A Preliminary Survey of the Arizona Farm Labor Act

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Agriculture in Arizona is big business. Cash receipts from all agricultural commodities and government subsidy payments totaled almost three-quarters of a billion dollars in 1971.[1] In 1972 the Arizona legislature moved to regulate labor relations in this important industry by passing the controversial Arizona Farm Labor Act (AFLA).[2] The reasons the legislature assigns for the passage of the Act are contained in its "declaration of policy":

> It is . . . the policy of this state that the uninterrupted production . . . of agricultural products is vital to the public interest. It is also declared to be the policy of this state that agricultural employees shall be free to organize, to take concerted action, and . . . enter into collective bargaining contracts . . . It is further declared that there now exists an inequality of bargaining power between agricultural employers and labor unions . . . While the right to strike is a basic right of organized labor, such right must take into account the perishable character and the seasonal nature of agricultural products and must be limited and regulated accordingly. It is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures . . . and to declare that certain acts are unfair labor practices. . . .[3]

Despite a long-term trend toward mechanization and a resultant decrease in seasonal hand labor,[4] there is still a monthly average of

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1. ARIZONA CROP AND LIVESTOCK REPORTING SERVICE, ARIZONA AGRICULTURAL STATISTICS, BULLETIN S-7 9 (March 1972). Sales of crops totaled $304,268,000; sales of livestock and animal products were $395,197,000; and government payments were $46,431,000. By way of comparison, the value of copper production in Arizona totaled approximately $913,000,000 in 1972. Arizona Weekly Gazette, Jan. 9, 1973, at 1, col. 5.

2. ARIZ. REV. STAT. ANN. §§ 23-1381 to -1395 (Supp. 1972-73). Idaho, Ch. 204, §§ 1-15 [1972] Idaho Sess. Laws 563-75, and Kansas, Ch. 193, §§ 1-14, [1972] Kan. Sess. Laws 749-60, have also recently passed farm labor laws. See discussion at note 53 *infra*. A California initiative to establish farm labor legislation was defeated in the general election of November 1972.

3. ARIZ. REV. STAT. ANN. § 23-1381 (Supp. 1972-73).

4. In 1950 there was a reported monthly average of 22,900 seasonal workers in

29,000 paid agricultural workers employed on farms in Arizona.[5] Most Arizona farm workers are not members of labor unions.[6] Aside from scattered groups of field workers recently organized by the United Farm Workers Union, the most significant agriculture-related union organization in Arizona has been among the "stitchers" and "haulers," the employees who prepare the packing boxes for the field workers and who drive the trucks that take the produce from the fields. Some 500 to 600 of these permanent employees are members of the Teamsters Union.[7]

Many provisions of the AFLA are taken from or are similar to those of the National Labor Relations Act (NLRA).[8] For example, the AFLA sets out the rights of employees to form unions and bargain over wages and conditions of employment.[9] It defines certain "unfair labor practices"[10] and provides remedies for persons aggrieved by such practices.[11] It creates an election procedure by which employees may select union representation.[12] Some provisions of the AFLA, however, have no parallel in the NLRA. For example, willful violations of the AFLA are "misdemeanors" punishable by fines of up to $5,000, or one year imprisonment, or both,[13] and a party injured by such violation may obtain civil damages and injunctive relief.[14] The AFLA also allows an employer to obtain a 10-day restraining order against a lawful strike.[15]

This comment will first survey the important provisions of the

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Arizona, ARIZONA STATE EMPLOYMENT SERVICE, AGRICULTURAL EMPLOYMENT IN ARIZONA SINCE 1950 at 9 (1968). By 1971, this figure had dropped to 14,900. *Id.* at 26d.

5. Of these workers, 14,100 are classified as "regular hired farm workers" and 14,900 as "seasonal" workers. *Id.* at 26d. Hired farm workers are defined as those hired or assigned to work on any one farm for a continuous period of 150 days or more in a year. Seasonal workers are those hired or assigned to work on any one farm for less than a continuous 150-day period in a year. *Id.* at 3. These figures are monthly averages only, so the annual total of individuals employed in agriculture would be much higher than any of the monthly average figures.

6. H. PADFIELD AND W. MARTIN, FARMERS, WORKERS AND MACHINES 9 (1965).

7. Interview with Lee Phillips, President and Business Agent, Local 274, International Brotherhood of Teamsters, July 19, 1972. These workers have a union contract providing for hourly wage rates of up to $4.60 per hour plus piece rate in 1972. *Id.* By comparison, the composite rate per hour for all Arizona farmworkers was $1.42 in 1970. EMPLOYMENT SECURITY COMMISSION OF ARIZONA, FARM LABOR AND RURAL MANPOWER SERVICES 1970 at 20 (1971).

8. 29 U.S.C. §§ 151-87 (1970).

9. ARIZ. REV. STAT. ANN. § 23-1383 (Supp. 1972-73); *cf.* 29 U.S.C. § 157 (1970).

10. ARIZ. REV. STAT. ANN. § 23-1385 (Supp. 1972-73); *cf.* 29 U.S.C. § 158 (1970).

11. ARIZ. REV. STAT. ANN. § 23-1390 (Supp. 1972-73); *cf.* 29 U.S.C. § 160 (1970).

12. ARIZ. REV. STAT. ANN. § 23-1389 (Supp. 1972-73); *cf.* 29 U.S.C. § 159 (1970).

13. ARIZ. REV. STAT. ANN. § 23-1392 (Supp. 1972-73). The NLRA, on the other hand, contains no criminal penalties except those for interference with a board agent. 29 U.S.C. § 162 (1970).

14. ARIZ. REV. STAT. ANN. § 23-1393 (A) (Supp. 1972-73). The NLRA provides for damage suits only in the event of a secondary boycott. 29 U.S.C. § 187 (1970).

15. ARIZ. REV. STAT. ANN. § 23-1393(B) (Supp. 1972-73). The NLRA contains no such provision.

AFLA and consider the workability of the Act. Ambiguities in the legislation regarding election procedures and the bargaining unit are analyzed and it is concluded that, depending upon the construction and application given these provisions, the AFLA presents serious obstacles to effective union organization and may deny participation in representation elections to seasonal farmworkers. Next, potential constitutional challenges to the Act will be examined. The degree of constitutional protection afforded union formation by the first amendment guarantee of freedom of association will be considered, and the right of free speech as applied to labor picketing will be discussed. Finally, since the Act provides that a grower may obtain a 10-day restraining order against a lawful strike, the degree of constitutional protection provided to labor strikes is briefly examined.[16]

THE MECHANICS OF THE AFLA

This section will survey the AFLA provisions related to defining who is covered by the Act, the election procedures, regulation of strikes and the definition of and remedies for "unfair labor practices." Parallels and differences between the NLRA and the AFLA will be noted.

