II. The Legal Background For Cooperative Farm Bargaining

The Sherman Act (1890)

During the 19th century, farmers, laborers, and consumers were faced with the growing power of large and powerful corporations whose control of the markets and the manufacturing facilities of many of the basic industries enabled frequent exploitation. In 1890, Congress passed the Sherman Act to curb the powers of the corporations. Meanwhile, farmers were turning to cooperative associations and labor was turning to unions in an effort to offset the power of the corporations. Farmers were particularly vulnerable. Individual farmers had little or no bargaining power. They frequently found themselves at the mercy of buyers who were able to purchase their production at depressed prices that the buyers were able to establish, and then to go on to process, store, distribute, and sell the products at the most advantageous market at the most advantageous times for high prices.

Following passage of the Sherman Act, organized labor and the young cooperative movement found themselves imperiled by the antitrust legislation that was intended to combat the excesses of large and powerful corporations that had victimized the farmer. The sponsors of the Sherman Act had not intended to include agricultural cooperatives and labor unions as unlawful combinations in restraint of trade. Indeed, Senator Sherman had proposed an amendment to the Act which provided, among other things, that it should not be construed to prohibit "any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their agricultural or horticultural products" [21 Cong. Rec. 2726 (1890)]. Sherman felt that the language was not necessary and it was omitted from the final bill.

Farmer cooperatives and labor found themselves the targets of antitrust suits by private parties as well as by State and Federal authorities.

To prevent such lawsuits from thwarting the development of cooperatives and unions, Congress in 1914 passed Section 6 of the Clayton Act which states:

> the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and the operation of *labor, agricultural, or horticultural organizations,* instituted for the purposes of mutual help, and not having capita1 stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof: nor shall such organizations, or the members thereof. be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. [15 U.S.C. §17(1976)]

The Capper-Volstead Act (1922)

It soon became apparent that in spite of the language of Section 6, the threat of prosecution remained especially for cooperatives organized on a capital stock basis. The express right to carry out the actions necessary to enable agricultural cooperatives to function effectively for their members was more fully set forth in the Capper-Volstead Act, which was enacted in 1922. Section 1 of that Act provides:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen. dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capita1 stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce. such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. [7 U.S.C. §291(1976)]

Section 2 of the Act empowers the Secretary of Agriculture to proceed against any cooperative which he has reason to believe monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced." If he finds that such undue price enhancement has occurred, the Secretary may issue an order to cease and desist from monopolization or restraint of trade.

Under the protection of these statutes, producers have been able to organize themselves in an effort to influence the market in which they sell or distribute their products, thereby combating the handicap of unstable market conditions and a price system determined by the weakest producer.

Farm Bargaining Compared to Labor Unions

While both labor and agricultural and horticultural organizations were mentioned in Section 6 of the Clayton Act, their operations are dissimilar. Labor is paid a wage or a salary and unions are made up of

wage and salary workers. Farmers are paid on the profits from their enterprise, and farm bargaining associations are made up of individual farmers who are entrepreneurs. Labor organizations have the benefits of laws that make monopolies legal through a closed shop. Farm bargaining associations are voluntary and must operate within the undue price enhancement provisions of Section 2 of the Capper-Volstead Act. Labor organizations can impose sanctions on employers through the use of a strike or a slowdown. Farm bargaining associations cannot stop production once it has started. Labor unions tend to be centrally controlled while farm bargaining associations tend to be democratic. Labor organizations may have strike funds and benefit from unemployment insurance programs which soften the burden of work stoppage for the wage earner. Farm bargaining associations must deal with the supply-demand character of the marketplace and their members always face the problems of oversupply and unsold products that hang over the market. Since the Clayton Act was adopted in 1914, legislative actions and court decisions have enabled organized labor to become a major force in the U.S. economy. Agricultural organizations have not fared as well.

Court Actions

The legal history of the Clayton and Capper-Volstead Acts and the decisions of the courts make it quite clear that farmers and producers may form cooperatives without violating the antitrust laws. However, the Capper-Volstead Act and its companion statutes do not give agricultural cooperatives carte blanche to evade the intent of the antitrust laws. On several occasions the Supreme Court has outlined the boundary between permissible cooperative activity under the Capper-Volstead Act and conduct that violates the antitrust laws.

