



CALIFORNIA FARM BUREAU FEDERATION

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September 15, 2015

Mr. J. Antonio Barbosa, Executive Secretary
Agricultural Labor Relations Board
1325 J Street, Suite 1900
Sacramento CA 95814

Re: Proposal for Educational Access Regulation

Dear Mr. Barbosa:

California Farm Bureau Federation, an incorporated nonprofit agricultural trade association, files these comments asserting that the Agricultural Labor Relations Board lacks legal authority to promulgate a regulation under which ALRB agents could trespass upon agricultural employers' premises to educate agricultural employees about their rights under the Agricultural Labor Relations Act.

The purported legal authority for the contemplated regulation is based on *San Diego Nursery Co. v. Agricultural Labor Relations Bd.* (1979) 100 Cal.App.3d 128 (*San Diego Nursery*). In that opinion, the Fourth District Court of Appeal in dictum¹ opined that

a duly promulgated administrative regulation authorizing an unconsented but specifically limited entry upon a grower's work premises by an agent of the ALRB in performance of duties imposed by the Act would transgress no constitutional command.

Id. at p. 135.

¹The court's observation is mere dictum because it was not essential to the decision. There was of course no such regulation to consider. "The access here sought, however, is not pursuant to an administrative regulation ... but rather is an ad hoc administrative 'policy.'" *Id.* at p. 136. The court's opinion, therefore, rested on a determination of whether that "policy" justified the access sought, not whether some hypothetical duly promulgated regulation would justify it. The latter question was not before the court and must wait for the time—if ever—for such a regulation to come to fruition for it to be judicially reviewed.

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Even if that observation were not mere dictum but a holding, *San Diego Nursery* would not provide a sound basis for the promulgation of the contemplated regulation. In *San Diego Nursery*, the issue was whether Labor Code section 1151, subdivision (a), authorized ALRB agents to trespass on an agricultural employer's premises "for the express purpose of advising, notifying, 'educating' both the Employer and the workers of their rights and obligations under the Act" (*San Diego Nursery, supra* at p. 132) *following the filing of a notice of intention to take access and of a notice of intention to organize*. "These notices evidence the fact that the UFW would engage in an organizational drive among the Employer's workforce which might culminate in an election petition." *Id.* at p. 131.

The dictum in *San Diego Nursery* was thus expressed in the context of the triggers of the two notices that were filed, possibly in anticipation of the filing of an election petition. In *San Diego Nursery* a labor organization invoked ALRB processes, which provided the ALRB with at least some palpable indication that an election petition might be forthcoming that would trigger administrative action by the ALRB.

The court approvingly noted the holding of a federal appeals court under the National Labor Relations Act to the effect that "a representation proceeding [is] an investigation within the purview of the Act" and that "[t]his definition of the entire representation (election) process as an 'investigation' within the meaning of the federal act has been accepted without dissent by the federal courts." *San Diego Nursery, supra* at p. 139.

In the court's view, the filing of the two notices thus triggered the entire representation (election) process as an "investigation" under the ALRA. This determination was crucial to the reliance by the court on Labor Code section 1151, subdivision (a), which is patterned on Section 11(1) of the NLRA and specifies the powers of the ALRB or its agents "[f]or the purpose of all hearings and investigations." Specifically, section 1151, subdivision (a), grants ALRB members or their designees or agents "the right of free access to all places of labor"—*but only for the purpose of all hearings and investigations*.

While there may arguably have been an "investigation" underway in *San Diego Nursery* by virtue of the filing of the two notices, the scope of the contemplated regulation apparently would not be limited to or predicated upon the existence of any such "investigation." Rather, it seems under the contemplated regulation ALRB agents could trespass on the premises of randomly selected agricultural employers merely because they suppose agricultural employees there should be told of their rights under the ALRA. An intrusion based upon nothing other than groundless supposition cannot reasonably be termed an "investigation."

The court in *San Diego Nursery* noted that it was dealing "with a rule of access which involves an unconsented invasion, a technical trespass on private property. Such a right is protected by both the state and federal Constitutions. While rights in property are not

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absolute, nevertheless, any impingement thereon should only be made subject to reasonable limitations.” *San Diego Nursery, supra* at p. 142. The first of those limitations should be the existence of a lawful purpose justifying any such trespass.

The ALRA expressly limits the exercise of the ALRB’s “right of free access” for “the purpose of all hearings and investigations.” The ALRB must honor that legislative directive and thus should not pursue the promulgation of a regulation that purports to allow its agents to trespass on agricultural employers’ premises in the absence of the existence of an investigation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Carl G. Borden". The signature is fluid and cursive, with the first name "Carl" being the most prominent.

CARL G. BORDEN