Employees Covered

Agricultural employees covered by the AFLA are those "engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field."[17] Specifically excluded are tenants and sharecroppers, relatives of the agricultural employer, independent contractors, stitchers and haulers, supervisors and executives.[18] Also excluded are employees of employers with fewer than six workers unless the employer opts for coverage under the Act.[19] While workers covered by the NLRA are also specifically excluded from coverage, this is of little practical importance since farm workers are excluded from the NLRA.[20]

16. The constitutional issues of equal protection, vagueness and overbreath are outside the scope of this comment.
17. ARIZ. REV. STAT. ANN. § 23-1382(1) (Supp. 1972-73).
18. *Id.*
19. *Id.* § 23-1382(2).
20. *Id.* § 23-1394. This section restates the principle that the NLRA pre-empts conflicting state regulation. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959). Significantly, workers covered by the AFLA are specifically excluded by the NLRA. 29 U.S.C. § 152(3) (1970). These workers are those engaged in the growing or harvesting of agricultural crops or the packing of such crops where this occurs in the field. The reason these workers were excluded from the NLRA is unclear. When the NLRA was first introduced in 1934 as S. 2926, 73d Cong., 2d Sess. (1934), farmworkers were clearly within its scope. When the Bill was reported out of the Sen-

Workers who are recruited by an independent contractor to do agricultural work for the benefit of an agricultural employer will be treated as employees under the Act if otherwise qualified and if the grower pays their wages.[21] This will be true even though the third party, usually called a labor contractor, supervises the workers, does the bookkeeping and issues the paychecks.[22] The contractor will be treated as their employer for the purposes of the Act.[23]

The Representation Election

Under the Act, a group of workers may choose a union to represent them in collective bargaining with their employer.[24] The employer is required to bargain with that representative, however, only if it is chosen through the election procedure set out in the Act.[25] Moreover, once a representative is elected in compliance with the Act, it is the exclusive representative of the employees in the "unit" for the purpose of collective bargaining.[26]

Before an election can be held, the union must first demand and be denied recognition by the employer.[27] This provision is probably designed to promote voluntary union recognition and thus avoid the necessity of an election. Significantly, there is no provision setting a time within which the employer must answer the request for recognition. Rather than extending recognition on demand, the employer will more likely deny the request and wait for the workers to petition for a representation election, or the employer himself may petition the Agricultural Employment Relations Board (AERB) to conduct an elec-

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ate Committee on Education and Labor, the term "employee" was redefined to exclude those employed as "agricultural laborers." S. REP. No. 1184, 73d Cong., 2d Sess. 1 (1934). Virtually no discussion appears in the Congressional Record concerning the reasons for the exclusion of farmworkers. It is not unreasonable to speculate, however, that at least one reason was the opposition of the powerful farmers' lobby and the corresponding lack of political power of the farmworkers. See Note, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 384 (1968).

There will be some agricultural workers who will be excluded from both the AFLA and the NLRA. Excluded under the NLRA are not only those workers who are engaged in growing crops but also, for example, those engaged in dairying and the raising of livestock and poultry. Pub. L. No. 91-667, Jan. 11, 1971. *See also* Fair Labor Standards Act, 29 U.S.C. §§ 203(e), (f) (1970). The AFLA, however, only covers a portion of farm laborers—those who work in growing, harvesting and packing crops in the field. Workers engaged in raising livestock, poultry, dairying or in certain packing operations not done in the field, therefore, will not be covered by either law.

21. ARIZ. REV. STAT. ANN. § 23-1382(1) (Supp. 1972-73).
22. *Id.*
23. *Id.* § 23-1382(2).
24. *Id.* §§ 23-1381, -1383, -1389.
25. *Id.* § 23-1385(A)(5).
26. *Id.* § 23-1389(D).
27. *Id.* § 23-1389(C)(1). See text accompanying notes 67-72 *infra* for a discussion of the problem of an employer recognizing a union which is not shown to him to represent a majority of his employees.

tion.[28] If an employer does not petition and denies the request for recognition, the union then may petition for an election by showing that at least 30 percent of the employees in the unit wish to be represented by the union.[29] If the AERB has reasonable cause to believe that a petition presents a "question of representation,"[30] that is, that a sufficient number of workers desire to have a union represent them to justify the expense of conducting an election, it will set a pre-election hearing.[31] Again, there is no provision stating how soon the Board must act on the petition or how soon the hearing should be held. If the Board determines at the hearing that there is a question of representation, it will direct an election by secret ballot,[32] but there is no provision establishing when the election must be held.

Once the AERB has set a unit election, the employer has 10 days to submit to the Board a list of his employees eligible to vote.[33] This list will be made available to the union.[34] The election must be by secret ballot and the choices on the ballot must include "no union."[35]

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28. ARIZ. REV. STAT. ANN. § 23-1389(C)(2) (Supp. 1972-73).

29. *Id.* § 23-1389(C)(1). This showing of 30 percent is usually made under the NLRA by presenting union authorization cards signed by 30 percent of the workers in the unit. See Bakelite Corp., 60 N.L.R.B. 318, 320-21 (1945).

30. ARIZ. REV. STAT. ANN. § 23-1389(D) (Supp. 1972-73). It is unclear exactly what will establish a "question of representation." Presumably, however, a 30 percent showing by the union would raise a valid question of representation as would a showing by the employer that a union claiming to represent a majority of his employees had demanded recognition as the exclusive bargaining representative of his employees. Under the NLRA, this 30 percent requirement is considered administrative rather than jurisdictional. The NLRB, therefore, can exercise its discretion and conduct an election where there has been less than a 30 percent showing of interest. NLRB v. White Constr. & Engr. Co., Inc., 204 F.2d 950, 953 (5th Cir. 1953); 29 U.S.C. § 159 (c) (1970).

31. ARIZ. REV. STAT. ANN. § 23-1389(C) (Supp. 1972-73).

32. The Board may also conduct an election to determine if the employees wish to continue to be represented by a union which has been certified by the Board or recognized by their employer. A petition for such a "decertification" election must present the same "question of representation" as a petition for a representation election. *Id.* § 23-1389. It remains to be determined, however, whether the decertification election is subject to the limitation that an election may not be held within 12 months of a previous election. See *id.* § 23-1389(G). An employer apparently may also petition for a decertification election based solely on his allegation that the union no longer represents a majority of his employees. *Id.* § 23-1389(C)(2).

Under the NLRA, an existing collective bargaining agreement will normally be a bar to a representation or decertification election. Copper Tire & Rubber Co., 181 N.L.R.B. 509 (1970) (decertification election); National Seal Div. of Federal-Mogul Corp., 176 N.L.R.B. 619 (1969) (representation election). This bar is designed to be a stabilizing influence on labor relations. Under the AFLA, however, it is specifically provided that an existing contract will not bar a decertification election. ARIZ. REV. STAT. ANN. § 23-1389(J) (Supp. 1972-73). Presumably, the contract will bar a representation election since there is no such specific provision regarding representation elections.

33. ARIZ. REV. STAT. ANN. § 23-1389(I) (Supp. 1972-73). The Act gives no criteria for determining voting eligibility. Presumably, this will be determined at the pre-election hearing. The practice of the NLRB is to allow those employees to vote who were on the payroll shortly before the direction of the election. Merrimac Hat Corp., 85 N.L.R.B. 329, 332 (1949).

34. ARIZ. REV. STAT. ANN. § 23-1389(I) (Supp. 1972-73).

35. *Id.* § 23-1389(D). While the NLRA does not spell out this requirement, the

If the union receives a majority of the votes cast, it will be certified by the Board as the representative for that unit and the employer will be required to "bargain collectively" with the union.[36]

The Bargaining Unit

A crucial factor in assessing the workability of the election procedure is the definition of the "bargaining unit" given by the AERB under the Act. The Board is directed to form the unit from either all the "permanent" employees, all "temporary" employees or both.[37] Thus, there may be one or two election units on each farm, depending on whether the permanent-temporary division is made.

Permanent workers are defined as those "over sixteen years of age who . . . [have] . . . been employed by a particular agricultural employer for at least six months during the preceding calendar year."[38] Another section creates an ambiguity, however. The Board is instructed to form the bargaining unit from the employees "working at the farm."[39] In effect, it would appear that a worker could qualify as a permanent employee under the Act but still be excluded from voting in an election in the unit. This would occur when a worker had been employed by a particular employer for more than 6 months during the preceding year but was not employed at the time of the election. In order to insure the fullest participation in the election procedure, the Board should allow all workers otherwise classified as permanent to vote whether or not they are currently employed at the farm.

NLRB has found that to insure the employee his free choice of representation the choice of "no union" must appear on the ballot. Solomon Mfg. Co., 3 N.L.R.B. 926, 929 (1937). If more than one union has made a 30 percent showing, then both will appear on the ballot together with "no union." ARIZ. REV. STAT. ANN. § 23-1389(D) (Supp. 1972-73). If there are two or more unions on the ballot together with "no union" and no choice receives a majority, a run-off election will be held between "no union" and the union which received the highest number of votes in the first election. *Id.* § 23-1389(D). Under the NLRA, the choice in the run-off is between the two choices receiving the most votes in the first election. 29 U.S.C. § 159(c)(3) (1970).