In 1939, the case of ***United States v. Borden Co.*** [308 U.S. 188 (1939)], brought before the court an alleged conspiracy between the Pure Milk Association, a cooperative, and noncooperative entities, including distributors, labor officials, and municipal officials. The conspiracy was alleged to be in violation of Section 1 of the Sherman Act by attempting to fix and maintain artificial and noncompetitive prices for milk. Reversing the lower court, the Supreme Court held that the Capper-Volstead exemption did not insulate all activities of agricultural cooperatives from the Sherman Act. The alleged conspiracy with noncooperatives removed the cooperative's conduct from the protection of the exemption. In the words of Chief Justice Charles E. Hughes:

> **The right of those agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.** [308 U.S. at 204-205]

Nearly a generation later, the Supreme Court again had occasion to elucidate the limits of the exemption for farmer cooperatives. In ***Maryland and Virginia Milk Producers Association, Inc. v. United States*** [362 U.S. *458* (1959)], the defendant milk-marketing cooperative had been charged with violations of: Section 2 of the Sherman Act by attempting to monopolize and monopolizing the fluid milk market; Section 3 of the Sherman Act by conspiring to eliminate competition in the same market; and Section 7 of the Clayton Act for acquiring the assets of its largest competitor. The Court, citing ***Borden,*** held that the alleged conduct deprived the cooperative of the immunity provided by Section 6 of the Clayton Act and the Capper-Volstead Act. It stated:

> **(T)he full effect of §6 (of the Clayton Act) is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out the *legitimate* objects thereof (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory practices at will.** [362 U.S. at 465-466]

The Court defined a further limit to the exemptions in ***Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*** [389 U.S. *384* (1967)]. In that case, it held that membership of persons and entities who were not themselves producers of agricultural products would nullify the Clayton Section 6 and Capper-Volstead exemptions for the cooperative.

While the foregoing Supreme Court decisions leave no doubt that the statutory immunity enjoyed by agricultural cooperatives is a limited one, both the Supreme Court and appellate courts in more recent decisions have continued to affirm the rights of cooperatives to join in combined action under the Capper-Volstead Act. Thus, in ***Sunkist v. Winckler & Smith Co.*** [370 U.S. 19 (1962)], the Supreme Court held that cooperatives, which were technically separate entities, could join together into one organization for collective processing and marketing of their fruit and fruit products without violating the antitrust laws. Sunkist was alleged to have conspired with two citrus fruit exchanges, Exchange Orange and Exchange Lemon, to commit various acts and violations of Sections 1 and 2 of the Sherman Act. The court was willing to look beyond the technical separateness of the three groups and held that:

> (T)he 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. [370 U.S. at 29]

The Capper-Volstead Act also specifically states that cooperatives may have agencies in common. A common marketing agency by a competing group of manufacturers, on the other hand, would be found to be illegal.

The ability to form a cooperative association permits farmers, by combination, to obtain some degree of market power. This can be done in two ways. First, to the extent the cooperative gains some control over the supply of the product, it can bargain with the buyer in order to achieve a higher price than the buyer would have to pay individual farmers selling separately. Second, farmers may form their own cooperative marketing agencies, thus bypassing the powerful marketer who would otherwise be able to achieve an unduly high profit at the expense of the farmer. However, this ability to overcome the power of large buyers must be considered in the light of overcoming exploitation and achieving a reasonably competitive profit, but not a monopoly profit.

The U.S. Department of Justice and the Federal Trade Commission (FTC) are constantly monitoring the activities of cooperative associations, particularly in those cases where a marketing order is also in operation. It is for this reason that many of the well-established bargaining associations work closely with their legal counsel. As bargaining associations become more successful in achieving their objectives, they will come under greater scrutiny. The cost of food is a sensitive political issue. With the decline in the political power of farmers, more and more attacks can be expected on the efforts of farmers to improve their prices through collective actions.

An example of some of the current thrust of the Department of Justice and the FTC is the contention made in the Treasure Valley case [Treasure ***Valley Potato Bargaining Assn. v. Ore-Ida Foods, Inc.,*** 497 F.2d 203 (9th Cir. 1974), ***cert. denied,*** 419 U.S. 999 (1974)]. Here it was argued that only associations that actively perform all of the processing, handling, and marketing functions are Capper-Volstead associations. In addition, it was argued that negotiating for price did not constitute marketing as that term was used in the act.

