. v. NLRB, 45 U.S.L.W. 4086. In its brief opinion, however, the Court did not come to grips with the major issues raised in the Grower-Shipper petition. Bayside involved neither a comprehensive state agricultural labor law nor severe administrative problems in applying Standard II (as the Court carefully noted, Bayside used only "[s]tandard contractual arrangements." Id. at 4087.) Without examining the assumption that "[t]he term agricultural laborer in the NLRA shall have the meaning specified in § 3(f) of the Fair Labor Standard Act," id. at 4086 [emphasis added], and while admitting that the issue of the agricultural nature of the Bayside truck drivers' work could "[w]ith nearly equal reason be resolved one way rather than another;" id. at 4087, the Court deferred to the judgment of the NLRB.

108. See notes 45, 46 and 47 supra.
context of the proposed unit would be difficult, primarily because of the highly fluid nature of agriculture.

First, in administering this standard, the Board would have to determine whether a person was engaged in primary or secondary agricultural work, or both. For example, under Standard II, machine operators of harvesting equipment are primary workers, while stitchers are secondary workers exempt only when employed by a farmer or on a farm. The lettuce wrap-machine drivers would thus be engaged in primary work while steering and in secondary work while stitching. If their employer harvested lettuce grown on a joint deal, the wrap-machine driver would be exempt from the NLRA while steering (primary work), and not exempt while stitching (secondary work not performed in conjunction with the farming of that field).

Similarly, Standard II defines a field-to-shed trucker as agricultural only "to the extent he is engaged in regularly hauling farm produce for his employer from his employer's own farm, but not an agricultural laborer to the extent he regularly hauls the produce for his employer from an independent grower's farm." Fabco drivers spend a large part of their time gathering produce to a "point of concentration" in the fields, admittedly primary harvesting work. But once the Fabco's wheels had left the field, these truckers would become secondary agricultural workers subject to the Act when hauling produce not grown entirely by their employer. If an employer grew several crops under joint deals, hauling to an in-field shed would always be primary agricultural work while hauling to an off-the-field shed would never be agricultural work.

Since many of the proposed unit members would perform both exempt and non-exempt work, as illustrated above, the NLRB would next have to determine whether the amount of exempt activity performed by each individual was too insignificant to defeat NLRA coverage. Under current Board law, a worker who performs any regular amount of non-agricultural work is covered by the NLRA with respect to that portion of the work which is non-agricultural. Although "regular" has never been precisely defined, many cases imply that only if fifty percent or more of the work time in a year is spent performing non-exempt work will an employee be included in an NLRB unit. Applying this test to the workers in question, the NLRB


114. Id.
In 1962 the NLRB attempted to include packing shed workers in an NLRB unit because 28% of
would need to ascertain whether individual employers grew fifty percent or more of their crops under contract; which crops were grown under contract; and whether the truck drivers worked with all of the crops grown, or if not, in what proportion their work time was divided. These determinations would probably need to be made yearly, since there is no guarantee that any given employer will raise the same crops in the same place under the same economic arrangements from one year to the next.

Illustrations of two companies involved in the proposed unit demonstrate the magnitude of fluidity in agriculture. D'Arrigo Brothers of California (a member of the GSVA) grows at least 16 crops, has farming operations in three California valleys and in Arizona, employs persons in nearly every classification of the proposed unit, grows some of its produce under approximately five different economic arrangements, and has access to a national marketing apparatus. In 1975, one percent of the company's total harvested acreage was done on a pack-out basis for other growers, fifteen percent was grown under joint-deals, and the remaining eighty-four percent was grown wholly by D'Arrigo. The contract grown crops included lettuce, broccoli, cauliflower, and melons. The percentage of crops grown under contract arrangements varied from crop to crop.

