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Farm Bargaining Cooperatives: Group Action, Greater Gain

Abstract

FARM BARGAINING COOPERATIVES: Group Action, Greater Gain

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For decades, agricultural producers have used bargaining cooperatives as a self-help tool to enhance the income they realize from the sale of their crops. Through group action, these growers have counter-balanced the market power of the large canners and other processors that buy farm produce. This report presents case studies to illustrate historical and contemporary bargaining association activity. Techniques for enhancing the prices growers receive and nonprice services such associations provide their farmer-members are presented. Future challenges and opportunities for producer bargaining associations are also discussed.

Keywords.' agriculture, bargaining, cooperative, law, marketing, negotiation

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Foreword

Dr. Randall E. Torgerson, Administrator
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Cooperative bargaining associations are a form of group action in agriculture that, once understood by growers, contributes greatly to their economic well-being and adds an important dimension to representation of their interests in the market place. Over the course of history of American agriculture, three attorneys have had a profound impact on the development of this form of group action: Aaron Sapiro, Allen Lauterbach, and Gerald Marcus.

Following in the footsteps of Sapiro, Gerald Marcus has developed an intimate knowledge of the formation, operation, and legal foundations of cooperative bargaining. As a practicing attorney, he has advised numerous associations on internal issues as well as on problems arising from negotiations with processors. Marcus serves as an active member of the American Arbitration Association and has served on the California Director of Food and Agriculture's Bargaining Advisory Committee.

Marcus was an initiating member of the National Bargaining Conference started in Chicago in 1957. Along with Ralph Bunje, Cameron Girton and my predecessor Joe Knapp, he helped mold the conference as a forum for discussion about issues facing cooperative bargaining associations and has been a regular contributor through speeches and discussion. His institutional memory captures many of the pertinent issues in the development of cooperative bargaining found in this book.

Due to their similarities in national prominence and West coast origins, I have often referred to Marcus as the modern day Aaron Sapiro. As a legal scholar, political

strategist, organizational advisor, and active legal practitioner, he has touched the practice of cooperative bargaining in many ways, both public and private. He clearly understands public and private roles in assisting producers and has sought ways to strengthen the contributions of both.

We are particularly pleased that Gerald Marcus has taken the time and effort to document his vast knowledge of this subject matter so that it can be shared with the larger public in hopes of fostering improved negotiating conditions for the producers of this nation's food and fiber.

Preface

Agricultural bargaining cooperatives, particularly on the West coast, have, since the 1950s, become an integral part of the system for marketing certain agricultural commodities.

It has been my good fortune to have been involved since the mid-l 950s as a practicing attorney helping to organize some and otherwise attempting to assist others in dealing with their day-to-day problems. Unquestionably, this has been the most interesting and challenging part of my practice.

Bargaining associationsare frequently described as part of the self-help movement, an effort by producers of a given commodity to improve their position without Government subsidies.

What has impressed me is the role played by these growers who provide leadership as officers and directors. They uniformly serve without compensation and receive modest expense allowances. While in some commodities there are members of substantial size, most are individual family-owned farm operations. The owners are “hands on” farmers.

What I find astonishing is the breadth of skills and knowledge these farmers must acquire to survive--scientific knowledge of soil, weather, agronomy, diseases, and pests, not to mention a myriad of Government regulations relating to farm labor, use of pesticides and fungicides, import and export, and others.

In addition to mastering the production of their crops, they must venture into the marketplace to sell in many cases to a decreasing number of purchasers of increasing size and bargaining power represented by highly trained, sophisticated management frequently of national or multi-national business organizations.

These farmers have learned the hard way that they cannot enjoy the luxury of “rugged individualism” and survive. This is why many have formed or joined bargaining cooperatives. They voluntarily surrender to elected

representatives the decision concerning the price and terms of sale for their produce and, in some instances, depending upon the type of bargaining cooperative involved, the actual sale of their produce.

These representatives in turn must become informed about the factors which affect price determination with their commodities, the antitrust laws and the tax laws which govern the cooperative structure. They must learn to understand and evaluate advice they receive from economists, lawyers and tax specialists, among others, if they are to operate legally and negotiate effectively with the management of their customers.

With some misgivings, I have been persuaded by Dr. Randall E. Torgerson, administrator of USDA's Agricultural Cooperative Service (ACS) for many years, to write about some of my experiences.

A number of excellent articles have been written about bargaining cooperatives. I have referred to some in the bibliography. There are two particularly outstanding in-depth studies. "Cooperative Bargaining in Agriculture: Grower-Processor Markets for Fruits and Vegetables" by Peter G. Helmberger and Sidney Hoos,[1] analyses the economic role of bargaining cooperatives in fruits and vegetables. "Cooperative Farm Bargaining and Price Negotiations" by Ralph J. Bunje[2] is the ultimate in explaining the nuts and bolts of organizing and operating a bargaining cooperative.

Certainly, it makes no sense to cover what they and others have so effectively written about; nor to write a comprehensive manual on the legal aspects of bargaining cooperatives. Rather, I'd like to describe some selected problems encountered by cooperatives with which I have worked and how we dealt with them.

With one exception my experience has been limited to bargaining by producers of fruits and vegetables. The exception is the recent experience of catfish producers in the

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[1] University of California, Division of Agricultural Sciences (1965).

[2] Economics, Statistics, and Cooperative Service, USDA, Cooperative Information Report 26 (1980).

Mississippi Delta in organizing the Catfish Bargaining Association under the protection of the Fishermen's Collective Marketing Act.[3] My colleague, Donald A. Frederick (ACS), has written an excellent article about that act in which he reviews its enactment to provide associations of producers in aquaculture protection from antitrust laws equivalent to that provided for producers of fruit, vegetable, milk, and other farm products under the Capper-Volstead Act.[4]

I've had no experience working with bargaining cooperatives in the dairy industry, and this is the only reason they have been omitted. Of course, a review of the legal climate in which agricultural cooperatives operate necessarily must include the use of Federal and State marketing orders in the dairy industry and significant Federal cases involving milk marketing cooperatives in the antitrust field.

Lastly, I have given special attention to the California Tomato Growers Association and the California Pear Growers, not only because of my experience with them over the many years, but also because each illustrates a different set of problems faced by bargaining cooperatives. The market for canning pears and other canned tree fruits has declined in recent years, resulting in a substantial decrease in the number of canners who produce canned pear halves or fruit cocktail.

Per-capita consumption of processed tomatoes has increased substantially, resulting in a steady increase in the number of processors with whom the tomato association negotiates. A significant difference also exists between the time a grower can plant and produce a marketable volume of pears for canning and a grower can produce tomatoes. Pear trees normally take 4 years to bear in a commercial quantity and 6 to reach maturity, while tomatoes are an annual crop.

Of course, all bargaining cooperatives have many problems in common and each year seems to produce new ones that present new challenges to association directors,

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[3] **48 Stat. 1213 (1934), 15 U.S.C. §§ 521-522.**

[4] **Donald A. Frederick, "Fisheries Marketing Cooperatives: An Antitrust Perspective," Vol. 9, No. 1,** *Journal of Agricultural Taxation & Law 47-63* **(Spring 1987).**

management and, I might add, their counsel. Perhaps this is what makes practice in this field so interesting and challenging.

Acronyms

This list of acronyms used in this report is provided for the reader's convenience:

AAA	American Arbitration Association--nonprofit, nongovernment agency that provides private dispute resolution services.
ACS	Agricultural Cooperative Service--agency within the U.S. Department of Agriculture
AFL	American Federation of Labor--association of labor unions
AFPA	Agricultural Fair Practices Act of 1967--Federal law
APC	Apricot Producers of California--bargaining cooperative
Cal Can	California Canners & Growers--processing cooperative, no longer in existence
CalPack	California Packing Company--noncooperative processor
CAGU	California Apricot Growers Union--early bargaining cooperative, no longer in existence

CCPA	California Canning Peach Association--bargaining cooperative for cling, or canning, peaches[5]
CCPA	California Canning Pear Association'--bargaining cooperative, now known as the California Pear Growers
CFPA	California Freestone Peach Association--bargaining association for fresh peaches
CPG	California Pear Growers--bargaining association
CPGA	California Pear Growers Association--an early bargaining association, no longer in existence
CTGA	California Tomato Growers Association--bargaining association
EC	European Community
FTC	Federal Trade Commission--Government antitrust enforcement agency
GAO	General Accounting Office--Government research agency

[5] Cling peaches are varieties whose pulp tends to cling to the pit, or "stone," and are most suitable for canning. Thus, the California Canning Peach Association is frequently referred to as the cling peach association. So-called freestone varieties are primarily marketed as fresh fruit. While the California Freestone Peach Association is a separate bargaining association, it is currently managed by the cling peach association staff.

[6] Whenever it is not clear from the context which association CCPA refers, a more descriptive phrase such as cling peach or pear association will be used. The recent name change of the pear association to California Pear Growers will minimize confusion caused by this acronym in the future.

PBA	Prune Bargaining Association--bargaining cooperative
PCP	Pacific Coast Producers--processing cooperative
RBA	Raisin Bargaining Association--bargaining association
TVG	Tri Valley Growers--processing cooperative
USDA	United States Department of Agriculture

Acknowledgments

I am indebted to Suzanne Vaupel, an attorney and economist who assisted me in analyzing the economic changes in the pear and tomato industries.

Professor John Hetherington of the Virginia Law School has been most helpful with suggestions about the project's focus.