The court rejected both of these contentions and, with reference to the latter, said particularly:

> **The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supporting marketing information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.** [497 F.2d at 215]

The ninth circuit has relied upon the rationale in Sunkist in finding the exemption applicable to two entirely separate potato bargaining associations charged with violations of the Sherman Act based upon their agreement with each other to sell their potatoes for a common price. In concluding that the associations were acting within the exemptions, the ninth circuit drew the principle from ***Sunkist,*** that, in the absence of predatory conduct and where the two bargaining associations could have formed a single association to market the product, mere organizational distinctions should be ignored. The court relied most heavily, however, on the language in Section 1 of the Capper-Volstead Act permitting associations to have marketing agencies in common. The court held that this provision exempted activities such as agreements as to pricing between two cooperatives on the grounds that the term "marketing" was broad enough to encompass such activity. The court also concluded that the actual form which the common marketing agency took was irrelevant and should not eliminate its legality.

Despite the denial of certiorari by the Supreme Court in ***Treasure Valley,*** the FTC announced that it would not consider itself bound by the ***circuit court's*** decision. In the summer of 1974, the FTC filed a complaint against the Central California Lettuce Producers Cooperative alleging in substance that the cooperative and its members were in violation of Section 5 of the Federal Trade Commission Act (in essence by violating Section 1 of the Sherman Act) by "illegally agreeing among themselves on the prices at which Central's members would sell the lettuce they produced." The administrative law judge's decision against the cooperative was reversed by the full Federal Trade Commission on appeal. The Commission may have heeded a decision of the U.S. District Court in San Francisco which had ruled, in a private suit against the same cooperative, that the same activities were exempt ***[Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413*** F.Supp. 984 (N.D. Cal. 1976) ***aff'd, 580*** F.2d 369 (9th Cir. 1978)]. The district court stated:

I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers. who meet in a cooperative to set prices. to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining. they would clearly be entitled to an exemption. 413 F. Supp. at 992.

The Agricultural Fair Practices Act (1967)

Prior to the 1967 passage of S-109, the Agricultural Fair Practices Act, the efforts of many farm groups to bargain collectively were met with opposition from handlers and processors.[1] The tactics on the part of some major buyers had more in common with the early history of unionization in the United States than in marketing farm products. For example, the Federal Trade Commission found that three major tomato-canning companies in Ohio engaged in a common boycott of the members of Cannery Growers, Inc., a growers' cooperative bargaining association. Canners refused to contract with members of the association and offered "sweetheart deals" to members who withdrew from the association. In one instance, field buyers contracted with growers provided the growers signed a form letter of resignation to withdraw from the association. One company, according to the testimony of a field buyer, proposed spending up to $100,000 to discourage the efforts of farmers to organize for bargaining purposes.

Growers in Pennsylvania and New Jersey who were identified with the bargaining associations found that their contracts were not'renewed, or that they were discriminated against at the receiving docks of the canneries. Blacklisting of growers was also carried out in the broiler industry. In one area in Mississippi, organizers had to visit growers in the night, and not give receipts of dues payments. When growers attended meetings, their car license numbers were taken down by field staff and the growers were called on the next day and warned not to join the association. Growers in other States found their contracts terminated if they joined a bargaining association.

In 1968, the Packers and Stockyards Division of USDA issued a decision known as P&S Docket No. 3497; It ordered Arkansas Valley Industries, Inc., Ralston Purina Company, and Tyson's Foods, Inc., to cease and desist from:

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[1]**For a history of the legislative life of this bill, see Randall E. Torgerson, Producer *Power at the Bargaining Table* (Columbia: University of Missouri Press, 1970)**

1. **Refusing to deal with a poultry farmer because of the farmer's affiliation with any association or organization formed to further the mutual interests of poultry producers;**
2. **Harassing, intimidating, coercing or threatening to refuse to enter into contracts or agreements with poultry farmers because of their affiliation with any associaiton;**
3. **Refusing to reinstate upon the basis of current terms, any poultry producer whose contracts or agreements were terminated for reasons of the producer's association;**
4. **Entering into, continuing, or cooperating in carrying out any agreement or combination to boycott, blacklist, harass, intimidate, or coerce any poultry producer or farmer for any reason whatsoever.**

The Agricultural Fair Practices Act of 1967 (S-109) was a landmark piece of legislation. It was the first reaffirmation by the Congress in many years of the policy of support of group action by farmers. It was stoutly resisted by many of the Nation's processors and handlers. While the final law is a far cry from the original draft, the very fact that it survived the opposition of the major factors in the food manufacturing and processing industry is evidence that the Congress will support farmers in their quest to achieve some equity with the concentrated power of the food industry.