J.J. Crosetti Company, another California corporation, grows approximately five crops. Crosetti grows sixty percent of the lettuce which it handles; the remaining forty percent is grown under one of approximately eleven different contractual deals with other farmers. Seventy-five percent of the lettuce is grown in the Salinas area. All lettuce grown by Crosetti in the Imperial Valley is contract grown, while most of the Salinas lettuce is grown solely by Crosetti. Ninety percent of the lettuce joint deals are in the Imperial Valley. The number and types of these joint deals vary from year to year. Thirty-four percent of its broccoli is grown by Crosetti; sixty to seventy percent is grown under pack-out deals.

Application of Standard II to D'Arrigo, Crosetti, or other unit truckers would require conclusions that some workers are primary one week and
secondary the next, and some would be subject to the NLRA one year but not the next. Exempt status would vary with the crop, the time of year, and the harvest locale. Classifications would need yearly review and revision for each employee of every employer. Unfortunately, the NLRA was not designed for such highly individualized administration.

2. **Standard II and the Policies of the NLRA**

   In large part, the administrative difficulties accompanying Standard II are a direct consequence of limiting the NLRA agricultural exemption to that of the FLSA without taking into consideration the crucial differences between the two labor laws. While individual, piecemeal determinations may well serve the goal of the FLSA to protect as many workers on as many work days as possible, they do not advance the NLRA policy of promoting stability and strength in the collective bargaining process.\(^2\)\(^2\) Not surprisingly, the application and enforcement of the FLSA is structured to deal with repeated review of coverage for individual workers during short time periods.\(^2\)\(^3\) The NLRA is not so designed, and the administrative nightmare guaranteed by Standard II may so subvert and distort the broad collective action orientation of the Act as to render this option infeasible.\(^2\)\(^4\)

3. **Standard II and California Law**

   Aside from the practical problems of administration, application of Standard II to the Teamster petition would undoubtedly affect the California
Agricultural Labor Relations Act. The ALRA was designed to bring peace and stability to California’s fields by regulating the labor relations of all farmworkers through the use of the industrial bargaining unit. All persons who would be defined as agricultural workers under NLRA guidelines must be included in the ALRB unit certified for an agricultural employer. Although the ALRB has already indicated that it will exercise broad jurisdiction, it is clear that the NLRB will play a critical role in defining the scope of the state board’s authority by simply expanding or contracting the section 2(3) exemption to the Act.

The danger of eventually whittling the ALRB’s jurisdiction over secondary agricultural workers to virtually nothing would be greatly enhanced by an application of Standard II to the proposed unit. In its most recent Standard II case, the NLRB limited the agricultural exemption for persons engaged in secondary activity to those employed by farmers “who deal exclusively with their own goods.” Egg truck drivers were not eligible for the NLRA agricultural exemption even though 11.5 out of 11.7 million eggs were produced by their own employer. Under this standard, an agricultural employer could contaminate secondary workers who would otherwise be agricultural (and subject to the ALRA) simply by cultivating a small portion of its total acreage under a contract arrangement with another grower, or by helping out a neighbor during a particularly heavy harvest.

Were Standard II to be applied, there would be other manifestations of its fundamental conflict with California law. Many truckers and stitchers would be in both NLRB and ALRB units, subject to dues payments to two

that great weight is to be accorded to the Labor Department’s opinion for which we have utmost respect, in the final analysis we are charged with responsibility for our own jurisdictional determinations.” 147 N.L.R.B. at 840.