36. ARIZ. REV. STAT. ANN. § 23-1385(A)(5) (Supp. 1972-73). *Id.* § 23-1385(D) provides:

> For the purposes of this section, to 'bargain collectively' is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment which directly affect the work of employees, or the negotiation of an agreement, or to resolve any question arising thereunder. To 'bargain collectively' includes the furnishing of necessary and relevant information in connection with the negotiation of an agreement or any issue arising under such agreement, or requiring as a condition for entering into an agreement the execution of a written contract incorporating any agreement reached if requested by either party. . . .

37. *Id.* § 23-1389(B).
38. *Id.* § 23-1382(1).
39. *Id.* § 23-1389(B).

A temporary worker is defined as "over sixteen years of age . . . employed by a particular agricultural employer and who has been so employed during the preceding calendar year."[40] Thus, a worker could be employed during certain times of each year by an employer and yet could not vote in an election if he was not currently employed.[41]

The Act speaks in terms of a "unit" both for holding an election and for collective bargaining.[42] The makeup of this unit is to be determined by the Board according to guidelines set down in the statute:

> [t]he unit . . . shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principle factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.[43]

The defintion of the unit given by the Board in exercising this power over a particular farm may impose burdens on the organizational efforts of the farmworkers involved. On its face, this subsection directs the Board to make the unit determination on the basis of the temporary or permanent nature of employment only. Regardless of whether the Board decides to make the unit all permanent employees, all temporary employees or both, the result may be to group together workers who have divergent interests. Such a determination may include different groups of employees working in separate fields up to 100 miles apart.[44] Also, temporary workers who are employed at different times of the year may be placed in the same unit. Grouping such different workers in the same unit will be burdensome to organization because the employees may be involved in varied work on different crops and may have contrary interests both as to their choice of union representation and as to bargaining goals.

A second consequence of determining the unit solely on the basis of the temporary or permanent nature of the employment stems from

40. *Id.* § 23-1382(1).
41. *See* text accompanying note 39 *supra.*
42. *See* text accompanying note 37 *supra.*
43. ARIZ. REV. STAT. ANN. § 23-1389(B) (Supp. 1972-73).
44. "Farm means any enterprise engaged in agriculture which is operated from one headquarters where the utilization of labor and equipment is directed and which, if consisting of separate tracts of land, such tracts are located within a fifty mile radius of such headquarters." *Id.* § 23-1382(5).

the fact that an election held in the unit will be a bar to another election for 12 months.[45] Because groups of workers may be hired at different times of the year and yet be in the same unit, an election among one group will bar a group hired later in the year from petitioning the Board to hold an election. This result appears contrary to the announced policy of the Act that all farmworkers should be free to organize.[46]

Another major problem of the election procedure arises from the seasonal nature of the employment. Many workers involved in short harvests may not be on a farm long enough to organize within the time schedule established by the Act. Some 15,000 seasonal workers[47] are hired principally to harvest and cultivate vegetables and fruit at specific times of the year. Many of these workers will be hired only during the peak of the harvest, which may be as short as 10 days.[48] Thus, while the "unit" of temporary workers may exist as such for only a short period, it is likely that the election procedure may take much longer.

If a union seeks to have the AERB conduct a representational election, it must first demand and be denied recognition by the employer.[49] The Act does not specify how long the union must wait for a refusal before it can obtain an election. It also takes time for the hearing to determine whether a question of representation exists.[50] If the Board determines that an election should be held, the employer has 10 days in which to submit a list of employees who are qualified to vote.[51] By the time an election is conducted, therefore, it is possible that the harvest will have been completed and the workers will have moved to another farm. Since they are no longer working at the farm they could not vote in the election.[52] If the unit contained only temporary workers, the election would be decided by the few workers left or, if there were no workers left, there would be no election. If the unit was comprised of both temporary and permanent workers, the permanent workers who were left would decide the election. In either

45. *Id.* § 23-1389(G).
46. *Id.* § 23-1381.
47. *See* note 4 *supra.*
48. While the total length of the harvest may be much longer, the peak period in which most of the workers are employed may be as little as 10 days in the case of lettuce. ARIZONA CROP AND LIVESTOCK REPORTING SERVICE, ARIZONA AGRICULTURAL STATISTICS, BULLETIN S-7 at 5 (March 1972); Interview with Richard Harper, Manpower Specialist, Tucson Office Rural Manpower Service, State Employment Security Commission, in Tucson, Arizona, Nov. 8, 1972.
49. ARIZ. REV. STAT. ANN. § 23-1389(C) (Supp. 1972-73).
50. *Id.*
51. *Id.* § 23-1389(I).
52. *See* text accompanying notes 39-41 *supra.*

case, the fate of the majority of the workers would be decided by an unrepresentative sample, if an election is held at all.

Calling a Strike

Assuming an election is held and a representative is selected, the employer is required to bargain collectively with that representative. If collective bargaining is unsuccessful and the parties are unable to agree on a contract, the union may elect to strike.[53] If there is a current contract in force, however, the party desiring to modify the terms must give notice at least 60 days before it expires.[54] The party seeking the change must meet and confer with the other party to negotiate a new contract, and the present agreement must be kept in full force and effect without a strike or lockout for the 60-day period.[55] In addition, before a strike may be called it must be approved by a majority of all the employees in the unit, not merely of those voting,[56] by a secret ballot election.

If the union satisfies the 60-day notice and strike vote requirements and is determined to strike, the employer may nonetheless prevent the strike by seeking relief in superior court. The Act provides that the superior court shall grant a 10-day restraining order against a lawful strike if the employer agrees to submit the issues in dispute to binding arbitration.[57] Apparently only the employer has the obliga-

53. ARIZ. REV. STAT. ANN. § 23-1381 (Supp. 1972-73). The provisions of the recently adopted Idaho and Kansas farm labor laws regarding strikes are substantially different from those of the Arizona Act. Under the Idaho Act, a grower may obtain an injunction against a strike only if the union has committed an unfair labor practice. Ch. 204, § 12, [1972] Idaho Sess. Laws 567, 574-75. The Kansas Act is more stringent in its control of strikes than either the Idaho or Arizona laws. Under the Kansas Act, if the parties to a labor dispute reach an impasse, the state will provide fact-finding and mediation procedures to promote voluntary settlement of the dispute. Ch. 193, § 9(a)-(c), [1972] Kan. Sess. Laws 757. If that fails, however, the parties will be required to submit the issues to binding arbitration. *Id.* § 9(d) at 757-58. The Act makes it an unfair labor practice for a union to call a strike during the harvest, during a period of marketing of livestock or while mediation or arbitration is being conducted. *Id.* § 11(c)(7) at 759. The Kansas Act was vetoed by the Governor because, in the opinion of the Kansas Attorney General, the bill was unconstitutional. The veto was overridden by the legislature, however. See [1972] Kan. Sess. Laws 1456 for the Governor's veto message and the opinion of the Attorney General.

54. ARIZ. REV. STAT. ANN. § 23-1385(E)(1) (Supp. 1972-73); *cf.* 29 U.S.C. § 158(d)(1) (1970).

55. ARIZ. REV. STAT. ANN. §§ 23-1385(E)(2), (3) (Supp. 1972-73); *cf.* 29 U.S.C. § 158(d)(4) (1970).

56. ARIZ. REV. STAT. ANN. § 23-1385(B)(13) (Supp. 1972-73). The NLRA has no such strike vote requirement. In most other states which have adopted similar legislation, the approval must be by a majority of those voting, not of those in the unit. H. NORTHRUP AND G. BLOOM, GOVERNMENT AND LABOR 378 (1963). Consider the problem faced by permanent workers where their unit is defined by the AERB to include temporary workers and where the temporary workers are not currently employed on the particular farm. The permanent workers in such a case could not validly strike under the Act, since even if they obtained a majority of "permanent" votes, the temporary workers would generally not have voted, due either to geography or to lack of interest, and the requisite majority of those *in the unit* could not be attained.