Many, who have been directly involved with the operations of agricultural bargaining cooperatives and consented to in-depth interviews, include Robert E. Collins, a Girton, Cameron, retired after 30 years of distinguished service as pear association manager; and David Zollinger, former manager of a number of agricultural cooperatives including the Cortez Growers, the California Freestone Peach Association, and the Livingston Farmers Association, and, until recently, executive vice president of the California Tomato Growers Association (CTGA). Also Kalem Barserian, manager of the Raisin Bargaining Association for many of its critical years; Ken Lindauer, president of the Prune Bargaining Association; Ralph Bunje, president of the California Canning Peach Association from 1950 to 1975; and Ron Schuler, current cling peach association president.

Others who have been most helpful include the late Galen Geller, for many years manager of the California Tree Fruit Association; Joe Mapes, recently retired associate director of the California Pear Growers (CPG); Jean-Mari Peltier, current CPG president; John C. Welty, current CTGA executive vice president; Bill Allen, Jr., manager of the recently organized Catfish Bargaining Association; and Richard Hudgins, director of administrative services of the California Freestone Peach Association.

Dr. Randall Torgerson, administrator of USDA's Agricultural Cooperative Service (ACS), has provided support and guidance to the agricultural bargaining cooperatives in

many ways and encouraged me to start this project, hopefully not to his regret.

Finally, but by no means last, I am deeply indebted to Donald A. Frederick, ACS law and policy program leader, who has given me invaluable assistance in more ways than I can

Contents

CHAPTER 1. CHARACTERISTICS OF BARGAINING COOPERATIVES

Agricultural bargaining cooperatives, particularly on the West coast, have since the 1950s become an integral part of the system for marketing certain agricultural commodities. These grower-owned and -controlled associations are frequently described as part of the self-help movement, an effort by individual producers of a given commodity or commodities to improve their position without Government subsidies.

Members of agricultural bargaining cooperatives negotiate collectively for a farmgate or roadside price for their raw produce. Conversely, processing cooperatives normally can, freeze, or otherwise process the produce of their members and then sell[7] the processed product to wholesale or retail distributors.*

Facilitator or Agent

Bargaining cooperatives fall into two categories. The first establishes minimum prices and terms of sale for their members' produce. This must be incorporated in the contracts the members themselves execute for the sale of their produce. Organizations of this type include the California Tomato Growers Association (CTGA), the Potato Growers of Idaho, the Washington Potato Growers, and the Olive Growers Council.

The second, in addition to establishing price and terms of sale, also act as exclusive sales agents for their members and contract for the sale of members' produce. The California Pear Growers

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[7] Technically, there is an exception in the case of raisins where growers ordinarily dry the grapes before selling them as raisins. In the case of prunes, the fruit is delivered to the processor for drying but the price is based on the dried product.

[8] In the membership or marketing agreement of some processing cooperatives, the member sells produce to the cooperative. Rather than receiving a fixed price, what the producer receives depends upon what the cooperative realizes from its sale of the processed product after deduction of all expenses.

(CPG), the Apricot Producers of California (APC), the California Canning Peach Association (CCPA), among others, operate in this manner.

Regarding the second type, some cooperatives such as the canning peach association actually take title to their members' produce; some like the pear and apricot associations do not. Whether the association takes title is not essential. What is most important, however, is that each association has the legal capacity to transfer to customers title to the produce covered by the contracts they executed with these customers.[9]

Financing

By definition a bargaining cooperative does not perform a function which adds value to the members' produce, so there normally are no profits available to enable such an association to cover its operating expenses.

Funds to meet operating expenses of the cooperative are generated from various sources:

Retains. Many associations which contract for the sale of their members' produce require the member, in the membership agreement, to agree that a percentage of the sales proceeds shall be paid by the processor directly to the cooperative, which in turn is authorized to retain these funds. Monies are allocated and distributed to the member, less such amount which may have been used by the association for operating or other expenses.

Some processors have insisted that growers annually execute an authorization for the deduction of retains as dues despite the provisions in the membership agreement. The purpose presumably is to harass the growers and not too subtly to remind them of moneys being diverted to the association. We have suggested that any such authorization be written it becomes a continuing authority upon which

[9] The argument for taking title is that it enhances the association's ability to compel a member to make deliveries of products pursuant to a contract which the association has entered into in the member's behalf. In either case, a properly drawn membership agreement should be legally enforceable. Cooperatives which do not take title have found this to be the case.

the processor may rely unless the grower notifies otherwise in writing.

For example, for many years the pear association had a 5 percent retain. If that money was not required for meeting the association's operating expenses, the cooperative returned 4 percent to the members in the same marketing year and retained 1 percent. This was allocated to the growers on the basis of their patronage. The 1 percent was put in a revolving fund and normally returned to the member at the end of 5 years.

Different associations use various periods of time for returning monies retained in their revolving funds. Some cooperatives found that by stretching out the period for revolving out what had been retained, they could develop a substantial fund.

Interest. Generally, a bargaining cooperative does not pay interest on retained funds. Interest earned on the investment of those funds becomes another source of income for the association. Normally the association uses that income to meet its operating expenses and pays taxes on the unused excess, which it then places in an unallocated fund.

Dues. Some bargaining associations realize income by collecting annual dues or fees from the members, often based on a percentage of the sales proceeds. In the membership agreement, the member authorizes and directs the processor to whom the member sells produce to pay such dues directly to the association. CTGA does not have retains or service charges and relies upon dues as a major source of meeting operating expenses and providing capital.

Service Charges. Some associations have successfully persuaded processors to pay a service charge based on a certain sum per ton over and above what the processor pays as the purchase price for the members' produce. A clause in a contract between a bargaining cooperative and a processor which provides for such a charge might read as follows:

> Processor hereby recognizes that the organization and continued existence of the association relieves the processor of the trouble, labor and uncertainty of soliciting and obtaining separate contracts with individual growers; in consideration thereof the processor agrees to pay to the association

> the reasonable price hereinabove designated, and a service charge of $_____ per ton at the time or times for payments specified herein, which service charge shall not be construed to be a part of the purchase price herein.

The canning peach association negotiated a service charge based on a percentage of the purchase price rather than a flat sum. This association has enjoyed a volume of sales of its members' peaches sufficiently large so that service charge income was substantially in excess of the operating expenses, enabling the association to revolve out each year all the retained funds.

Ralph Bunje, former canning peach association manager, explained that processors accepted the concept of paying a service charge with the expectation that bargaining cooperatives would become a stabilizing factor in the pricing of commodities from year to year and tended to eliminate marketplace price differentials.

The Prune Bargaining Association (PBA) receives a service charge or fee from packers not only for the tonnage purchased from association members but also for the tonnage the packers acquire from nonmembers, including tonnage the packers grow themselves. Ken Lindauer, PBA president, says packers pay this because they "realize the importance of getting a uniform price established for prunes and that the PBA seems to be the only organization that is capable of doing it. "

Lindauer also reported that having the fee apply to all growers eliminates a hurdle to signing up new growers. When a new grower joins the association, the grower does not have to become concerned about obligating the grower's packer to a service fee. The packer is already paying on the grower's tonnage.

Other Income. A few associations successfully developed income from such activities as publishing a periodic magazine for their industry which has articles of interest to both members and processors. Income is realized from the sale of advertising and subscriptions.

CTGA's monthly magazine, ***The California Tomato Grower,*** is an important source of income to the association. The magazine includes an editorial written by the association manager and various

articles dealing with the production of tomatoes and processing and marketing tomato products.

A healthy balance sheet can be a valuable asset in negotiation. Bunje was convinced that if a buyer knew that the association was financially capable of weathering any kind of storm that might occur, this reduced the opportunities for the processor to take advantage of it. Using this approach, the cling peach association has amassed a reserve fund of more than $1 million. This reserve has protected the association from making the kinds of unwanted decisions, such as compromising important points in litigation to cut legal expenses, that have faced other associations.

There is a psychological advantage to using revenue sources other than retains to fund an association. Growers view money retained from sales proceeds due them as their money. For political reasons, associations feel pressured to return retains to their growers as quickly as possible. Service fees paid by the processors, on the other hand, are viewed as the processors' money. The cling peach association, for example, pays tax on the service charges it receives and does not allocate them to the members. The association is free of the pressure to revolve these funds to the members and can use the money to support its bargaining positions and other activities.

Likewise, the dues paid by tomato growers to CTGA are viewed differently than retains. The growers know from the outset that the dues money is not coming back to them. Even though dues are assessed on a per-ton basis, no need exists to educate the growers on the importance of accumulating the funds at the cooperative. Dues are viewed as an expense, not an investment they are entitled to get back.

The accumulation of unallocated reserves gives the association freedom to aggressively pursue opportunities that might be foreclosed if the money is allocated to members. One example is litigation to protect association contracts and legal rights. When the board sees potentially significant legal expense ahead, it flinches much less if the bill is to be paid with "association" money rather than coming out of the members' pockets. In reality, of course, all of the money is grower money. But people just react differently depending on how it is accumulated and allocated.

Member Traits and Voting Methods

Bargaining cooperatives uniformly are extremely democratic, many with one-vote-per-member rules regardless of size, or, when the voting is based upon the volume produced by the members, a limit is usually placed on the number of votes any one member can cast.