126. Id. at §§ 1140.4(b), 1156.2.
128. Secondary agricultural work encompasses far more than that of the proposed unit. Also included are fruit packing; plant and field clerical work; sales and delivery work; hauling fruit trees from nursery to field; transporting bees to fields (for pollination); fruit drying; alfalfa dehydration; seed mill operations; branding and vaccinating livestock; grading wool; cotton ginning; hauling, cleaning and storing cotton seed; mechanical work; hauling feed to chickens and livestock from mills; land leveling and barn building; manure hauling; dairy pasteurizing and homogenizing; small retail selling directly from nurseries; and fruit sales from in-field produce stands. All of these activities are agricultural if performed for a farmer or on a farm. Interview by author with Bob Thompson, legal worker, United Farm Workers, AFL-CIO (May 1, 1976).
129. Decoster Egg Farms, 223 N.L.R.B. No. 123, 92 L.R.R.M. 1123 (April 13, 1976). See also H-M Flowers, Inc., 227 N.L.R.B. No. 178 (Jan. 17, 1977), a case involving a California based flower packing operation. Since more than half the plants handled were purchased from other farmers, the enterprise would have been non-agricultural under either Standard I or II (and therefore raised no real potential for conflict with the jurisdiction claimed by the ALRB). In finding these packing-shed workers “employees” within the meaning of the NLRA, the Board reaffirmed both its
unions during the same time period. The ALRB specifically forbids payment of dues to more than one union in any month.\textsuperscript{130} Rather than the single bargaining unit mandated by the ALRA,\textsuperscript{131} there could be two or more units of an agricultural employer's "agricultural" workers. Agricultural unions might seek to bargain for truckers, stitchers, or other secondary workers as members of ALRB units. Employers, on the other hand, could rely on Standard II to support a refusal to bargain for such persons, at least where they perform work on contract grown produce. Ultimately, these employers could be whipsawed between ALRB unfair labor practice charges for refusals to bargain and NLRB unfair labor practice charges for bargaining with a non-representative union in an improper unit. The United Farm Workers Union might be subject to the stricter NLRB boycott provisions (from which it has hitherto been exempt as an agricultural union), because of its representation of secondary workers subject to both the NLRA and the ALRA.\textsuperscript{132}

Under Standard II, other difficult jurisdictional questions might arise. For example, if a trucker hauling both contract grown and employer grown produce were unlawfully discharged, could unfair labor practice charges be lodged with both the ALRB and the NLRB? If not, would the choice depend upon the nature of the activity for which the trucker was discharged, such as organizing for the UFW, or upon the nature of the work performed on the day of discharge, such as hauling lettuce grown under a joint-deal? If the ALRB ordered reinstatement, would the truck driver be subject to rehire and back pay only to the extent he hauled produce grown solely by his own employer, or would he be rehired as both a secondary agricultural laborer and a non-agricultural employee?

Application of Standard II to the proposed unit would cause unavoidable head-on clashes with California law. Agricultural laborers who work next to each other—perhaps performing the same job, subject to identical working conditions, mutual supervision, and common labor relations problems with their employer—would be covered by different unions, and would be subject to two labor boards applying different labor laws. Rather than peace and stability, Standard II would likely bring turmoil and uncertainty to California agriculture.

\textsuperscript{130} CAL. LAB. CODE § 1153(c) (West Supp. 1976).

\textsuperscript{131} Id. § 1156.2.

\textsuperscript{132} The NLRA defines a labor organization subject to its jurisdiction as "any organization of any kind . . . in which employees participate and which exists for the purpose . . . of dealing with employers . . . ." NLRA § 2(3), 29 U.S.C. § 152(3) (1970). "Employees" includes any worker not specifically exempted. Id. 152(3).

The United Farm Workers faced just this problem in early 1972. NLRB General Counsel Peter Nash filed an action in federal court to enjoin the UFW boycott of lettuce and grapes, based upon the allegation that a few UFW members worked in a packing shed subject to the NLRA. The charge was eventually dropped when the UFW divested itself of the offending workers. See 118 CONG. REC. 10918, 11004, 11323 (1972).
C. Adopting Standard II But Declining to Assert Jurisdiction

The third option open to the NLRB is to accept the Standard II definition of section 2(3) as coterminous with section 3(f), exercise Board discretion, and refuse to assert jurisdiction over persons engaged in agriculture related activity. In this way the Board could classify the proposed unit as non-agricultural within the meaning of section 2(3), and still dismiss the petition on the grounds that the purposes of the NLRA would best be effectuated by a declination of jurisdiction. This disposition is not precluded by the NLRA, and would reduce the administrative tangles which application of Standard II would otherwise create. Declination would conform with NLRA policies and structure, and, theoretically, the states could regulate the labor relations of those persons over whom the Board had refused to take jurisdiction, though it is not clear that the ALRB could in fact assert jurisdiction if the Teamster petition were disposed of in this manner.