57. ARIZ. REV. STAT. ANN. § 23-1393(B) (Supp. 1972-73).

tion of submitting to binding arbitration. The union will probably accept arbitration in most cases, however, since without an effective strike it has little economic leverage with which to seek concessions from the employer.

If an illegal strike or boycott is instituted, or if one is threatened, the employer will be entitled to injunctive relief issued *ex parte* under Rule 65 of the *Arizona Rules of Civil Procedure* if he shows that the strike "will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality, or marketability of an agricultural commodity or commodities for human consumption in commercial quantities."[58]

Unfair Labor Practices

The "unfair labor practices" outlined in the Act are specific actions which the legislature has determined to be contrary to the state's agricultural labor policy or which thwart the operation of the Act. Failure to comply with some of the procedures and requirements already discussed constitutes an unfair labor practice. For example, it is an unfair labor practice to fail to bargain in good faith,[59] give 60 days notice before striking if there is a contract in force[60] or obtain a majority vote before a strike is called.[61]

The most important unfair labor practices apply to both employers and unions. These forbid both the employer and the union from restraining or coercing employees in the exercise of their rights under the Act such as the right to organize and form unions or to refrain from doing so.[62] It is also an unfair labor practice to restrain or coerce

58. *Id.* "For the purpose of this subsection an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities." *Id.*

59. *Id.* §§ 23-1385(A)(5), (B)(4).

60. *Id.* § 23-1385(E)(1).

61. *Id.* § 23-1385(B)(13).

62. *Id.* §§ 23-1385(A)(1), (B)(1). Because of the broad language of these sections, it is useful to examine the experience of the NLRB in administering the NLRA which contains similar provisions. See 29 U.S.C. §§ 158(a)(1), (b)(1) (1970). The NLRB has found that an employer has "interfered with, restrained and coerced employees" when he has forbidden solicitation of union members by employees during their own time in non-work areas of the plant, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); where he was responsible for beating a union organizer, Brown Shoe Co., 1 N.L.R.B. 803 (1936); where he placed under surveillance employees engaged in union activity, Goodall Co., 86 N.L.R.B. 814 (1949); and where he conferred an additional holiday and gave other benefits shortly before an election to influence its outcome, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). These decisions construed 29 U.S.C. § 158(a)(1) (1970), which is similar to section 23-1385 (A)(1) of the AFLA.

The NLRB found that a union violated 29 U.S.C. § 158(b)(1) (1970), which parallels section 23-1385(B)(1) of the AFLA, when a union official made a speech in front of a store whose employees the union was attempting to organize. The official declared that the union intended to organize the store and that "wives and

employees in the exercise of their rights under other state labor laws.[63] An employer may not discriminate and a union must not force him to discriminate "in regard to hiring or tenure of employment or any term or condition of employment . . . [where a purpose of the discrimnation is] . . . to encourage or discourage membership in any labor organization."[64] Also, both unions and employers are forbidden to penalize anyone who invokes the processes of the Act.[65]

An employer commits an unfair labor practice if he dominates or interferes with the formation or administration of any labor organization or contributes financial or other support to it.[66] This section is apparently designed to enable the employees to exercise their rights of self organization free from interference even if this interference is in the form of support of one labor organization over another.

It is not altogether clear whether it will be an unfair labor practice for an employer voluntarily to recognize a union which is not shown to him to represent a majority of his employees.[67] The provisions of the NLRA[68] which are similar to the above mentioned AFLA sections[69] have been interpreted to prohibit an employer from recognizing a union as the exclusive representative of his employees unless a majority of the employees have designated the union as their representative.[70] The reason for making such recognition an unfair labor practice is that by giving recognition to a union which does not represent a majority of his employees, the employer is interfering with their right to refrain from bargaining collectively.[71] Such action also violates the NLRA provision which forbids an employer to support a labor organization.[72] Presumably, the respective provisions of the AFLA will be interpreted in a similar manner.

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children of employees had better stay out of the way if they didn't want to get hurt." Union Supply Co., 90 N.L.R.B. 436, 437 (1950).

63. ARIZ. REV. STAT. ANN. § 23-1385(A)(1) (Supp. 1972-73). These laws are *id.* §§ 23-1341 to -1342, 23-1301 to -1307, 23-1361 (1956). Section 23-1341 voids any contract by which an employee promises not to join a union (yellow-dog contract). Sections 23-1301 to -1307 make it unlawful to compel anyone to become or remain a union member (right-to-work law). Section 23-1361 defines the "blacklist" prohibited by ARIZONA CONST. art. 18, sec. 9, as a list circulated whereby a laborer is prevented from obtaining employment by action of the employers circulating the list.

64. ARIZ. REV. STAT. ANN. §§ 23-1385(A)(3), (B)(5)(d) (Supp. 1972-73).

65. *Id.* §§ 23-1385(A)(4), (B)(3).

66. *Id.* § 23-1385(A)(2).

67. This situation would arise only if no union had been certified by the Board, since if a union is certified it is deemed the exclusive bargaining agent. *Id.* § 23-1389 (D).

68. 29 U.S.C. §§ 158(a)(1), (b)(1) (1970).

69. ARIZ. REV. STAT. ANN. §§ 23-1385(A)(1), (2) (Supp. 1972-73).

70. International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 737 (1961).

71. *Id.* at 738; 29 U.S.C. § 158(a)(1) (1970).

72. International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 738 (1961); 29 U.S.C. § 158(a)(1) (1970).

The NLRA recognizes the special problems of the temporary nature of work in the construction industry, however, by specifically exempting employers in that industry from the usual prohibition against recognition of a union which has not proved that it represents a majority of the workers in the unit.[73] This exception permits contracts between the employer and the union in which the employer agrees to hire only through the union hiring hall, in effect giving the union exclusive recognition even though the employees have not yet been hired.[74] Once the employer desires to start work he will notify the union of how many workers he needs and the union will send out workers from the hiring hall on the basis of seniority.

To prevent a construction workers' union which has been recognized under this exception from binding the workers to an unacceptable contract, the NLRA provides that a contract between such a minority union and the employer will not be a bar to an election petition.[75] Therefore, if the workers were dissatisfied with the minority union or the contract, they could petition the NLRB to hold an election to decertify it as their representative.

Since the AFLA does not have a specific exemption allowing recognition of minority unions, a contract signed before the workers are hired may be an unfair labor practice.[76] Such a result would be unfortunate because the hiring hall has advantages to both employees and employers in industries which use temporary day workers.[77] The employer has a steady supply of temporary labor and the worker need not scout about to find temporary work. The AFLA, therefore, should be amended to allow recognition of minority unions and agreements for utilization of hiring halls. Workers could not be required to join the union in order to use the hall[78] and yet would benefit from its services. The workers at a particular farm would not be prevented from ousting the union as their representative if they so desired, since the Act provides that an existing certification or contract will not be a bar to a decertification election.[79]

Some unfair labor practices are applicable only to unions. A union may not penalize a person not a member of the union, "who refrains from compliance with a union rule, policy, or practice which es-

73. 29 U.S.C. § 158(f) (1970).
74. Such an agreement in Arizona would have to operate in a manner which did not discriminate against those who are not union members. See text and note 63 *supra*.
75. 29 U.S.C. § 158(f) (1970).
76. *See* text accompanying notes 67-72 *supra*.
77. Teamsters Local 357 v. NLRB, 365 U.S. 667, 672-73 (1961).
78. *See* note 63 *supra*.
79. ARIZ. REV. STAT. ANN. § 23-1389(J) (Supp. 1972-73).

tablishes or affects wages, hours, or working conditions at such person's place of employment."[80] To cause or attempt to cause an agricultural employer to perform certain acts will also constitute an unfair labor practice.[81]

Several unfair labor practices are aimed at limiting the union's use of secondary pressure on the employer.[82] Conducting a secondary boycott is declared to be an unfair labor practice.[83] It is also unlawful "to induce or . . . coerce any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle, transport, process, pack, sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists."[84]

The Act does recognize the legitimacy of secondary pressure by means of truthfully urging consumers not to buy the products of an employer with whom the union has a dispute.[85] There are severe lim-

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80. *Id.* § 23-1385(B)(2).