The voting scheme often reflects the nature of the membership. One-vote-per-member is used when the members are somewhat homogeneous. One-member, one-vote proved to be impractical for organizations such as CPG, a partially federated cooperative consisting of individual pear-grower members and a number of cooperative members including local bargaining associations and packinghouses. The cooperative members would not have joined unless voting was based upon a volume of canning pears sold.

Until a few years ago, CTGA allocated one vote per member. Several large volume producers would not join the association unless they were given a larger voice in its affairs. It then adopted weighted voting to attract these producers, with a limit on the votes any one member can cast.

The relationship between the large-volume producer and the bargaining association must be handled with care. The association wants to have significant amounts of tonnage under contract, but avoid becoming captive to a small group of high-volume producers.

Large growers may decide to become processors, but not on a cooperative basis. Caution must be exercised to make certain a grower-processor does not acquire a seat on the bargaining association board of directors, lest there be an interlocking directorate that exposes the association to some antitrust implications.

Other Characteristics

A bargaining cooperative does not exist to generate a profit and the sources of its funds are limited, so it normally has a fairly small staff consisting of a manager, sometimes an assistant manager, one or more field staffers, and secretarial support.

With few exceptions, members retain the right to terminate their membership annually at a designated time.

CHAPTER 2. BARGAINING ASSOCIATION PROFILES

Each cooperative bargaining association has unique methods of accomplishing its goals. This chapter reviews the development of two such associations in the 1920s and 1930s, and two associations currently active. These examples weren't chosen because the associations are any more important than others that could have been profiled These associations are merely ones of which I have some personal knowledge and can discuss with some degree of confidence.

Bargaining Cooperatives Prior to the 1950s

Records of agricultural bargaining cooperative activity prior to the 1950s are fragmentary at best. Hoos and Helmberger reported that the California Pear Growers Association (CPGA) operated from 1917 to 1937, the California Grape Growers Exchange from 1919 to 1929, the California Cherry Growers Association from 1920 to 1935, and the California Canning Peach Association from 1921 to 1935. Whether each was a bargaining cooperative or rather a trade association that did not bargain but sought to encourage favorable prices is not clear.

The following profiles of CPGA and the California Apricot Growers Union (CAGU) reflect the concerns of growers during this period and the steps they were willing to take to achieve reasonable returns from their efforts.

California Pear Gro wers Association

Minutes of the meeting indicate pear growers from the Sacramento River region and Contra Costa County met in Walnut Grove on July 11, 1917. A resolution was adopted unanimously that provided in part:

> WHEREAS, the unorganized producers cannot maintain a living price for his products when prices are dictated by organized combinations of buyers and food speculators.

> WHEREAS, nearly all California producers, with the exception of pear growers are now organized. Oranges, lemons, peaches, apricots, prunes, almonds, walnuts, olives and raisins are handled by growers' organization and are bringing living prices.
>
> AND WHEREAS, since 1916 there has been an extensive and powerful combination of canners and packers, which seems to have practically eliminated healthy competition and buying, and apparently enables operators to take advantage of the situation.

The resolution concluded that growers should organize into a pear growers association to establish reasonable prices "for our products and to plan for efficient marketing in future years. "

Growers agreed to assess themselves 10 cents per ton on the estimated tonnage for 1916 to cover expenses of the organization. Apparently, the growers proposed that the association bargain with purchasers of pears for canning and the fresh market.

Additional minutes indicate an executive committee was formed. When growers next convened on July 22, 1917 at Walnut Grove, the committee reported it had met "at attorney Sapiro's office and drew up articles of incorporation for a state pear growers association and expected to have some kind of a contract to bring to you, but after working a day and a half on the matter so many angles and questions came up that we decided to report to you and let you decide what should be done. "

This was a reference to Aaron Sapiro, a San Francisco lawyer who in the 1910s and 1920s became nationally prominent in helping to organize producers of many commodities into agricultural cooperatives. [10] He raised many issues for the committee.

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[10] Aaron Sapiro is probably the most colorful and dynamic person to become involved in organizing agricultural cooperatives, not only in California but nationally. Some of the principal features of what became the Sapiro Plan are still pertinent. Unquestionably, he gave a much needed impetus to organizing marketing cooperatives, particularly in the years after

Growers wanted $50 per ton. The executive committee met in San Francisco with representatives of two canneries who said they could not can many pears at $50 per ton but would can more if the price were less. Growers again were urged that unless an effective organization was established immediately, they would not get more than $35 per ton and some canners might buy their pears on the market in San Francisco for as little as $20 per ton.

The leadership reported that growers in one area were being offered $22.50 per ton by canneries. The group sent a release urging pear growers to refrain from signing long-term contracts at unreasonably low prices.

Shortly afterwards, representatives of Santa Clara and Sutter Counties were contacted and growers agreed to form a statewide organization. It appears that associations were formed in the various pear growing districts in California and a statewide organization, CPGA, became a federation of those district associations.

No further record of the organization exists until 1918. Apparently, the association was unable to bargain effectively in 1917 because growers received about $35 per ton.

In 1918, CPGA proved much more effective. The board of directors attempted to establish a price of $70 per ton for No. 1 pears. On May 28, 1918, the association wired the United States Food Administration and requested its assistance in obtaining higher prices from packers who held term contracts of Bartlett pears. On July 18, the manager reported that the canners accepted the growers' price of $70 per ton less freight charges to San Francisco--"the best price ever paid for the whole crop of canning pears of the State of California."

Five days later the manager reported a problem with growers delivering pears that were wilted, wormy, and rotting. He concluded with the following advice "feed the wormy pears to pigs and raise some pork to win the war."

The growers, moreover, persuaded canners voluntarily to raise the price of pears in term contracts executed in 1917 by $10 per ton. This amounted to more than $60,000 to the association's growers.

World War I and the 1920s. See the bibliography for a partial list of articles written about him and some of his most dramatic speeches.

It is interesting to note that a letter in November 1918 from CTGA representatives to the CPGA president indicated that the two cooperatives had attempted, unsuccessfully, to secure joint offices.

An evaluation of the association's articles of incorporation, bylaws, membership agreement called a "pear crop agreement," and canners agreement indicates some important differences from those of the present California Pear Growers (CPG).

In the membership agreement, the early association agreed to "buy and the grower agrees to sell and deliver to the Association" all of its pears. Presently, CPG simply acts as the growers' exclusive agent. It is significant also that the grower was committed to sell and deliver his pears to the early association for a number of years. This was consistent with the Sapiro belief that it was essential for the cooperative to have a long-term contractual commitment by the grower for the cooperative to be effective. CPG and most other bargaining associations permit membership termination annually at a designated time as necessary to induce growers to join.

As a forerunner of the current retain, the grower authorized CPGA to deduct and retain a charge in the discretion of the association, not to exceed 50 cents per ton for canning pears and 25 cents per ton for dried pears. The agreement provided that at the end of the year's operation any surplus might be used by the association "for common advantage" or refunded to the growers.

Each grower agreed to provide the association with an estimate of tonnage production for the year and estimates of the quantity the grower expected to ship to the fresh markets, to sell to canneries, and to dry. The growers recognized at this early date that with a multi-use crop such as pears, it was necessary for some preference to be indicated by the member so the association could contract with canners or buyers in the fresh markets.

The crop agreement also provided for pooling by the association.

Correspondence in 1923 indicates that the association was advertising pears. Some directors indicated concern that the size of the pear crop might be getting too large.

The last recorded CPGA communication, dated July of 1932, indicated it was continuing to operate. Apparently it ceased operations in 1937, presumably as a result of the severe depression that year.

California Apricot Growers Union

A unique chapter in the history of efforts of fruit growers to organize to improve prices and other terms of sale they receive from canners and dried fruit packers occurred in the late 1930s in the apricot industry.[11] Apricots are a multi-use crop, sold to canners for processing, to packers for the fresh market, or to dried fruit packers.[12] Efforts to form a processing apricot cooperative in 1936 and to secure adoption of a marketing agreement under the California Pro Rate Act in 1938 failed.

In 1917, the prune and apricot growers organized the California Prune and Apricot Growers Association in hopes of improving the prices paid by dried fruit packers. At first, the association was successful, but gradually the plan broke down because many growers found they could get the benefits of the association without paying for them.

As a result, the association was reorganized in 1929 as a cooperative marketing dried fruit in competition with the proprietary processors. A substantial portion of the apricots went to canning, and returns during the 1930s for canning apricots were generally poor.

In 1937, a large pack met with disappointing sales, undoubtedly due to the 1937-38 recession. A large carryover crop in turn depressed prices to growers to the disastrous level of $23 per ton. One prominent grower in Santa Clara described 1938 as the worst year in farm history because the supply of fruit so far exceeded the demand.

In 1938, nearly all the growers in San Benito County organized, dried their fruit, and pooled it. They sold the fruit on a rising market and realized a better return than the canning or dried fruit price for 1937. They also obtained a concession from the packers to allow two association members in the packing plants during the grading of the member fruit.

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[11] This has been reported in detail by Herbert M. Free in a masters thesis he completed in 1941 at the University of California, Berkeley. Free based his report in large part upon news stories in the *San Jose Mercury Herald* and the *San Jose News*, many of which he included at length.

Another excellent secondary source is Glanna Matthews, "The Apricot War," Vol. 59, No. 1, *Agricultural History*, January 1985.

[12] Apricots are now also used by the freezing industry.