1. The Section 10(a) Proviso of the NLRA

The proviso to section 10(a) of the NLRA permits the Board to cede jurisdiction to state courts and agencies in carefully circumscribed situations.

[T]he Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.\textsuperscript{133}

Although California's ALRA is undeniably consistent with the general goals and structure of the NLRA, the feasibility of a cession agreement is doubtful. The ALRA requires a single bargaining unit composed of all agricultural workers of an employer.\textsuperscript{134} The NLRA protects the right of craft units to exist in the midst of larger industrial units.\textsuperscript{135} Thus, while the workers in issue could petition the NLRB for a unit separate from fieldworkers, they would be required by the ALRB to be part of a much larger unit composed of all the farmworkers of their employer. This fundamental conflict between the two acts not only triggered the Teamster petition, but also fails to meet the proviso's requirement that the specifically applicable provisions of federal and state law be consistent.

Furthermore, the term "consistent" has been interpreted to mean "identical" for purposes of a section 10(a) cession agreement. To date, no

\textsuperscript{134} CAL. LAB. CODE § 1156.2 (West Supp. 1976).
state law has been sufficiently identical to permit a formal cession of NLRB jurisdiction.\textsuperscript{136} Given this extremely narrow definition, the ALRA is obviously not consistent with the Act. The fact that a cession agreement could not be concluded with California, however, does not prohibit a Board\textit{declination} of jurisdiction it might assert over the members of the proposed unit.

2. \textit{Section 14(c) of the NLRA}

In contrast to the section 10(a) proviso, under which states may acquire jurisdiction only through formal agreement with the NLRB, section 14(c) permits state action in the event that the Board exercises its discretionary power to decline jurisdiction. Section 14(c) provides that:

\begin{itemize}
\item[(1)] The Board, in its discretion, may, \ldots \ decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: \textit{Provided}, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory \ldots from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.\textsuperscript{137}
\end{itemize}

It might be argued that section 14(c), ostensibly written in terms of "labor disputes," could be used to block Board declination of jurisdiction over any employees over which jurisdiction would have been taken in 1959. This assertion, however, rests on an inaccurate perception of the jurisdiction referred to in section 14(c). As the history of this section indicates, section 14(c) serves only to define which \textit{businesses} sufficiently affect commerce to justify NLRB intervention in alleged labor disputes. Section 14(c) does not define which \textit{employees} are subject to the Act. Read in this light, the proviso to section 14(c) does not bar the Board from declining jurisdiction over the employees in the proposed unit.

\textsuperscript{136} \textit{The Developing Labor Law} 762 (C. Morris ed. 1971). \textit{See also} the Feb. 12, 1959 memo of L.E. Gooding, Chairman of the Wisconsin Employment Relations Board submitted to the Senate Labor Committee: While effective arguments have been made by the states on behalf of such agreements, no cession agreements have been executed to date. It is our feeling that the National Board has construed the word "consistency" to mean identical and has used such argument as means of blocking a cession agreement. Furthermore, there is no assurance that, even if a State statute was conformed to a Federal statute, litigation over consistency of construction could not be advanced in a particular case as a means of delay. With nine circuit courts of appeals passing on National Labor Relations Board decisions, it would be impossible for any State administrative agency to guarantee total consistency of interpretation no matter how hard it tried and no matter what the spirit of the administrators were toward the statute.

\textsuperscript{105} \textit{CONG. REC.} 15701, \textit{reprinted in} II \textit{LMRDA LEGIS. HIST.} at 1741 (1959).

a. Declination of Jurisdiction Before Section 14(c)

The NLRB is empowered to prevent unfair labor practices and to direct elections in cases "affecting commerce."\(^{138}\) The Act's definitions of "commerce" and "affecting commerce"\(^\text{139}\) indicate that Congress wanted Board jurisdiction to encompass the furthest reaches of the commerce clause. This interpretation has been consistently upheld by the courts.\(^\text{140}\) However, for reasons including limited resources and personnel, the NLRB has never insisted upon expanding its operations to the full extent of its jurisdictional grant.