81. For example, *id.* § 23-1385(B)(5) makes it an unfair practice to cause an employer:

a) To pay or deliver or agree to pay or deliver any money or other thing of value for services which are not performed or are not to be performed.

b) To establish or alter the number of employees to be employed or the assignment thereof.

c) To assign work to the employees of a particular employer.

d) To discriminate in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Nothing in this paragraph shall prohibit agreements between labor organizations and agricultural employers which regulate hiring and tenure of employment on the basis of seniority; provided further that the labor organization is not given power to determine seniority unilaterally.

82. A union exerts secondary pressure on an employer by coercing or convincing another employer (secondary employer) on whom the primary employer depends, such as a purchaser of his products, to cease doing business with the primary employer until the union's demands are met. For example, if a union is on strike against a grower of lettuce (primary employer), it could put indirect economic pressure on the grower by convincing employees at a supermarket selling the lettuce (secondary employer) to strike until the supermarket agreed not to sell the lettuce. Alternatively, the union could picket the store asking drivers of trucks delivering goods not to cross the picket line, or it could ask the public not to patronize the store until the management stopped selling lettuce. All of these techniques would be illegal secondary boycotts under both federal and Arizona law. National Labor Relations Act, § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970); ARIZ. REV. STAT. ANN. §§ 23-1321 to -1323 (1956). On the other hand, if the union merely picketed, asking consumers in the community not to purchase the lettuce this would be a "consumer boycott" permissible under both federal and Arizona law. National Labor Relations Act, § 8 (b)(4), 29 U.S.C. § 158(b)(4) (1970), *construed in* NLRB v. Local 760, Fruit & Vegetable Packers, 377 U.S. 58 (1964); ARIZ. REV. STAT. ANN. § 23-1385(B)(8) (Supp. 1972-73).

83. *Id.* § 23-1385(B)(6) (Supp. 1972-73). Arizona law declares all secondary boycotts to be illegal, not merely those in agriculture. *Id.* §§ 23-1321 to -1323 (1956).

84. *Id.* § 23-1385(B)(7) (Supp. 1972-73). This language was apparently included because the United States Supreme Court, in interpreting the NLRA secondary boycott provisions which are similar to those of the AFLA, see 29 U.S.C. § 158(b)(4) (1970), found that the Congressional intent was not to make inducing a manager to make a management decision an illegal secondary activity. NLRB v. Servette, Inc., 377 U.S. 46 (1964). The Arizona legislature probably wanted to make clear that such action would constitute illegal secondary activity.

85. ARIZ. REV. STAT. ANN. § 23-1385(B)(8) (Supp. 1972-73).

its placed on this activity, however. A union may not urge consumers to boycott goods identified by a "trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name" with whom the union has no primary dispute.[86] This section would prohibit union activity such as the recent encouragement of a nation-wide consumer boycott of table grapes and the boycott encouraged by the United Farm Workers against the sale of non-UFW picked lettuce. Such a boycott would be an unfair labor practice because the use of generic terms such as "California grapes" or "non-UFW picked lettuce" would certainly include some growers with whom the union had no primary labor dispute. Since growers sometimes sell their produce to co-operatives or to common distributors, this section will prohibit consumer boycotts in many cases.

There are other unfair labor practices applicable to unions only. A union may not "intimidate, restrain, or coerce agricultural employers in the exercise of their rights guaranteed by section 23-1384."[87] Included are the right to join or refuse to join any labor organization or employer organization, the right to work on his own farm at any time, to manage, control and conduct his operations and to determine the type of equipment or machinery to be used. Apparently, the union cannot force the employer to bargain over these matters by threat of a strike or other pressure. These management rights will be subject to negotiation, however, if they relate to wages, hours, conditions of work and matters of safety, sanitation, health and the establishment of grievance procedures.[88] Thus, although the grower has a right to manage his operations, the choice of a particular pesticide presenting a safety problem presumably would be a proper subject of collective bargaining.

Under the Act it is an unfair labor practice for a union to picket or boycott an employer, or threaten to do so, in order to force the employer to bargain with the union when the employer has legally recog-

86. This provision may be susceptible to manipulation by the growers. If a union had a primary labor dispute with the grower of "Crispy" brand lettuce, under the terms of the Act the union could publicize the dispute and attempt to convince consumers not to buy that brand of lettuce. *Id.* § 23-1385(B)(8). If the grower of "Crispy" lettuce purchased a part of the lettuce that he marketed under the name "Crispy" from a grower with whom the union had no primary dispute, however, then the union activity would be an unfair labor practice. This would be so because the "permissible inducement or encouragement [allowed by the Act] does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name." *Id.* It is not unrealistic to speculate that a grower faced with a consumer boycott of his products might purchase the product of another grower with whom the union had no dispute in order to render his brand name immune from the boycott.

87. *Id.* § 23-1385(B)(11).

88. *Id.* §§ 23-1384(A)(1)-(5).

nized another union, when there has been an election in the preceding 12 months, or when a petition for an election has been filed.[89] If these criteria are inapplicable, a union will be able to strike to force the employer to recognize the union and bargain.[90] In many situations this may appeal to the union since it would be able to avoid the delay in waiting for the election and the possibility that by the time the election is held the crops will have been harvested and the workers gone. The employer may decide, however, to file for an election if the union does strike, thereby making the strike an unfair labor practice. He might gamble that by the time the election is conducted the work will have been completed and the temporary workers gone.

Remedies for Unfair Labor Practices

A party aggrieved by an unfair labor practice may request the Board to issue a complaint stating the charges and giving notice of a hearing before the Board or a member or an agent of the Board not less than 5 days after the serving of the complaint.[91] The person charged has the right to file an answer and to appear in person and give testimony at the hearing. If the Board finds the charges true it will issue findings of fact and an order requiring that the person cease and desist.[92] The Board may also order the offender to take affirmative action.[93] The Board can petition any superior court in the county where the unfair labor practice occurred or where the person lives or does business for enforcement of its orders,[94] and the court may grant temporary relief or restraining orders.[95]

A person adversely affected by a Board order may obtain review in superior court by filing a petition to have the order of the Board modified or set aside.[96] The court will proceed in the same manner as when the Board petitions for enforcement.[97] Any person aggrieved by any violation of the Act or any injunction issued under the Act may sue for damages and injunctive relief.[98]

89. *Id.* § 23-1385(B)(12).
90. *Id.* Under the NLRA, a union may not picket for recognition for more than 30 days without filing a petition for a representation election. 29 U.S.C. § 158(b)(7)(C) (1970).
91. ARIZ. REV. STAT. ANN. § 23-1390(B) (Supp. 1972-73).
92. *Id.* § 23-1390(C).
93. *Id.* These Board orders may also require the person "to make reports from time to time showing the extent to which he has complied with the order." *Id.*
94. *Id.* § 23-1390(E). The findings of the Board with respect to questions of fact shall be conclusive in the superior court "if supported by substantial evidence on the record considered as a whole. . . ." *Id.*
95. *Id.*
96. *Id.* § 23-1390(F). These petitions to the court filed under the AFLA "shall be heard by the court expeditiously, and if possible within ten days after they have been docketed." *Id.* § 23-1390(I).
97. *Id.* § 23-1390(F).
98. *Id.* § 23-1393(A).