San Benito growers felt that organizing on a statewide basis would be even more successful. They assessed themselves to finance a statewide organization campaign and formed the California Apricot Growers Union (CAGU). Growers in Santa Clara, the largest producing area in the State, were particularly targeted by the organization effort. The membership agreement provided for a $1 fee and an agreement to hold the sale of fruit subject to a uniform price scale to be adopted later by the association.

An effective signup took place in all eight major apricot producing districts in California. At a meeting in San Jose on June 7, 1939, 60 growers representing all production areas in the State elected Ed Grant, a Santa Clara County grower, as president. A minimum price scale for canning fruit was adopted. Matthews noted "the 'Union' (CAGU) that emerged was a strange hybrid indeed, because it was to a large extent sponsored by the local business community while at the same time it employed the rhetoric of the labor movement. "[13]

Bankers and business people were concerned because 90 percent of the apricot orchards were heavily mortgaged. Growers were also in debt to valley merchants.

The first discussion between CAGU officials and canners was in San Francisco on June 12. Grant said the canners favored organization, provided the association was strong enough to guaranty that growers wouldn't sell below their own minimum price. The Canners League president reportedly questioned if the canners could legally reach a price agreement with the CAGU.

The growers committee then explored the possibility of support by the State American Federation of Labor (AFL). The State AFL secretary offered to cooperate, either through an alliance or a direct affiliation by issuing an AFL charter. He proposed that once a year a committee with equal representation of growers and laborers jointly bargain with canners to set the price of fruit and wages of field and cannery workers.

CAGU declined the proposal to avoid a split among its grower members. Matthews points out how paradoxical it was for the growers to be considering a joint organization with the AFL. Only a few years earlier, many apricot growers had joined the quasi-

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[13] **Matthews, "The Apricot War," p. 33.**

violence, let farmers know they would be unable to form a union without paying a heavy price.[14]

Negotiations began in earnest on July 6, 1939, when growers in the San Jose area began harvest. Intense bargaining followed through July 12. Fruit was ripening and dropping on the ground unharvested. Growers, frustrated by the refusal of the canners to accept the prices offered by the association, became increasing violent. Local newspapers reported several incidents of setting fire to fruit boxes placed in growers' fields to facilitate harvesting and of fruit being dumped on its way to a cannery.

On July 10, CAGU agreed to participate in a mediation conference with the canners to be attended by the president of the San Jose Chamber of Commerce, the president of the leading bank in San Jose, and the president of the San Jose Realty Board. These community leaders were reported to be authorized to convey a compromise offer from the association.

On July 11, the local papers reported that a meeting in San Francisco of the mediators with the canners had failed and that the Cannery Workers' Union had offered to give "its full support and cooperation" to the apricot growers.

On the same date, growers picketed the Libby, McNeil & Libby cannery in Sunnyvale and the Teamsters Union and cannery workers recognized the picket line. Most major canneries were completely shut down.

On July 12, the Mercury ***Herald*** reported that the strike had been settled. CAGU claimed a victory because the canners had come up $10 from their previous offer, while the association came down only $7.50 from its asking price. Unfortunately, the agreement was only with the smaller canners. The three major canners refused to recognize the agreement. Many growers feared losing their fruit it they insisted on the compromise price. The withholding action collapsed and the price paid by the major canners was substantially less than that worked out through mediation with the small canneries.

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[14] Id., at 30.

Free points out that the 1939 crop was the largest in 23 years, which undoubtedly presented an insurmountable problem for the cooperative. [15]

Throughout their ordeal, growers enjoyed widespread community support. For example, the police did not make a single arrest of a grower although Free reports that even association officials admitted that the police knew the persons who were responsible for the violence. At the height of the turmoil, the San Jose City Council permitted CAGU to conduct a demonstration parade through the city streets.

Growers attempted to reorganize in 1940. But the 1940 crop, in contrast to the large 1939 crop, was one of the smallest in history. CAGU had difficulty getting growers to cooperate. In most cases price negotiation was conducted by the individual growers and CAGU acted primarily in an advisory capacity.

Free observed that while "Farmers are generally opposed to violence, yet during the growers' strike, even many of the most conservative orchardists condoned the violent tactics used."

He further observed that "Nonmembers of such associations generally benefit as much as members, yet are not forced to cooperate or contribute financially. Growers characteristically tend to put off attempts to help themselves until they are actually in trouble. "

As a final footnote to Free's study, he reports that in January 1941, an organization of Santa Clara County apricot growers announced that they were contemplating a union charter with the Congress of Industrial Organizations. Growers named a committee that conferred with a West coast organizer to explore possibly aligning apricot producers with the labor movement. One grower was quoted as saying, "The organized grower is seeking aid from organized labor because here he sees affiliated power that has been abetted by State and Federal government and the power condoned by the State and Federal Supreme Courts."

Apparently nothing came of this proposal. No further serious effort to organize apricot growers occurred until the formation of the Apricot Producers of California as a bargaining cooperative in 1960.

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[15] Herbert W. Free, "California Apricot Growers Union," unpublished masters thesis, University of California, Berkeley (1941).

Contemporary Bargaining Associations

These two reports on the organization and activities of bargaining associations merely illustrate the many successful such associations operating today. They were selected primarily because of the author's familiarity with their experiences, and because they illustrate the two different types of agricultural bargaining associations.

California Tomato Growers Association[16]

The California Tomato Growers Association, (CTGA) was incorporated in 1951 and organized in 1954 as a growers' service association. Its primary functions were to recruit field labor for tomato growers, set piecework rates for workers, and provide legal advice to growers concerning the Bracero Farm Worker Program.

A predecessor organization, also known as the California Tomato Growers Association, was apparently organized in 1917. Unfortunately, no minutes or other records of the early association could be found. The group had likely ceased to exist several years prior to the formation of CTGA.

An unsuccessful effort to bargain for price in behalf of its members was made in 1958 and 1959. With that exception, the association continued to function as a service organization.

Anticipating the end of the Bracero program in 1964, the association in the early 1960s began promoting mechanical harvesting. The development of the tomato harvester and of suitable varieties of processing tomatoes caused the industry to change rapidly from hand

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[16] The following materials were used in the preparation of this section: CTGA minutes and annual reports; a paper entitled "An Economic Analysis of the Processing Tomato Industry From 1970 To The Present" by Suzanne Vaupel, June 1990; speech by Dr. Randall E. Torgerson, "Back to the Basics in Bargaining Cooperatives," June 1991, at CTGA annual meeting; interview of David Zollinger by Gerald D. Marcus, March, 1989; case study of CTGA prepared by Kathleen McManus under the supervision of Professor Chester 0. McCorkle, University of California, Davis, and Vice President/Manager Kenneth C. McCorkle, Wells Fargo Bank, Fresno, 1990; "President Dave Zollinger Analyses California Tomato Industry's Myriad of Past and Present Challenges, " ***California Tomato Growers, 1992.***

to mechanical harvesting. A formerly labor-intensive crop was changed to one requiring comparatively little labor. Harvested acreage increased from 141,300 acres in 1970 to 299,200 in 1975. Total production increased for the same period from 3.4 million tons to 7.3 million tons.

Consumption of canning tomatoes, however, was not keeping pace with production. After peaking in 1971, consumption dropped 15 percent by 1973.

With increased production and flat or falling consumption, inventories of tomato products began to grow and processors' demand for tomatoes declined. After reaching a peak in 1975, production dropped 30 percent in 1976 and 15 percent of the acreage was abandoned that year.

Early in the 1970s, CTGA, which had been organized as a growers' service organization, began considering a role in pricing of tomatoes to canneries. The price per ton at the processor door was $31.60 in 1970 and $34 in 1972 and 1973. In 1974, CTGA announced that if it were designated the bargaining representative for 70 percent of the state's processing tomato volume, the association would bargain with processors in 1975. Processors responded by increasing the price in 1974 to $56.80!

In 1975, CTGA made its 70-percent goal, began to bargain with the processors, and negotiated a farmgate price of $55 per ton. With the association acting as bargaining agent, grower prices remained relatively stable during the last half of the decade, despite depressed industry conditions.

Acreage and production continued to decline through the rest of the decade while consumption remained flat from 1978 until about 1981; however, production still exceeded demand. The canning tomato industry was in a desperate situation. Prices for canned product were low and inventories continued to build.

Weak industry conditions and a glut of tomato products continued through the first half of the 1980s. The severe depression in the industry took its toll on processors and the bargaining process. Two cooperative processors did not survive this period, California Canners & Growers (Cal Can) and Glorietta Foods. In 1980, some industry leaders estimated that the carryover represented the full year's supply of tomato products. The whole industry was marked

by chaos. No price was negotiated by CTGA for the 1981 crop. Production bottomed out in 1981 at 4.9 million tons.

The late 1970s was marked by turmoil within CTGA. The association had a negotiating policy of setting a price and asking members to hold out until it received that price. Many growers broke ranks. They were faced with unsold tomatoes rotting on the ground. Association membership began to decline.

The board, to encourage growers to renew their memberships, placed a clause in their membership agreement permitting growers to "opt out" in certain circumstances. If a grower received a contract offer different from the negotiating position of the association, the grower could ask the association to approve the contract. If the association did not approve the contract, the grower could option out for that season. The grower would not be subject to the contractual requirement to observe the minimum price and terms of sale requested by the association.

A resurgence in membership occurred, but at a price. Growers knew they did not have to observe the terms the association was attempting to negotiate. Worse yet, the processors were aware of the contract provision. Some processors would try to go around the association by making contract offers directly to growers.