During the first fifteen years of its operation, the NLRB asserted jurisdiction over various employers on a case-by-case basis. This ad hoc method was replaced in 1950 by published standards for different industries (e.g., retail, non-retail, utilities, defense), composed of yearly interstate dollar inflow and outflow figures.\(^\text{141}\) These dollar-amount yardsticks were raised in 1954,\(^\text{142}\) greatly enlarging that "twilight zone" of employers over which the Board would refuse to assert jurisdiction but over which the states were arguably preempted from exercising control. In 1956, the Supreme Court froze this zone into a "no-man's land" in which the NLRB could refuse to act but in which the states could not act.\(^\text{143}\) The Board responded by lowering its dollar-amount standards to a level below that established in 1954,\(^\text{144}\) and, in 1959, Congress further reduced the territory of the no-man’s land by enacting section 14(c).

b. Legislative History of Section 14(c)

In 1959, the President recommended that Congress "authorize the National Labor Relations Board to decline to take cases where the effect on commerce is relatively insubstantial and to permit the State courts and


\(^{140}\) E.g., NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944); Glen Manor Home for Jewish Aged v. NLRB, 474 F.2d 1145 (6th Cir. 1973).


The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.

\(^{26}\) L.R.R.M. 50 (1950).

\(^{142}\) 34 L.R.R.M. 75 (1954).

\(^{143}\) Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1956).

agencies to act with respect to these cases.'\textsuperscript{145} During the next nine months, eight bills were introduced to eliminate the judicially imposed no-man's land.\textsuperscript{146} The proposals for narrowing the no-man's land varied widely but had two important points in common. Each accepted the premise that the NLRB could refuse to exercise the full measure of its legal jurisdiction over labor relations in businesses affecting commerce.\textsuperscript{147} In addition, a primary concern in the formulation of each bill was the establishment of a mechanism for governing labor relations of small businesses over which the Board might choose to decline jurisdiction.\textsuperscript{148}

Addressing this question of Board jurisdiction, some bills referred to "cases"\textsuperscript{149} and others to "labor disputes"\textsuperscript{150} over which declination might be appropriate. But the language finally adopted was couched in terms of "labor disputes involving any class or category of employers" where commerce would not be sufficiently affected to warrant exercise of NLRB jurisdiction.\textsuperscript{151} At no time during the lengthy debates over section 14(c) did Congress speak of the type of work (i.e., employees) over which jurisdiction could be asserted. Instead, repeated references in the Congressional Record to "enterprises," "business operations," the pre-section 14(c) dollar yardsticks, and considerations of how labor unrest at large or small businesses would affect commerce,\textsuperscript{152} leave little doubt that the framers of section 14(c) were concerned with the size of businesses (i.e., employers) over which the NLRB might decline jurisdiction.

Given this reading, the proviso to section 14(c)—prohibiting the Board from refusing to assert jurisdiction over any labor dispute over which it

\begin{thebibliography}{99}
\bibitem{146} H.R. 4474, 86th Cong., 1st Sess., 105 Cong. Rec. 2431 (1959); H.R. 8342, id. at 14177; H.R. 8400, id. at 14381; H.R. 8490, id. at 15024; S. 505, id. at 883; S. 748, id. at 1272; S. 1384, id. at 3951; S. 1555, id. at 5137. Reprinted in I LMRDA LEGIS. HIST. (1959).
\bibitem{147} See, e.g., Sen. Goldwater's explanation of his proposed amendment to S. 1555, introduced on April 21, 1959:
This amendment would specifically authorize the Board to decline jurisdiction over cases which, in its opinion, do not sufficiently affect commerce to warrant the exercise of its jurisdiction. This is a discretionary power which the Board has been exercising during its entire history, under both the Wagner Act and the Taft-Hartley Act. The provisions of the amendment, therefore, would write into the statute an existing implicit power, and would not mean any change in practice.
\begin{verbatim}
\end{verbatim}
\bibitem{150} E.g., S. 505, 105 Cong. Rec. 883; S. 748, 105 Cong. Rec. 1272 (1959), reprinted in I LMRDA LEGIS. HIST. at 29, 84 (1959).
\end{thebibliography}
would have acted on August 1, 1959—cannot be a deterrent to Board declination of jurisdiction over the instant petition. The "standards prevailing upon August 1, 1959" to which the proviso refers are the dollar yardsticks first formalized in 1950. Section 14(c) contains no provision binding the NLRB to the jurisdiction it asserted over classifications of employees as of August 1, 1959. Whether or not the Board would have asserted jurisdiction in 1959 over certain businesses which employ truckers, stitchers, and machine operators is immaterial to whether the Board can now decline jurisdiction over members of the proposed unit in order to best effectuate the NLRA policy of exempting all agricultural laborers.