CONSTITUTIONAL PROBLEMS

Freedom of Association and the Right to Organize

While the AFLA recognizes a "right" of farmworkers to organize,[99] the cumulative effect of some of its provisions will burden organizational efforts, possibly preventing many temporary farmworkers from participating in the selection of representative unions. The most important barrier to organization of farmworkers is the time element. In some cases, it will take longer to comply with the election procedure than it will to complete the harvest, and the workers thus will have left the farm before an election can be held.[100] In addition, certain workers will be excluded from the election unit because of the problem of defining an eligible "employee" under the Act.[101] The broad definition of the election unit will also hinder organization among farmworkers since many unrelated groups may be placed into one unit. In this case, an election among one group of workers will bar others employed in the same unit at a different time of the year from holding another election.[102]

The United States Supreme Court has recognized that the right to organize and join unions[103] and other organizations[104] is a fundamental right. In *NAACP v. Alabama*[105] the Court noted that the right of freedom of association was "an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[106] If state action results in curtailing the freedom of association, therefore, the state must justify its interest as compelling or such action will be an invalid abridgement of the first amendment.[107] In *NAACP v. Alabama* the Court also indicated that first amendment protections are not limited to speech or activity in any one particular area. The Court observed that state action which curtailed the freedom to associate for economic reasons was subject to the closest scrutiny.[108]

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99. *Id.* § 23-1381.
100. *See* text accompanying notes 47-52 *supra.*
101. *See* text accompanying notes 37-41 *supra.*
102. *See* text accompanying notes 45-46 *supra.*
103. Local 232, U.A.W. v. Wisconsin Employment Relations Bd., 336 U.S. 245, 259 (1949); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
104. NAACP v. Alabama, 357 U.S. 449 (1958). There, the NAACP resisted a state court order, issued pursuant to a state law relating to local organizations to produce its membership list. The Court found that such disclosure would discourage membership in the organization and thus inhibit freedom of association. *Id.* at 462. The Court held that the state's reasons for requiring membership disclosure were not sufficient and that the contempt order for failure to produce the membership list could not stand. *Id.* at 464.
105. 357 U.S. 449 (1958).
106. *Id.* at 460-61.
107. *Id.* at 463.
108. *Id.* at 460. *See also* Thomas v. Collins, 323 U.S. 516 (1945), where a union

Relying on *NAACP v. Alabama,* a number of courts have held that the right to belong to a labor union is a constitutional right. In *McLaughlin v. Tilendis*[109] and *American Federation of State, County, and Municipal Employees v. Woodward,*[110] plaintiffs claimed that they had been discharged from public employment because they were union members. Both courts held that a claim was stated under the Civil Rights Act of 1871[111] because the facts, if proven, demonstrated a deprivation of a basic constitutional liberty—the right to belong to a union—by an official acting under color of state law.[112]

Before a state can restrict an individual's freedom of association, it must demonstrate a "compelling interest" in the limitation.[113] Under this test, it is immaterial that the restriction was not intended.[114] Furthermore, even if the state can show a sufficient reason for restricting the right of association, the specific restrictions will be invalid if there are "less drastic means" available to effectuate the state's purpose.[115]

While it might be argued that the AFLA does not affect freedom

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organizer was arrested for addressing a union meeting urging the workers to join the union without first obtaining a state permit. In finding that the right to assemble and to urge others to join a union is constitutionally protected as free speech, the Court said:

> Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.
>
> The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity.

Id. at 531.

109. 398 F.2d 287 (7th Cir. 1968).

110. 406 F.2d 137 (8th Cir. 1969). The principle that the first amendment freedom of association protects union membership advanced by *Tilendis* and *Woodward* has found acceptance in a number of other federal courts. *See, e.g.,* Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970); Service Employees Int'l Union v. County of Butler, Pa., 306 F. Supp. 1080 (W.D. Pa. 1969).

111. 42 U.S.C. § 1983 (1970).

112. These courts cited Thomas v. Collins, 323 U.S. 516 (1945), *discussed supra* note 108, for the proposition that union membership is protected by the right of freedom of association. American Fed'n of State, County and Municipal Employees v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 289 (7th Cir. 1968). While this conclusion is not explicit in *Collins,* when read with NAACP v. Alabama, 357 U.S. 449 (1958), the proposition follows logically. See American Fed'n of State, County and Municipal Employees v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 289 (7th Cir. 1968).

113. NAACP v. Alabama, 357 U.S. 449, 463 (1958), *citing* Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957).

114. NAACP v. Alabama, 357 U.S. 449, 461 (1958). In this case, the Court found the result of forcing the NAACP to disclose membership lists would have been to subject its membership to public hostility which in turn would impede free association. Because the state was forcing disclosure of the membership lists, the restraint was held to be state action even though it was private community pressure which affected NAACP membership.

115. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (state statute unconstitutional because it required teachers to disclose all associational ties when the state's purpose could have been achieved by the less drastic means of requiring disclosure only of ties in which the state had a legitimate interest).

of association because it does not prevent anyone from joining a union, this argument places form over substance. In many instances, the Act will make the right to "join" a union an empty one. The crucial inquiry should be directed at whether a worker may participate in the selection of a representative which will be recognized under the Act and which can lawfully and effectively further the worker's goals through bargaining.

The election procedures of the AFLA are ostensibly aimed at providing an orderly, democratic method for workers to choose their representatives for the purpose of collective bargaining—certainly an interest which justifies some restrictions on union association.[116] The specific procedures mandated by the Act, however, may not survive the less drastic means test. The seasonal nature of agricultural labor, together with certain provisions permitting delays of unit representation elections, may deny an individual farmworker's right to participate in labor organization.[117]

While the requirement that the union has demanded and been denied recognition may be designed to encourage voluntary settlement of the question of representation, it is subject to abuse by the employer. By delaying his decision on recognition, the employer can delay the election. A requirement that the union only have demanded recognition would serve the same purpose without any danger of abuse. The employer could still voluntarily recognize the union after the demand had been made, but his indecision would not delay the scheduling of an election.

Allowing the employer 10 days after the pre-election hearing to produce a list of the employees eligible to vote is arguably unnecessary. Since the list will probably be a payroll list for some period shortly before the election,[118] the employer should be able to supply it immediately.[119] To allow the union the maximum time before the election to communicate with the workers, the employer should be required to provide the payroll list at the pre-election hearing. After determining

116. *Cf.* NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 33 (1937), where the Court, finding the NLRA to be a constitutional exercise of governmental power, held that the stabilization of the country's industrial relations was an interest which justified the infringement of the rights of individuals to engage in business. Certainly, an election procedure is a central element in regulating labor relations.

117. *See* text accompanying notes 47-52 *supra.*

118. *See* note 33 *supra.*

119. The union should be able to challenge the names of voters on the list. There is no provision in the AFLA for challenging ballots; however, the practice of the NLRB, which likewise has no statutory provision for challenges, could be adopted. Under the NLRB, a voter's eligibility must be challenged at or before the time of voting. Halliburton Portland Cement Co., 92 N.L.R.B. 1552, 1553 (1951).

at the hearing who will vote in the election, he should be required to submit an amended list to the Board and the union.

The state's interest in providing orderly farm labor relations is not advanced by defining the election unit so as to group together unrelated classes of workers. This is particularly true where temporary and permanent workers are both included in a farm's unit. It can at best be explained as an administrative convenience. To the extent that many workers are denied the right of participation in the formation of representative unions by this provision,[120] there is a possible abridgement of freedom of association.[121] A narrower definition of the election unit should be adopted, limiting it to smaller, related groups of workers with common interests, who work at the same place at the same time of the year.