That clause is still in the CTGA membership agreements. David Zollinger, CTGA executive vice president from 1981 to early 1993, would have liked to do something about it, but it was a politically sensitive matter that was popular with growers. He never found a way to convince growers to give it up.

In the 1980s, demand for tomato products increased with the growing popularity of Italian and Mexican foods. Per-capita consumption of processing tomatoes rose from 59.3 pounds in 1981 to 64.6 pounds by 1987, reaching a 20-year high of 68.4 pounds in 1989.

With relatively low production, increasing consumption, and a strong U.S. dollar, the United States became a target for tomato product imports. In 1980-81 and 1981-82, imports more than quadrupled from 39 to 161 metric tons. With the European Common Market subsidizing production, imported tomato products in eastern United States markets sold for less than they could be produced and shipped by domestic producers.

When Zollinger became executive vice president, a change occurred in the way the association conducted negotiations with processors. Until then, the chairman of the board also served as chief negotiator. As CTGA manager, Zollinger was given the authority to be the chief negotiator in consultation with the executive committee. Rather than depending on a seasonal basis for its bargaining, CTGA became more flexible and negotiated when necessary over a longer period of time or when it would have more ability to collect current information.

In 1984, CTGA changed from one-member, one-vote to modified weighted voting of one vote per thousand tons with a maximum of 100 votes. This encouraged some large producers that previously had not joined the association to become members while retaining the family-sized farms.

CTGA also changed its method of pricing. Previously it negotiated for single price for tomatoes. Now, it bargained for what it called an "anticipated average price."

Zollinger explained that the industry was divided into two lines of business. One part dealt with whole peeled tomatoes--tomatoes peeled and canned either whole or wedged, sliced, diced, or crushed. The other dealt with tomato products made from concentrate or paste--sauces such as pizza, chili and spaghetti, and ketchup. [17]

Processors who wanted whole peeled tomatoes were looking primarily at sub-skin color and a tomato that is solid, can be peeled, put into a can, diced, or otherwise similarly processed. In the case of concentrates, canners were less concerned if the tomato was actually solid but if they were whole and sound tomatoes. Zollinger said CTGA:

> . . .developed quality incentive programs for the two basic industries and then we had to find some way since these contracts were different (so) they could be equated. We had to create several standards on both sides of this equation so that we could equate in value whatever contract that we were dealing (with) to a contract for other processors in the

[17] **Interview with David Zollinger, March 25, 1989.**

various major segments of the industry. As a result, the association became able to be flexible in working with individual processors to meet their special needs and yet end up with substantially the same values for each. [18]

Zollinger said this has become a very beneficial program for the California processing tomato industry and offshore suppliers are beginning to adopt it. He described this change in price bargaining as follows: "Negotiating for price and contract terms has undergone many changes since the early days when one price for all production was agreed to throughout the industry in response to processors' needs for varieties with specific characteristics and equating price based on payment for desired characteristics is negotiated. "[19]

California production increased with the growing demand for tomato products. In 1991, California tomato growers harvested 9.9 million tons, the third record-breaking crop in a row.

Increased demand and production has led to an expansion of the processing industry. Several new canners have entered the business and, on the whole, California processing plants are relatively new and efficient. High-tech plants have been built with state-of-the-art equipment and effective management. Existing facilities have been refurbished and modernized.

While prices have been relatively stable since 1981 and growers' costs have increased, Zollinger explained that the growers' position has improved because of their marked improvement in productivity.

California in recent years has produced as much as 87 percent of the total U.S. production. The association's membership ranges between 45 percent and 50 percent of the tonnage going to proprietary processors.

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[18] Id.
[19] Id.

California Pear Gro wers[20]

Except for the activities of the pear growers association formed in 1917 and apparently ceasing operation in 1937, there was no effective statewide collective bargaining in behalf of the California pear growers until the formation of the California Canning Pear Association (now known as the California Pear Growers) in 1953.

Bartlett pears are a multi-use fruit suitable for canning, fresh market, and drying. Production increased dramatically in California from 1931 with 191,400 tons to estimates of 330,000 in 1952. Until 1945, use was primarily in fresh pear sales. That year marked the beginning of the growth of the canned pear market. Production of canning pears increased from 69,000 tons on the average from 1935 to 1939 to 265,000 tons by 1955.

Grower prices for California cannery pears were about $54 per ton for 1921-25 and declined to $23 per ton during the 1930s. Prices rose during the war years until in 1946 they reached $100 per ton. Prices fluctuated wildly in the years before the formation of the pear association: $65 per ton in 1947, $120 per ton in 1948, $31 per ton in 1949, nearly $100 per ton in 1950, and $49 per ton in 195 1.

During those years, new outlets were developed by the canning industry, including pear nectar, fruit salad, and baby food. Favorable consumer reception for fruit cocktail, which had been introduced in 1930, increased demand for pear production. Fruit cocktail became an important outlet for California pears because they constituted one-third of the total fruit content.

These new uses prevented a catastrophe which would have prevailed had the industry been limited to canned pear halves, fresh and dried uses.[21] Production of pears was skyrocketing due

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[20] Among the materials used in the preparation of this section are the minutes of the association board meetings; annual reports; interviews of Cameron Girton and Robert E. Collins by Gerald D. Marcus in December 1988; a conference with Jean-Mari Peltier and Joe Mapes; a case study of the California Pear Growers Association prepared by Kathleen McManus under the supervision of Professor Chester 0. McCorkle, University of California, Davis; and "A History of California Grade Pack Pears" by Edward Thor and Daniel Moen of Tri Valley Growers.

[21] H.V. Beckman, Manager, Pear Growers League, "Wither Are We Drifting with Pears?" Pear Growers League Annual 1953.

primarily to increased yields resulting from use of sprinklers and the availability of irrigation water through major water projects.

In 1952, 60 representative growers from every pear producing district in California met in Sacramento. Jack Z. Anderson, first president of the California Canning Pear Association (CCPA), described the meeting as follows:

> The primary topics of discussion were: Organization and surplus control. It was generally agreed that only through some type of a statewide canning pear association could we expect to be in a position to bargain with the processors on a price for our product. It was further agreed that such an organization could go a long way toward eliminating the wide range in prices paid for pears and assist tremendously in stabilizing the entire industry. That stabilization was badly needed is best emphasized by looking back to 1948 when the California Bartlett growers received an average of $120.00 per ton for their pears and looking quickly, but reluctantly, at 1949 when these same growers sold for an average of $3 1 .00 per ton a crop of almost the same tonnage as was produced the previous year. It is obvious that no industry can expect to survive and prosper under conditions that permit a variation in price of almost five hundred percent from one year to the next.[22]

In 1953, CCPA was organized as a partially federated association consisting of cooperatives such as the Central Coast Pear Association and the Lake County Pear Association, a number of cooperative shipping houses, and individual pear growers. To provide equality in voting power between the cooperatives and individual members, voting was on the basis of tonnage rather than one-member, one-vote.

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[22] Speech by Jack Z. Anderson before the Washington State Horticultural Association of Wenatchee entitled "Organization for Self-Preservation" 1953. A copy of his speech is included in the appendix.

Because pear growers had received different prices for canning pears depending upon the district in which they were produced, CCPA members agreed to recognize existing price differentials by using a lo-year average of prices that each district received as a format for the prices the association would negotiate.

Members also agreed that the association would only bargain for canning pears. To learn the volume for which the association would be bargaining, each member had to file a preference request in advance of harvest, indicating the tonnage that the grower would produce for the canning market as distinguished from pears headed for the fresh market or be used otherwise.

The pear association adopted the policy of the cling peach association, acting as a sales agent for members' fruit and establishing the price and terms of sale at which it would be sold. The form of contract was also substantially the same as that of the canning peach association, featuring "reasonable price." That enabled the association and its canning customers to sign binding contracts in advance of harvest without designating a specific price.

The association employed its first manager, Cameron Girton, and amazingly was prepared to begin negotiations for the 1953 crop within weeks after it was organized.

To expedite negotiations, which legally had to be conducted individually with each processor, Joe Wahrhaftig, CCPA's first legal counsel, helped develop an ingenious formula. Proposed prices would be submitted by telegram (no faxes in those days). The association contract provided that if a requisite number of processors representing a sufficient volume of fruit reached agreement, each of the processors would be bound to the price.

CCPA was financed primarily by service charges paid by the processors and per-unit retains. As the amount of retains in the revolving fund grew, the association also earned interest from the investment of the revolving fund.

In preparing for price negotiations with canners, the association used a formula developed by Drs. Sidney Hoos and George Kuznitz of the Giannini Foundation at the University of California in Berkeley. If the proper information was supplied, the formula would forecast the FOB price for a case of 24 2½-cans of pears for the next marketing season. From that number, the reasonable per-ton price for the raw fruit could be estimated.

The formula considered a number of variables including estimated crop tonnage; amounts anticipated for fresh, canned and dried purposes; past and present conditions of unsold canned stocks of pears, pear products, and competing fruits including clings, freestones, apricots, and sometimes pineapple; and the general economic condition of the country including consumers' buying power.[23]

In its first year of operation, the pear association negotiated with 24 proprietary canners and two processing cooperatives, Turlock Growers and Tri/Valley Packing Association, that merged in 1963 to form Tri Valley Growers (TVG). Negotiations with the processing cooperatives was, of course, only for such fruit that the cooperatives purchased commercially. Several of the independent canners were -smaller family-owned proprietary operations.