3. Advantages and Disadvantages of Declination

By accepting Standard II's classification of the unit as non-agricultural while refusing to assert jurisdiction, the NLRB can preserve the breadth of the section 2(3) agricultural exemption in practice, if not in theory. Not only does this option avoid the administrative difficulties of applying Standard II, but it also allows the states free rein to regulate agriculture and related work as an integrated whole. Once again, lack of uniformity among state laws would present some problems. When confronted with analogous charges regarding section 14(c), Sen. Kennedy, Massachusetts, replied that:

"If any effort is made to use this provision as an opportunity to limit rights which all of us believe all American working people and employers in these States have, then it will be very easy under this provision for the National Labor Relations Board by administrative decision to assume much fuller jurisdiction."

Likewise, if the states abuse this opportunity to regulate agriculture more fully, the NLRB can simply reassert the complete measure of its jurisdiction over the proposed unit.

A far more serious question is whether this option actually enables the California ALRB to assert jurisdiction over these unit members. Only the labor relations of "agricultural employees" can be regulated by the ALRB, and that term is statutorily limited to mean:

"One engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code)."

A Board declination of jurisdiction would not make the members of the proposed unit "employees excluded from the coverage of the National

Labor Relations Act, as amended, as agricultural employees." In fact, such
declation would be premised upon the non-agricultural status of the unit
under Standard II, and the ALRB would technically be prohibited from
asserting its jurisdiction over these workers.

A careful examination of the spirit and intent of Section 1140.4(b) of
the ALRA, however, favors the exercise of ALRB jurisdiction, especially
when not to exercise jurisdiction would freeze a segment of people em-
ployed in agriculture-related work into a new no-man’s land. Section
1140.4(b) was obviously designed to avoid any conflict with federal labor
law by prohibiting the ALRB from regulating the organization of persons
presently subject to the Board. But, were the NLRB to decline jurisdiction,
potential conflicts between state and federal law would, for all practical
purposes, be removed. Since no policy of section 1140.4(b) would be served
by a continuing refusal to accept jurisdiction, and since the ALRA policy
favoring units composed of all the agricultural workers of an employer
would be frustrated by failing to include persons engaged in agriculture-
related jobs in such units, the ALRB could and should assert jurisdiction in
the event of NLRB declination.

V

CONCLUSION

The Teamster election petition pending before the NLRB presents a
unique opportunity to confront a serious disparity in Board precedent regarding
the scope of the section 2(3) NLRA agricultural exemption. In resolving
this conflict, the Board can choose among several options, none of which is
entirely satisfactory. On balance, however, the application of Standard
I—exercising NLRB discretion to attach broader boundaries to section 2(3)
of the Act than the FLSA Administrator has given section 3(f), and classify-
ing the entire proposed unit as agricultural—presents the most attractive
solution. It avoids the administrative nightmare posed by an application of
Standard II, reflects both the policy and structure of the NLRA, coincides
with the economic organization of modern agriculture, and ensures that
California’s Agricultural Labor Relations Board will be able to exercise
jurisdiction over the unit’s truckers, stitchers, and machine operators.

155. id.