Picketing

The AFLA proscribes picketing in a number of ways. For example, it is illegal to picket an employer to force him to recognize a union in violation of the Act, to picket in furtherance of an illegal secondary boycott or other "unfair labor practices."[122] The limits placed on picketing will probably survive a constitutional challenge based on the rationale expressed in *International Brotherhood of Teamsters v. Vogt, Inc.*[123]

In *Vogt* the union had failed in its attempt to persuade the employees of a gravel pit to join the union. It then set up a picket line at the gravel pit with signs reading "[t]he men on this job are not 100% affiliated with the A.F.L."[124] In observance of the picket line, drivers of trucking companies refused to enter the premises, and the business suffered economic damage. The owner obtained an injunction against the picketing and the Wisconsin supreme court upheld the restraint.[125] The court found from the facts and surrounding circumstances that while the picketing did not advocate specific action by anyone, its purpose and effect was to force the employer to coerce his employees to join the union. It found that the picketing could be enjoined since this was a violation of Wisconsin law.[126]

120. *See* text accompanying notes 45-46 *supra.*
121. *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958).
122. ARIZ. REV. STAT. ANN. §§ 23-1385(B)(1)-(3), (5)-(13) (Supp. 1972-73). Some unfair labor practice provisions specifically prohibit picketing or strikes, while others prohibit coercion or inducement which would include conduct such as picketing or strikes designed to violate the section.
123. 354 U.S. 284 (1957).
124. *Id.* at 285.
125. *Id.* at 286.
126. *Id.* at 287.

The United States Supreme Court upheld the decision but did not establish a test for determining what kind of state interest is sufficient to proscribe labor picketing. Instead, the Court noted that the question was one of due process of law to be determined by "a gradual process of judicial inclusion and exclusion."[127] It then reviewed the law of labor picketing[128] and found that the cases "established a broad field in which a State in enforcing some public policy . . . could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[129] The Court then found that Wisconsin's interest in preventing coercion of workers in their choice of collective bargaining representatives fell within that broad field and that the state could therefore enjoin picketing in violation of that policy.[130]

Based on the principles expressed in *Vogt*, if the picketing is in violation of the AFLA, an embodiment of state policy, then a state court can constitutionally enjoin such activity. That policy would have to be "valid" within the broad field outlined in *Vogt*, however. That is, the state law must not be a blanket prohibition of picketing but must be designed to protect some policy in which the state has an interest sufficient to justify the limitation.[131] On their face most of the limits on

127. *Id.*

128. The Court discussed Thornhill v. Alabama, 310 U.S. 88 (1940), where it had held unconstitutional a blanket prohibition against labor picketing. While the Court concluded that the broad language of *Thornhill* that labor picketing was a form of free speech protected by the first amendment was only dicta, and that this language had been modified by subsequent cases, it did approve the holding of *Thornhill* that a blanket prohibition of labor picketing would be invalid. The Court then reviewed the cases subsequent to *Thornhill* to illustrate that injunctions against labor picketing will be sustained "even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation." International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 291 (1957). The Court discussed Local 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 345 U.S. 192 (1953), where a state court had enjoined picketing in violation of the state "right to work" law (which prohibits forcing anyone to become or remain a member of a union); Local 262, Bldg. Service Employees Int'l Union v. Gazzam, 339 U.S. 532 (1950), which sustained an injunction against picketing where the purpose of the picketing was to force an employer to coerce his employees into joining the union in violation of state law; Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950), which found a valid state policy in forbidding picketing of a business in which the owner was the sole employee to force him to establish a union shop; Hughes v. Superior Court of Cal., 339 U.S. 460 (1950), where an injunction against picketing to secure quota racial hiring in violation of state policy was upheld; Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949), sustaining an injunction where the purpose of the picketing was to induce a violation of state antitrust law.

129. International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 293 (1957).

130. *Id.* at 295.

131. For example, the requirement that consumer picketing must be truthful, see text accompanying note 85 *supra*, is certainly a valid limitation. *Cf.* International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957); Thornhill v. Alabama, 310 U.S. 88, 99, 105 (1940). The part of the section raising free speech questions, however, is that which forbids even truthful publicity against a trademark, trade name or generic name which may include a producer with whom the union does not have a primary dispute. ARIZ. REV. STAT. ANN. § 23-1385(B)(8) (Supp. 1972-73). This proscription will be overbroad in some circumstances because there will be no sufficient state interest in protecting innocent employers against injury justifying the restraint on free speech.

picketing in the AFLA appear to be within the broad field established by the Supreme Court.[132]

Right to Strike

The AFLA recognizes a right to strike[133] but limits it in two significant ways. First, strikes in furtherance of unfair labor practices are illegal.[134] Following a rationale similar to that of the picketing cases,[135] this prohibition is probably valid assuming that the end furthered by the strike can be legitimately proscribed by the state. The Supreme Court of the United States has often found that the states have valid interests in their labor laws and thus could proscribe picketing which encouraged violations of those laws.[136] Since the right to strike is not afforded the same high degree of protection accorded more fundamental first amendment rights such as picketing,[137] a strike in violation of a state law may be prohibited.[138]

The second major way in which the AFLA limits the right to strike is by providing that an agricultural employer may obtain an injunction against a lawful strike if he agrees to submit the contested issues to binding arbitration.[139] This limitation on union activities is basically different from those in the picketing cases. Here, the employer is not forced to commit an illegal act, nor is the strike in furtherance of an end illegal under state law; rather, the employer is being forced to participate in legal activity—collective bargaining.

It is unclear to what extent states can limit the right to strike when the strike is not intended to induce a violation of state law. While

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This could occur where a union had a primary dispute with all the growers who used a trademark except one or two small producers. In such a case, the state's interest in protecting the one or two small growers from the publicity may not outweigh the employees' first amendment right to publicize the dispute. In *Vogt* the Court outlined instances in which states had been justified in restricting the first amendment right to publicize a labor dispute because the state had a valid public policy reason for doing so. In the hypothetical outlined above, however, the state's interest is not of the same magnitude as those reasons which the Court in *Vogt* found would justify such a restraint.

132. *But see* hypothetical discussed in note 131 *supra*.

133. ARIZ. REV. STAT. ANN. § 23-1381 (Supp. 1972-73).

134. *See* note 122 *supra*.

135. *E.g.*, International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957); Local 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 345 U.S. 192 (1953); Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949). For a discussion of these cases, see note 128 *supra*.

136. *See* note 128 *supra*.

137. Local 232, U.A.W. v. Wisconsin Employment Relations Bd., 336 U.S. 245, 259 (1949) ("The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' . . .").

138. *See, e.g.*, Furukawa Farms, Inc. v. Chavez, 25 Cal. App. 3d 776, 102 Cal. Rptr. 271 (1972); City of Wilmington v. General Teamsters Local 326, — Del. Ch. —, 290 A.2d 8 (1972).

139. ARIZ. REV. STAT. ANN. § 23-1393(B) (Supp. 1972-73).

Justice Brandeis, speaking for the majority in *Dorchy v. Kansas*,[140] concluded that "[n]either the common law, nor the Fourteenth Amendment, confers the absolute right to strike,"[141] it can be argued in principle that the right to strike should be accorded some measure of constitutional protection.[142] Since there is an element of personal liberty involved in the voluntary withholding of personal services, the state should be required to demonstrate that it has an interest in prohibiting this conduct which outweighs the strikers' interest in their activity.[143] Not only does the state have an interest in its overall economic health, it also should have an interest in the economic security and standard of living of its citizens. As the Court said in *Thornhill v. Alabama*, "[i]t is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned."[144]

By providing that a grower can obtain an injunction against otherwise lawful strikes, the AFLA effectively strips the workers of their most meaningful weapon. Whether the state's interest outweighs the workers' interest on this point is at least questionable. Even if it can be shown that Arizona's overall economic health, rather than that of

140. 272 U.S. 306 (1926).

141. *Id.* at 311. The Supreme Court has not expanded on this observation other than to quote it with approval in Local 232, U.A.W. v. Wisconsin Employment Relations Bd., 336 U.S. 245, 259 (1949).

