Agricultural Labor Relations Act 40th Anniversary

June 24, 2015 at 5:00 PM

Leland Stanford Mansion

800 N St., Sacramento, CA 95818

William B. Gould IV, Chairman

Chairman of the National Labor Relations Board (1994-1998)

It is a pleasure to be here on this June 24 at the Stanford Mansion. On behalf of the Agricultural Labor Relations Board, I am pleased that Governor Edmund G. Brown Jr. can be with us this day, while confronting the challenges of tunnel and railway construction and the unprecedented drought which afflict our state and imperil our farmlands on which employees, growers and public so considerably depend.

As a Stanford law professor who has taken up the charge of steering this ship which we call the Board through what at times is a sea of conflict and turmoil, I cannot resist taking note of something about which virtually we all can agree, i.e. the appropriateness of this venue. And I note also that Governor Stanford, the second of the Civil War California Governors, was inaugurated in 1862 under circumstances that we can only envy today-heavy rain that was so intense that it interfered with travel around the state capitol.

This year, 2015, is the year of anniversaries. As such, it is meet and right-to invoke the 1928 Book of Common Prayer parlance- that we both focus upon how we got to this stage as it relates to farm labor and growers, where we are at now, and where we might be going in the future.

As we celebrate or commemorate this 40th anniversary of the Agricultural Labor Relations Act (ALRA), an achievement realized at the outset of the first Edmund Brown Jr. Administration in 1975, in the wake of discussions, philosophical, amicable and even at times angry between this Governor, Cesar Chavez, grower representatives and other interested parties-now in 2015 it is appropriate to reflect anew upon the policy fashioned from the legal framework embedded in this important statute.

For the promise of this law in 1975 was to promote a democratic tradition in the fields through freedom of association for all agricultural workers as well as the encouragement of the collective bargaining process itself-a promise previously denied farmworkers through their exclusion under the National Labor Relations Act, the 80th anniversary of which we also mark. It was thought that pernicious delays, so frequently associated with the NLRA beginning in the early 70's, could be eliminated or at least diminished under a new law unencumbered by previously observed deficiencies. The so called makewhole provisions now frequently associated with interminable litigation would plug one of the many NLRA loopholes. Fulfilling the promise remains very much a work in progress.

This then is the year of significant anniversaries and thus the opportunity for reflection. But the most significant of them all is the historic bedrock upon which both the NLRA and ALRA have been built- Magna Carta itself which first emerged as a limit upon unqualified authority in 1215. Eight hundred years ago, confronting King John, acting only on behalf of privileged nobles, the barons formulated landmark Article 40 which established an equivalency between the denial of "right and justice" and its "delay". Out of this came the well-known and much cited maxim that "justice delayed is justice denied". Now in 2015 the urgency posed by Magna Carta's Article 40 here in California's fields has never been more pressing.

We are far away from the halycon days of the late 70's and early 80's when the Board in Sacramento and throughout the state was besieged with representation petitions-it conducted 150 elections in the first two months- and unfair labor practice charges in the context of considerable union organizational activity. Today not one single representation petition has been filed by a labor organization since I took office in March 2014-yet unfair labor practice litigation persists aplenty, principally involving spontaneous concerted activity by workers who protest employment conditions which they deem to be unfair and who are totally uninvolved with union organizational campaigns at all. But that really is the tip of the iceberg.

Whatever the content of litigation before the Board-at present we have had some rather well known cases arising out of decertification petitions- the pattern of these past four decades represents a sharp departure from union organization activity in 1975. If the view is that agricultural workers are inactive because of their satisfaction with employment conditions, that is a proposition belied by our unfair labor practice docket in 2015. For those who believe that farmworker grievances are only historical, let them come to the Coachella Valley's town of Mecca where I and my colleagues witnessed migrant farmworkers sleeping both in and next to their automobiles, sometimes switching with one another between the auto itself and the adjacent mats. In the 21st century the absence of housing for workers in the richest country of the world is unbelievable.

So let us remember that the path towards justice in the fields is a bumpy, evolving and incomplete process. Let us also remember that five centuries elapsed subsequent to Magna Carta before its provisions were invoked against England's autocratic monarchy- and yet another 200 years before its corollary, the evolution of Parliament as an institution through which the broad mass of people could be represented by virtue of the reform acts of the nineteenth century.

Forty years may be substantial in one's own life span-the age at which one obtains the first inkling of the footsteps of the Lord. Yet it is a mere blip on the screen of democratic evolution on the great stage of history.

Let us not forget that 1215, however mythical its origins, similarly served as an inspiration for the great post-Civil War amendments in this country triggered by Appomattox 150 years ago, designed to realize President Lincoln's objectives, that is, "..the weights should be lifted from the shoulders of all men, and that all should have an equal chance." Yet, generations were denied equality and opportunity, a substantially unaltered pattern until fundamental reforms in the 60's and 70's, of which our statute is a part.

So too our statute has not borne out some of its early promise. Legislative recognition that our cases were not being handled with sufficient dispatch were first manifested in the enactment of the Mandatory Mediation and Conciliation Act of 2002, mandating first contract agreements where voluntary resolutions of collective bargaining differences could not be obtained sometimes after many years of bargaining, thus diminishing the prospect of ongoing

representation-a statutory approach thrown into some measure of constitutional doubt by the recent division between the views of our Third and Fifth Districts of Courts of Appeal.