Association president Anderson described it dramatically:

> Price negotiations that first year were not for the faint-of-heart. The board met repeatedly to establish its differentiated pricing structure and initial bargaining position. The first meetings with processors took another 3 days and produced only one acceptance.
>
> Then the canners were hit with a strike that lasted for 8 tortuous days. Pears were ripening fast. Canners were taking non-association pears into storage but association members had no home for their fruit. When the strike was settled, CCPA immediately offered member fruit to the canners at the association price. Again only one canner accepted the offer.
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> The board held emergency sessions. The growers were becoming desperate, but no breaks occurred in the ranks. The board, after individual conferences with several major canners, agreed to reoffer member tonnage at $7 per ton less than the original asking price. Within 24 hours the

[23] The appendix contains a detailed explanation by Girton of how the formula was applied.

compromise price was accepted, the pears were sold, and the association was established as a credible organization in the eyes of both growers and processors."

During that first year, it became evident that without organization of the Northwest pear growers, the major canners had a great advantage. Del Monte, Libby, and Hunt were buying pears both in California and the Northwest.[25] If canners could buy pears cheaper in the Northwest, that was a deterrent to the ability of CCPA to negotiate a reasonable price.

CCPA leaders went to the Northwest and met with pear growers in Medford, OR, and Yakima and Wenatchee, WA. In 1954, the Washington Canning Pear Association was formed. It closely followed the structure and procedures of the California association. Shortly afterwards, many Oregon pear growers joined and the association became the Washington-Oregon Canning Pear Association.

While the two associations decided not to bargain for a joint Pacific coast price or prices, they felt it was important to work together rather than against each other. The Pacific States Canning Pear Marketing Association was formed with two members, the California and Northwest associations. The alliance remains in effect, usually meeting twice a year to exchange information and coordinate bargaining activities.

California growers had a marketing order under which grades were established, research was conducted, and funds withheld for promoting canned pears. Oregon and Washington had similar enabling legislation. The Pacific Coast Canned Pear Service was formed by the three states with representatives from each State to administer a fund for promoting canned pears.

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[24] "Organization for Self Preservation," a speech by Jack Z. Anderson, CCPA president, reprinted from the 1954 Annual of the Pear Growers and Central Coast Pear Association and included in the appendix.

[25] Then the Pacific coast produced 90 percent of the total U.S. production of canning pears, California produced about two-thirds, and Washington and Oregon, the balance.

Girton discussed efforts to establish an overall Pacific coast bargaining association with the primary function of establishing a Pacific coast price:

> The growers in the Northwest were very suspicious that in surplus years we would recommend … tighter grades, particularly as far as size is concerned which would affect them seriously. There were several large growers, very large influential growers, in the Northwest who were pretty much dry farmers and, therefore, their fruit was not as large as our grade would require, and they fought us … when we attempted to amend the Federal Marketing Act to include canning pears. They raised the issue that this might be a ploy on the part of California to affect grades and be very harmful to their efforts to harvest their crops.[26]

The 1953 and 1954 grower prices were near the previous 10-year average, so CCPA was regarded as successful in its efforts to achieve price stability at a reasonably profitable level.

By 1957, the association recognized that production was increasing and processors were finding canning less profitable. Several proprietary canners discontinued operations. The association faced the prospect of having unsold fruit and adopted a resolution to pool. It remained in effect until 1974." The purpose of pooling was to protect CCPA prices from being undermined by homeless fruit being sold to processors at distressed prices. Portions of the current retain were used to cover pooling losses.

In 1974, as a result of cannery strikes and a large crop, so much unsold fruit existed that the entire 5-percent retain was used to cover the pooling losses. Due to pressure from a number of growers whose pears had been sold, the board reduced the retain from 5 percent to 2 percent, extended the revolving period for retains from

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[26] **Interview with Cameron Girton on Dec. 9, 1988.**

[27] **A copy of the California Canning Pear Association pooling policy adopted in 1957 is included in the appendix. Pooling is discussed in greater length in Chapter 5.**

5 to 7 years, eliminated the pooling resolution, and in its place established a pool for unsold fruit. As Girton explained:

> Finally we adopted a best efforts policy whereby we would make our best effort to sell the product. In the event we couldn't, the grower would be so advised, it might then elect to place its fruit in what we referred as an unsold lot. The unsold lot was fruit that was not sold as of a given date and that was in there at the grower's request. We would normally be able to sell all or a portion of it . . . sometimes at canning prices, sometimes to the fresh market, sometimes to the dry market, sometimes to Gal10 (to produce wine) at reduced prices which would, in most cases, return an average per ton of less than the number 1 canning price.
>
> The proceeds in the pool would be supplemented by the Board if it so chose and were then divided up in a prorata basis.[28]

The leadership 'often discussed what would happen if the canners and the association failed to agree on price. In 1966, the unthinkable happened. The association and the leading canners failed to agree, but under their contracts the canners were required to accept the pears committed to them with no agreed price. The ensuing legal battle is discussed in detail in the chapter 4 section covering litigation over reasonable price.

The mid-1960s were memorable also because Dr. Hoos completed a study of price differentials and at long last the eight pear producing districts agreed that price differentials should be eliminated and a single price established statewide.

During these years 50 percent or more of growers selling to proprietary processors joined the association and it achieved processors' acceptance as a stabilizing influence in the industry.

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[28] Interview with. Cameron Girton on Dec. 9, 1988. A copy of the revised California Canning Pear Association pooling policy adopted in 1976 is included in the appendix.

The 1970s and 1980s were difficult for growers of pears and other fruit for canning. The number of proprietary canners kept diminishing with mergers, acquisitions, and bankruptcy. Processing cooperatives, which for a time appeared likely to pick up the slack, appeared and, except for TVG and Pacific Coast Producers (PCP), disappeared. CCPA was instrumental in organizing growers to form processing cooperatives to protect their growers' home and market. These ventures are covered in the chapter 6 section on processing cooperatives initiated by bargaining associations.

Girton said that the canned fruit industry problem was caused by a decrease in the consumption of canned fruit:

> This was attributed to many things -- (1) the availability of fresh fruit year round due to the importation of fruit, (2) the cost of a canned product which was getting higher and higher, and (3) people were getting concerned with the heavy syrups that we had put in our product. So these three items we feel attributed to the decline in the consumption of canned fruit in general.[29]

As Thor and Moen point out, "The ending of the Vietnam War and winding down of government needs caused a decline in canning profitability as the ending of earlier wars had. By 1975 production had shifted so that more than half of the pears processed for fruit cocktail and grade pack in California were processed by cooperatives."[30]

This was also a time when major California fruit companies were taken over by large conglomerates. As a result of leveraged buyouts, increasing emphasis was placed on the bottom line. The operating companies in a conglomerate were faced with a heavy burden of interest payments. Capital needed for plant modernization and change was diverted into non-productive costs of the buyouts.

While California bartlett pear bearing acreage decreased substantially from 1978 to 1988, yield per acre increased to the point

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[29] Girton interview.

[30] Edward Thor and Daniel Moen, "A History of California Grade Pack Pears," unpublished working paper prepared for TVG (March 1990), p. 15.

that pear supply continued to grow while demand for canned pears waned. Grower returns per ton from canning dropped sharply from $176 per ton in 1978 to $109 per ton and $105 per ton in 1981 and 1982.

During these years the pear association encouraged tree pullout, considered merging with the Washington-Oregon Canning Pear Association, and even studied a suggestion of the cling peach association that the two cooperatives develop a mixed fruit product. Pear association income was substantially reduced. It dropped membership in a number of organizations and reduced operating expenses in other ways. In the end, the board decided that the association should continue as an independent organization and expand its services.. For this reason, the name was changed from the California Canning Pear Association to the California Pear Growers (CPG). Although none of us recognized it at the time, this was the name of the first pear association.

While in the 1980s canners had disappeared and maintaining canner homes for fruit became more and more difficult, by 1990 a situation approaching equilibrium between supply and demand had developed. Processors operating in California included PCP and TVG, major proprietary canner Del Monte, and two small proprietary canners, J.R. Wood and Gerber Foods. TVG was the only processor producing grade-pack pears.

At this writing, CPG's membership has remained constant. The association is accepted by pear growers as their voice in marketing and other industry matters. Under the leadership of president Jean-Mari Peltier, who succeeded Cameron Girton, the association has expanded its non-pricing activities in a number of innovative and creative ways as described in chapter 7.

CHAPTER 3. LEGAL STATUS OF AGRICULTURAL BARGAINING

Agricultural bargaining, as a form of cooperative marketing of farm products, is greatly influenced by the legal environment in which it operates.

Like all marketing cooperatives, bargaining associations are subject to general antitrust law and dependent on the limited exemption provided by the Capper-Volstead Act.

They are also affected by the Federal Agricultural Fair Practices Act (AFPA), which has both important strengths and weaknesses. Several states have enacted laws with various provisions to promote agricultural bargaining within their borders.

This chapter discusses these legal foundations underpinning farm bargaining cooperatives and concludes with some suggestions on how the Federal act could be improved to bring public policy support of bargaining into clearer focus.

Antitrust Law and Cooperative Farm Bargaining

Antitrust law, like most of our legal traditions, is founded on English common law. When common law was developing, the "trades" were tightly controlled by guilds and towns. If someone agreed not to practice his trade, he might become a burden on the public. Therefore, the courts refused to enforce any contract that "restrained trade."