142. Several recent cases have commented on the right to strike. I.A.M. v. National Mediation Bd., 425 F.2d 527 (D.C. Cir. 1970), dealt with the statutory right to strike under the Railway Labor Act, 45 U.S.C. § 155(1) (1970). The Court of Appeals for the District of Columbia noted that apart from the statutory right to strike involved

> [t]here are constitutional as well as common law underpinnings of the rights of employees to strike . . . . The rights of self-help . . . are indeed in a sense symbols of freedom, reminders that even though their occasional exercise and the disorder of industrial warfare may be vexing to the point of distress the underlying freedom is more productive of a healthy and vigorous economy and nation than a structure of economic regimentation and dictated order.

Id. at 536-37.

In Bennett v. Gravelle, 323 F. Supp. 203 (D. Md.), *aff'd*, 451 F.2d 1011 (4th Cir. 1971), the court noted that public employees do not have the right to strike, and stated:

> [B]ut while an individual does not have an absolute right to strike, a state cannot arbitrarily or capriciously deny this conduct. A state in governing its internal affairs, can prohibit any strike only if the prohibition is reasonably calculated to achieve a valid state policy in an area open to state regulation.

Id. at 208.

In United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 885 (D.D.C.), *aff'd mem.*, 404 U.S. 802 (1971), Circuit Judge J. Skelly Wright, in a concurring opinion, made the novel argument that there is a constitutional right to strike derived from the first amendment freedom of association. He argued that because a strike is constitutionally protected, the government must have a compelling justification to limit that right.

143. For a full discussion of this theory, see Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 579 (1951).

144. Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

the individual growers, is dependent on the success of a harvest involving hand laborers, and further, that a strike on individual, selected farms will disrupt that economy,[145] it is self-evident that the workers also have substantial interests which should be protected by the state.

It is likely, however, that if a court uses a balancing of interests test to determine if the state is justified in limiting strikes, it will also consider that the employer must submit the dispute to binding arbitration if he seeks an injunction. To some extent, this provision compensates the employees for the 10-day loss of the strike weapon.

CONCLUSION

The AFLA has procedural defects and definitional problems which await clarification by the AERB or by the courts. The election procedure is unnecessarily cumbersome and time consuming and will prevent many workers from participating in the selection of bargaining representatives. The election unit as defined by the Act will often be too large, having the undesirable results of grouping together workers with different interests and of preventing many workers from participating in the election.

It can be argued that certain provisions of the Act are unconstitutional. The AFLA raises issues regarding freedom of association, freedom of speech and the right to strike. In matters involving state labor policy, however, the Supreme Court has shown considerable deference to the states in the formulation of that policy. This deference is based on the principle that the states have an important interest in maintaining orderly industrial relations.

If the question of the Act's constitutionality at this juncture is difficult to answer, a judgment as to its fairness is not. While the Act states that workers shall be free to organize and negotiate collective bargaining agreements establishing wages and other conditions of employment,[146] this statement may prove to be without substance in view of the obstacles facing farmworkers seeking to organize.[147] These obstacles will make meaningful participation in collective action by many farmworkers almost impossible. Even if they are overcome and a union is certified as the unit representative, the workers still face the possibility of an injunction against a lawful strike.[148] This limit on strikes is based on the legislature's belief that there is an inequality of

145. *See* text accompanying notes 149-153 *infra*.
146. ARIZ. REV. STAT. ANN. § 23-1381 (Supp. 1972-73).
147. *See* text accompanying notes 27-49 *supra*.
148. ARIZ. REV. STAT. ANN. § 23-1393(B) (Supp. 1972-73).

bargaining power between agricultural employers and labor unions, with the unions having the upper hand.[149] This statement seems unfounded since the history of agricultural labor-relations has shown the farmworkers to be in the weaker position.[150] Farmwork involves relatively little skill and thus, in the event of a strike, replacement workers are easily hired. Further, because of the already-impoverished condition of many farmworkers, they are ill-equipped financially to endure in any prolonged dispute. The history of agricultural collective bargaining in Arizona is also evidence that the legislature's evaluation is incorrect. The stitchers and haulers represented by the Teamster's Union have had the opportunity to disrupt the harvest by striking but have not done so. Instead, they have negotiated reasonable contracts which provide for moderate wages.[151] This tends to disprove the assumption that agricultural unions will dictate contracts with unreasonable provisions because of their superior bargaining strength at harvest time. Agricultural strikes in Arizona and elsewhere have usually involved recognition rather than collective bargaining.[152] Experience in Hawaii, where there is a history of strong unionization of farmworkers, has also been that relatively few agricultural strikes result from attempts to force acceptance of a collective bargaining point, as opposed to recognition.[153]

Most Arizona farmworkers are citizens of the state,[154] but enjoy few of the economic advantages of other citizens. The farmworker in general is the lowest paid American worker[155] and is excluded from most social and labor legislation.[156] Thus, the grower often need not

149. *Id.* § 23-1381. The Congressional statement of policy in the NLRA stated:
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151 (1970).

150. *See* Note, *The Farmworker: His Need for Legislation*, 22 MAINE L. REV. 213, 213-17 (1970); Note, *Unionization of the Agricultural Labor Force: An Inquiry of Job Property Rights*, 44 S. CAL. REV. 181, 183-92 (1971).

151. *See* note 7 *supra*.

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

153. Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1985-86 (1966).

154. *See* ARIZONA STATE EMPLOYMENT SERVICE, AGRICULTURAL EMPLOYMENT IN ARIZONA SINCE 1950 at 26d (1968).

155. S. REP. No. 91-83, 91st Cong., 1st Sess. 51 (1969). For a discussion of farm wages, see Note, *The Farmworker: His Need for Legislation*, 22 MAINE L. REV. 213 (1970).

156. For a discussion of the coverage of farmworkers under labor and social legislation, see *Legal Problems of Agricultural Labor*, 2 U. CALIF. DAVIS L. REV. (1970).

pay workmens' compensation insurance,[157] unemployment tax,[158] the usual minimum wage[159] or overtime.[160] Without a union contract, the farm employer need not provide such fringe benefits as health insurance, sickness and accident disability insurance, life insurance, holiday pay or vacations.

The Arizona legislature should recognize that its interest in the workers' economic welfare is at least as great as its interest in the welfare of the employers. In view of this interest, the AFLA should be amended to allow farmworkers to organize more easily. A realistic election procedure should be devised and the election unit should be redefined. The provision that allows a grower to obtain an injunction against otherwise lawful strikes should be deleted. The sections regarding union activities inducing consumer boycotts against trademarks or generic names, which may include a producer with whom the union has no primary dispute, should also be omitted. The strike prohibition is alien to American labor relations[161] and the limit on enlisting the support of consumers is susceptible to manipulation by the growers.[162] Because of the seasonal nature of farm labor, provision should also be made to allow the employer to contract for the use of a hiring hall and for recognition of "minority unions" similar to the NLRA construction industry exception.[163] If the changes suggested above fail to provide the farmworker with a realistic opportunity to engage in free collective bargaining, however, the Act should be repealed.

157. Only 13 states include farmworkers in workmens' compensation schemes, although farming is the third most hazardous industry in the United States. Note, *supra* note 155, at 233.

158. Hawaii is the only state that includes farmworkers in such laws. *Id.* at 234. See HAWAII REV. STAT. § 384-4 (Supp. 1972).

159. Note, *Workmens' Compensation, Minimum Wage and the Farmworker*, U. CALIF. DAVIS L. REV. 113, 137, 140 (1970).

160. *Id.* at 134-35.

161. "Our national labor policy is founded on a paradox: (1) effective collective bargaining is the best means of securing industrial peace, and (2) preservation of the weapons of industrial warfare is the best means of securing effective collective bargaining." Reel, *The Duty to Bargain and the Right to Strike*, 29 GEO. WASH. L. REV. 479 (1960). Even Senator Taft, co-sponsor of the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq.* (1970), which is considered by many to be "anti-union," recognized the basic importance of the strike in American labor relations: "[f]ree collective bargaining . . . means that we recognize freedom to strike." 93 CONG. REC. 3835 (1947).

162. *See* note 86 *supra.*

163. *See* text & notes 73-79 *supra.*