More directly, the 2011 amendments signed into law by Governor Brown mandated a timetable for a handling of the elections themselves. But none of these measures directly addressed the 500 pound gorilla which has become such a dominant problem in connection with the administration of the ALRA in 2015, those cases where unfair labor practice allegations and issues relating to the conduct of elections have made the consolidation of election disputes with unfair labor practice machinery appropriate.

Only last week did our Board finally fashion proposed rule changes designed to address delay in the realization of worker sentiment in such cases. Only through such measures can we keep faith with Magna Carta's Article 40 and its promise to provide justice-justice in this case to farmworkers and growers both of which want to get on with their lives rather than be enmeshed in *Bleak House*-type litigation without end.

But if delay has posed problems not fully anticipated in 1975, a whole host of developments changed the field substantially even before the threat posed by our drought,

present and future. The first, of course, involves the advent of labor contractors through which employers effectively control workers while limiting their own liability along with the myriad administrative regulations that have become more ephemeral and distant.

A second relates to the presence of undocumented workers living in the shadow of our law as well as the more recent advent of indigenous employees who speak frequently neither Spanish nor English and are now over 20% of the California farmworker population. As is well known the number of undocumented present in the economy began to swell in the 1970's and early 80's and the United States Supreme Court said in 1984 that undocumented employees were employees within the meaning of the National Labor Relations Act because, said Justice O'Connor, they both fit the literal definition of employee and to exclude them would create an unprotected group and that would incentivize the exploitation of both the undocumented and the employees who have the right to work here. Our Agricultural Labor Relations Board, again in the 80's, held that such workers were qualified to receive back pay – and while I was Chairman at the NLRB that Board so held in 1997.

But the landscape was significantly altered in 2002 when the Supreme Court, by 5-4 vote held, in an opinion by Chief Justice Rehnquist, that the undocumented workers are not entitled to monetary relief, that immigration law trumps labor law and that, in part, to rule to the contrary would provide a magnet for employees who would come to the United States to seek such benefits. As all labor lawyers know, monetary relief is the critical prophylactic in the agricultural employment relationship.

Where does that leave us in California for workers excluded from the National Labor Relations Act and covered by our law? In this connection, it is well known that a substantial portion of the California workforce is undocumented and that therefore the applicability of our statutory protections are vital to the protection of the agricultural workforce. Last summer the California Supreme Court in the *Salas* decision held that our state law protecting undocumented workers meant that, under some circumstances, undocumented workers could obtain damage relief under California law prohibiting disability and discrimination.

That then is some measure of the legal landscape that confronts us in the California fields i.e. whether "the applicable precedent" – to use the language of the ALRA itself –i.e., the NLRA

applies under the circumstances. But, in my view, there is an equally more fundamental problem. For there is a substantial likelihood that many, indeed most, workers do not even know of our law, or its procedures or its remedies whatever the courts or our Board hold in the future about the scope of them. Again, in 2015, remember that most of the unfair labor practice proceedings pending before the Board involve spontaneous action by unorganized employees who are not involved in a union organizational campaign but simply protest working conditions such as wages, safety or sexual harassment which they deem to be unfair.

Again, using Magna Carta as our lodestar and quoting the British historian David Carpenter, it is "…vital that [the provisions of the law] should be well known both in their general principles and in their detail." Thus, the charter itself was both made known through "…proclamations of the content and distributions of the text". In 1218 sheriffs were sent "engrossments" to be "read..in..county courts", and copies were placed in each cathedral and "collegiate churches" so that everyone entering could plainly see it.

Now, most modern employment statutes provide that posted notice contents be made available and be provided in all work establishments. The NLRA, antedating these more recent

laws, does not have such a provision although that Board is now attempting to provide for notice posting by rulemaking.

Our own ALRA contains some of the same notice posting problems. Yet, given the isolation as well as illiteracy of many of the employed agricultural workers, notice posting is hardly enough. Indeed, I would submit that in agriculture it is almost beside the point. That is why I told the Senate Budget and Fiscal Review Committee that my Board will attempt to fashion rulemaking which will expose the statute's content, both substantive and procedural, to workers and all other interested parties.

The root of this lies in the invitation provided by the Court of Appeal for the Fourth District fashioned during the second Brown Administration in the 1970's, explicitly inviting us to provide rules relating the circumstances under which our lawyers can make the content of our statute known to workers on employer property. This summer we will hold a series of hearings where the farmworker population is substantial. Amongst the inquiries to be undertaken will be (1) the extent to which farmworkers, including undocumented and indigenous farmworkers, are aware of their rights under the ALRA; (2) the factors that make communication of the statutory

content difficult, including language barriers for workers who speak neither English nor Spanish and illiteracy; (3) the importance of the workplace as opposed to other facilities to provide some kind of education. Adjudication is meaningful only if those to whom is it aimed are aware of its existence!

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"The greatest accomplishment of my administration was the enactment of a farm labor relations law." Those were the words of our Governor at a different time and place. One can only wonder how the passage of time has affected that view; perhaps as I invite him here to the podium he can share his reflection with us.

So, this is where we are in 2015 in youthful middle age! This Board, like that very first one 40 years ago tries to help shape the horizon. The lessons of Magna Carta and Appomattox, both inspirational and humbling, are that it will take some time. But you may be assured that we are on the case nonetheless.