This view was gradually relaxed, and by the early 18th century, agreements in restraint of trade were enforceable if reasonably related to a lawful transaction. The pendulum gradually moved to the other extreme and the common law of trade restraint became largely a dead letter.

After the Civil War, industrial leaders in the United States took advantage of the hands-off attitude adopted by our courts and mounted serious challenges to free competition. Persons in the same line of business, including industries important to farmers--steel, petroleum, farm machinery, sugar, cotton, oil, and tobacco--formed "trusts."

A "trust" was an early version of the holding company. Controlling blocks of stock in previously separate (and usually competing) companies were placed in a trust under the direction of a single board of trustees. The trustees could then control virtually an entire industry, by setting levels of output and prices of all the largest producers.

Farmers, particularly in the South and West, responded to the trusts by organizing the so-called Granger movement. Farmers used their political influence to help secure first State and then Federal laws to limit the power of the trusts. While the trust is now an archaic form of business structure,' the term "antitrust" has survived to describe laws aimed at protecting the competitive market system.

The Sherman Act (1890)

The Sherman Act of 1890,[31] the first Federal antitrust law, remains the most important such act. Most antitrust suits against cooperative associations allege violations of sections 1 and 2 of this act.

Section 1 makes it illegal for competitors to form a trust or other combination or conspiracy that restrains trade. Section 2 prohibits a single firm or a group of firms from becoming a monopoly, or even attempting to do so.

After passage of the Sherman Act, the young farmer cooperative movement found itself imperiled by the antitrust legislation intended to combat the excesses of large and powerful corporations that had victimized the farmer. Sherman Act sponsors had not intended to include agricultural cooperatives as unlawful combinations in restraint of trade. Indeed, Senator Sherman proposed an amendment to his bill 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. "[32]

The amendment wasn't adopted. Many legislators felt it was important not to limit the applicability of the new law in any way. Senator Sherman was persuaded by his colleagues that no one would consider applying the antitrust statute to agricultural producers.

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[31] 15 U.S.C. §§ 1-7.

[32] 21 Cong. Rec. 2726 (1890).

But soon, farmer cooperatives found themselves the targets of antitrust suits, mainly under State statutes patterned after the Sherman Act.[33]

Labor unions, like farmer cooperatives, were also under attack. In one famous labor case, the Danbury Hatters decision, the U. S. Supreme Court stated the Sherman Act:

> ...made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show several efforts were made to exempt, by legislation, ***organizations*** *of farmers* and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us. (emphasis added)[34]

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, agriculture, or horticultural organizations,*** instituted for the purposes of mutual help, and not having capital 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. (emphasis added)[35]

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[33] See, e.g., Ford v. Chicago Milk Shippers' Ass'n, 39 N.E. 651 (Ill. 1895); Reeves v. Decorah Farmers' Co-operative Society, 140 N.W. 844 (Ia. 1913).

[34] Loewe v. Lawlor, 208 U.S. 274, 301 (1908).

[35] 15 U.S.C. § 17.

The Capper- Volstead Act (1922)

It soon became apparent that despite 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, enacted in 1922. Section 1 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 capital 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.[36]

Section 2 authorizes the Secretary of Agriculture to proceed against any cooperative that he believes monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced."[37] If the Secretary finds undue price enhancement has occurred, an order to cease and desist from monopolization or restraint of trade is issued.

Under the protection of these statutes, producers have been able to organize themselves 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.

In ***National Broiler Marketing Association v. United States,*** Justice Harry A. Blackmun eloquently explained the conditions that led Congress to permit agricultural producers to improve their bargaining position in the marketplace by forming cooperatives:

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[36] 7 U.S.C. § 291.
[37] 7 U.S.C. § 292.

> Farmers were perceived to be in a particularly harsh economic position. They were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. Often the farmer had little choice about who his buyer would be and when he could sell. A large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time. Few farmers, however, so long as they could act only individually, had sufficient economic power to wait out an unfavorable situation. Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.[38]

Court Actions

The legal history of the Clayton and Capper-Volstead Acts and the decisions of the courts make it clear that farmers and producers may form cooperatives without violating the antitrust laws. These statutes, however, 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 and conduct that violates the antitrust laws.

In 1939, the case of *United States v. Borden Co.*[39] brought before the U.S. Supreme Court an alleged conspiracy between the Pure Milk Association, a cooperative, and noncooperative entities,

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[38] 436 US 816, 825-26 (1978).
[39] 308 U.S. 188 (1939).

including distributors, labor officials, and municipal officials. The conspiracy allegedly violated 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.[40]

Nearly a generation later, the Supreme Court again had occasion to discuss the limits of the exemption for farmer cooperatives. In *Maryland and Virginia Milk Producers Association, Inc. v. United States*[41], *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

[40] 308 U.S. at 204-205.
[41] 362 U.S. 458 (1959).

(emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory practices at will."

The Supreme Court defined a further limit to the exemptions in *Case-Swayne* Co., *Inc.* v. *Sunkist Growers, Inc." The Court* 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 these Supreme Court decisions leave no doubt that the statutory immunity enjoyed by agricultural cooperatives is a limited one, both the Supreme Court and the appellate courts have affirmed the rights of cooperatives to join in combined action under the Capper-Volstead Act. In *Sunkist v. Winckler & Smith Co.*[44], *the* U. S. Supreme Court held that two or more cooperatives could work together to collectively process and market their members' fruit and fruit products without violating 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 looked 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.[45]

The Capper-Volstead Act also specifically 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 to achieve a higher price than the buyer would likely pay individual

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[42] 362 U.S. at 465-466.
[43] 389 U.S. 384 (1967).
[44] 370 U.S. 19 (1962).
[45] 370 U.S. at 29.

farmers selling separately. Second, farmers may form their own cooperative marketing agencies and compete directly with other value-added entities in the marketplace.

Bargaining Association Status Under Capper- Volstead

The applicability of Capper-Volstead protections to agricultural bargaining associations was clearly established in two cases decided in the mid-1970s.

In ***Treasure Valley Potato Bargaining Assn. v. Ore-Ida Foods,*** Inc.,[46] two separate potato bargaining associations were charged with violations of the Sherman Act based on their agreement with each other to sell their potatoes for a common price. Processors argued that negotiating for price did not constitute marketing as that term was used in the Capper-Volstead Act; only associations that actively perform processing, handling, and marketing functions are protected by Capper-Volstead. The court rejected these contentions, holding:

> The two associations were in fact "bargaining" associations. ... Their principal function was to bargain collectively for their respective members as to prices, terms, and conditions of preseason potato contracts.
>
> ...
>
> We think the term ***marketing*** is far broader than the word sell. A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including ***among others*** buying, selling, storing, transporting, standardizing, financing, risk bearing, and ***supplying market information."*** Webster's New Collegiate Dictionary, 1953 Edition. [Emphasis added]. 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

[46] **497 F.2d 203 (9th Cir. 1974), cert. denied, 419 U.S. 999 (1974).**

> 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.[47]

Relying on the rationale of ***Sunkist v. Winckler and Smith*** and language in Section 1 of the Capper-Volstead Act permitting associations to have marketing agencies in common, the Court found joint bargaining by the two associations was permissible.

In ***Central California Lettuce Producers Cooperative***[48] ***the*** Federal Trade Commission (FTC) issued a complaint arguing a growers' association wasn't eligible for Capper-Volstead protection because it did less than bargain on behalf of its members. The association didn't negotiate directly with lettuce buyers. Individual members conducted their own negotiations and sales. Central served as a vehicle for lettuce producers to come together and agree on a pricing policy. Central's members agree to sell all their lettuce at prices within the limits of ceiling and floor prices set by the cooperative.

The initial decision of an administrative law judge distinguished ***Treasure Valley*** and concluded a cooperative that "merely serves as a forum for a price-fixing agreement does not engage in collective processing, preparing for market, handling and marketing as those terms are used in the Capper-Volstead Act."[49]

While the administrative law judge's decision was being reviewed by the full FTC, the U.S. District Court in San Francisco, in a private suit against the same cooperative, ruled that the same activities were exempt.% The district court stated:

> ...even if Central engaged in no other collective marketing activities, mere price-fixing is

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[47] 497 F.2d at 215.

[48] 90 F.T.C. 18 (1977).

[49] 90 F.T.C. at 50 (Initial Decision, March 13, 1975).

[50] 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), cert. denied 439 U.S. 1090 (1979).

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."

Ultimately the FTC, noting the court's decision, set aside the administrative law judge's initial decision and dismissed the complaint.[52]

Capper- Volstead Under Continuing Scrutiny

While the amount of litigation involving the Capper-Volstead Act has fallen considerably since the 1970s, cooperatives have had to remain vigilant in their defense of the limited antitrust protection provided by Capper-Volstead.

For example, in the late 1970s, FTC sent voluminous, burdensome requests for information to numerous farmer cooperatives. Cooperatives felt FTC made little or no use of the information provided and that FTC was usurping USDA's authority under Section 2 of Capper-Volstead to prevent abuses of any market power developed by farmer cooperatives. Cooperatives persuaded Congress to include language in Section 20 of the Federal Trade Commission Improvements Act of 1980 that barred FTC from using any appropriated funds to (a) study, investigate, or prosecute any agricultural cooperative for any conduct protected by the Capper-Volstead Act, and (b) to study or investigate any agricultural marketing order."