S-109 recognized the need for farmers to be free to join together voluntarily in cooperative organizations and declared that interference with this right was contrary to the public interest. The act establishes standards of fair practices that would be required of handlers in their dealings in agricultural products. The law deals primarily with six practices that were declared to be unlawful for any handlers, employees, or agents:

(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association: or

(b) To discriminate against any producer with respect to price, quantity. quality, or other terms of purchase. acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or

(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

(d) To pay or loan money, give anything of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers: or

(e) To make false reports about the finances, management, or activities of associations of producers or handlers; or

(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter. [7 U.S.C. §2301(1976)]

There will be moves to change the legislation to require good faith bargaining on the part of handlers and processors. The problems with the existing legislation are in its narrow scope and inadequate enforcement machinery. Evidence of violations is very difficult to obtain. According to the Department of Agriculture, 27 complaints have been received since the fall of 1968, when administration of the Act was transferred to the Fruit and Vegetable Division, Agricultural Marketing Service, of the Department. Seven of the 27 complaints were settled in favor of the producers or the association; one case was settled without any action; and one was closed when the growers decided not to pursue the complaint. All of the other cases were closed after investigation, on the basis of insufficient grounds for action. Securing good evidence is a problem, particularly from farmers who have been induced to withdraw from a bargaining association in return for some special treatment. Fear of future retaliation is also a factor that influences the availability of good evidence.

State Legislation

Legislation supporting farm bargaining has been adopted in a number of States. The most far-reaching is the Michigan Agricultural Marketing and Bargaining Act. In effect since January 1973, this legislation: permits producers of agricultural commodities in Michigan to be represented by associations; creates an agricultural marketing and bargaining board; provides for the accreditation of associations; establishes obligations on the part of handlers and associations; provides for arbitration; defines unfair practices; and describes penalties.

California legislation declares it to be the public policy of the State of California to establish and support the right of any farmer to join voluntarily and belong to a cooperative bargaining association. In addition, it defines unfair trade practices, including the refusal to negotiate or bargain for price, terms of sale, compensation for commodities produced under contract, and other contract provisions relative to any commodity which a cooperative bargaining association represents.

Most of the legislation in the other States prohibits certain unfair trade practices and discrimination against producers who have voluntarily joined a bargaining association. In 1975, Wisconsin enacted a

statute that is unique in that it prohibits vegetable processors who "grow more than 10 percent of a species of vegetable processed at a single plant, from paying growers who sell vegetable crops to the processor an amount per ton less than the amount per ton incurred by the processor in growing the vegetable himself."

The States of Maine and Minnesota have adopted legislation that compares with the Michigan statute. Extensive bargaining has not yet been carried out under these State laws, but they are an indication of the desire and need for such an approach in the absence of strong Federal legislation.

Future Legislation

The major Federal legislative acts related to farm bargaining are the Capper-Volstead Act of 1922, the Agricultural Marketing Agreement Act of 1937, and the Agricultural Fair Practices Act of 1967. All of these laws are basically permissive and protective in that they permit producers to act together to obtain equity in the marketplace and protect them from certain unfair practices. The major piece of State legislation that departs from the'permissive and protective character is the Michigan Act, which promotes and implements the idea of collective bargaining for agriculture.

The next several years will probably see continued efforts being made to improve the legislative climate for farm bargaining. These efforts will be directed toward causing the government to assume a more active role. Included will be legislation that will legally limit the alternative actions of handlers. This might include provisions whereby exclusive agency bargaining is authorized along the lines of the Michigan Act, perhaps the most comprehensive type of bargaining legislation with explicitly defined rules. Federal legislation could substantially improve the climate for bargaining in a number of specific areas:

Provisions for marketing fee deductions;

Requirements for negotiators to bargain in good faith;

Provisions for mediation or arbitration;

Provisions for qualifying or otherwise accrediting a bargaining association;

Provisions for defining a bargaining unit; and providing for the designation or selection of an exclusive agent for the bargaining unit;

Protective rules and a means for promulgating and administering them.

Most of the provisions suggested above involve a basic decision by the Congress as to whether as a matter of public policy the idea of farm bargaining should be actively supported and promoted. The legislative history at the Federal level is largely permissive and protective. Some of the States have gone beyond the Federal action and have declared that, as a matter of public policy, farm bargaining should be supported and promoted.