While the Act expired after 3 years, Congress has included these limits on FTC action against cooperatives'and marketing orders in legislation providing appropriated funds to FTC for each year since 1982.

Another challenge to Capper-Volstead emanated from a letter dated August 4, 1989, to the Comptroller General from two U.S.

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[51] **413 F.Supp.** at **992.**

[52] **90 F.T.C.** at **52 (Opinion of the Commission, July 21, 1977).**

[53] **Pub. L. 96-252.**

Senators. The letter asked the General Accounting Office (GAO) to study the impact of Capper-Volstead on consumers of agricultural products, individual farmers, and the economy in general. Specific areas of inquiry in the letter directed GAO to focus on dairy cooperatives that operated in areas covered by Federal marketing orders.

Fortunately, GAO took a balanced approach in its report." GAO found that while dairy farms had grown in size and sophistication, so had the processing and distribution firms that purchased their milk. The executive summary reported:

> Therefore, to the extent that the increased market strength of processing and distribution firms and of dairy farmers offset each other, the premise of the Capper-Volstead antitrust exemption for cooperatives--that farmers cannot effectively bargain independently because their operations are too small--remains .[55]

Agricultural Fair Practices Act of 1967

The volume of agricultural products marketed through bargaining cooperatives grew substantially during the 1950s. Producers found, however, substantial resistance by many processors to the development of agricultural bargaining cooperatives.

Agricultural producers, bargaining cooperatives, and many farm organizations supported an effort in Congress in the mid-1960s to enact legislation which would provide a more favorable legal climate in which producers could bargain for the sale of their produce through bargaining cooperatives.

The Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry conducted hearings on farm bargaining. Testimony was presented of various practices by processors which discouraged the growth of bargaining cooperatives--blacklisting producers who tried to organize

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[54] GAO, "Dairy Cooperatives: Role and Effects of the Capper-Volstead Antitrust Exemption" (September 1990).

[55] Id. at 3.

or join a bargaining association, discriminating against producers who were members of such organizations by offering more favorable prices to noncooperative members, and offering inducements to producers not to join or to terminate their membership in a bargaining cooperative.

On April 16, 1968, President Lyndon Johnson signed into law the Agricultural Fair Practices Act of 1967 (AFPA), sometimes known as S109.[56]

The congressional findings and declaration of policy section includes the following:

> The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.[57]

AFPA provides that it was unlawful for any handler knowingly to engage in the following practices:

(a) To coerce a producer from joining an association or refusing to deal with a producer because he had joined one;

(b) To discriminate against a producer because of his membership in an association;

(c) To coerce a producer to breach or terminate his association membership;

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[56] Agricultural Fair Practices Act of 1967, Pub. L. No. 90-288, §§ 2-6, 82 Stat. 93 (1968), codified at 7 U.S.C. §§ 2301-06. For a comprehensive report on the legislative history of AFPA, see R. Torgerson, ***Producer Power at the Bargaining Table,*** Columbia: University of Missouri Press, ***1970.***

[57] 7 U.S.C. § 2301.

(d) To offer an inducement to a producer to cease being an association member or to refuse to join;

(e) To make false reports about an association; or

(f) To conspire with another to commit any of the above.[58]

Injured parties were given the right to sue in the U.S. District Court and also the remedy of filing a complaint with the Secretary of Agriculture who, in turn, could file suit through the Attorney General.[59]

Section 2304, entitled Disclaimer of Intention to Prohibit Normal Dealing, was included as a compromise with opponents of the act. This section provides as follows:

> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.[60]

A provision relating to preemption reads:

> The provisions of this chapter shall not be construed to change or modify existing state law nor to deprive the proper state courts of jurisdiction.[61]

Producers, through their cooperatives, understandably sought to bring their complaints of violations of the act to USDA rather than to file suit themselves. The administrative process involved far less expense and held the promise of a quicker resolution of their differences with handlers. Producers hoped that if the Department brought the parties together, handlers would become aware of the act and many abusive practices would end. Cordial relations are advantageous to handlers, producers, and their associations because

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[58] 7 U.S.C. § 2303.
[59] 7 U.S.C. § 2305.
[60] 7 U.S.C. § 2304.
[61] 7 U.S.C. § 2305(d).

the relationship between producers and customers continues from year to year and protracted litigation frequently benefits neither side.

Unfortunately, enforcement of the act through filing complaints with the USDA has, on the whole, been unsatisfactory. After a flurry of activity in the early years after 1968, the act has generally fallen into disuse.

In 1978, ACS prepared a summary of complaints filed with USDA. It, revealed that 34 complaints had been filed in the first 11 years. Twelve were filed by milk and poultry producers and the remainder by producers of vegetables, sugar beets, potatoes, and grapes. One was settled and 15 were closed for insufficient evidence. In 7, USDA persuaded the Attorney General to file suit. Results favored the growers.

Since 1978, only two complaints have been filed. In 1982, a group of Colorado sugar beet growers asked USDA to pursue legal action against Great Western Sugar Company. While USDA was inclined to initiate litigation, the Attorney General was reluctant to do so and the matter never moved forward.

In 1986, the Central Washington Farm Crops Association filed a complaint against a local processor of sweet corn. USDA's Agricultural Marketing Service rejected the complaint on the basis that it was supported by insufficient grounds for action.

The unsatisfactory record of enforcement through the administrative process can be attributed to several reasons. USDA has limited investigative personnel and has generally placed the duty of investigating and developing the facts upon the complaining cooperative or growers who do not have the resources or capacity to present the Department with a documented case. Even if the Department believes a violation has been established, it must then convince the Attorney General to take action.

Moreover, proof of discrimination against cooperatives and their members is frequently difficult to establish. Producers, who have terminated their membership in a cooperative or decided not to join because of inducements or pressure from a processor, are unwilling to testify against the processor lest they lose a home for their produce. Even producers, who joined a cooperative or retained their membership in the face of pressure from processors, are reluctant to testify against the processor lest in the long run they have a problem disposing of their produce.

While some cooperatives have filed suit, such litigation is extremely expensive and time consuming and generally the processor is in a far better position than the cooperative to survive a battle of attrition.

Moreover, the Act does not reach what is probably the most serious problem faced by bargaining cooperatives--the refusal of some processors to have meaningful negotiations with them.

One case that deals with enforcement of the statute is ***Butz v. Lawson***.[62] A dairy processor had a contract with a producer to supply it with milk. When the producer subsequently joined a bargaining association, the processor promptly terminated its contract, relying upon the disclaimer clause of the Federal Act. The court held that Lawson violated the AFPA when it terminated the contract because of the producer's membership in the association.

The court also stated "in dictum" that under the disclaimer clause the processor was not required to deal with the producer through his association. While the essential holding of the court was that the processor violated the Act when it discriminated against the producer because of his membership in the association, the dictum has unfortunately been used to justify passive enforcement of the Act.

More recently, a U.S. District Court in Florida granted a preliminary injunction favorable to growers and USDA ordering Cargill, 'Inc., to reinstate a normal business relationship with the president of the Northeast Florida Broiler Growers' Association and not to discriminate against him or any other association member in any way.[63]

The court relied upon AFPA, the Packers and Stockyards Act, and anti-racketeering provisions of the Federal Racketeer Influenced and Corrupt Organization Act.

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[62] **386 F.2d 227 (N.D. Ohio 1974).**

[63] **Baldree, et al. v. Cargill, 758 F. Supp. 704 (M.D. Fla. 1990). The decision to grant the preliminary injunction was affirmed without opinion by the U.S. Court of Appeals for the 11th Circuit, 925 F.2d 1474 (11th Cir. 1991).**

The only decision of the U.S. Supreme Court which has interpreted AFPA is ***Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Board."***

In 1972, Michigan enacted fair practices legislation.[65] The law, patterned after one used in Canada, provided for a more definitive collective bargaining plan with arbitration to resolve an impasse in negotiations when it occurred.

Under the Michigan Act, a so-called "agency shop" was adopted. If a majority of the producers of a commodity in a designated area covered by the Act became members of a bargaining association, that association became the negotiating agent for prices and terms of sale for all of the producers of that commodity in that area.[66] All such producers, whether members or not, were required to provide financial support for the association and abide by the terms of the contracts the association negotiated with processors.[67]

In 1973, an asparagus bargaining unit was accredited under the law. The Michigan Canners and Freezers Association and two producers challenged the law's constitutionality.

The plaintiffs contended that the service fee and the mandatory representation provisions of the Michigan Act conflicted with the purpose of AFPA because that Act expressly protected the right of farmers to decide whether or not to join an association. They argued that the Michigan Act was preempted by the Federal Act and was unconstitutional.

In ***Michigan Canners & Freezers, the*** U.S. Supreme Court unanimously reversed the Michigan Supreme Court, which had upheld the Act. The U.S. Supreme Court found that because the Michigan law required nonmember producers to abide by those contract terms negotiated by the cooperative and to pay service fees to support the cooperative, the practical effect was to deny those incidents of voluntary association membership protected by AFPA.

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[64] Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Board, 467 U.S. 461 (1984).

[65] Michigan Agricultural Marketing and Bargaining Act, Michigan Statutes Annotated §§12.94(101)-12.94(126).

[66] Id., § 12.94(107)(c).

[67] Id., §§ 12.94(110)(1), 12.94(113)(1).

The court did not embrace, however, the processors' contention that the Federal Act created and protected a right in processors to bargain directly with an individual producer even though the producer was a member of the bargaining association. The court did not reject the contention but simply did not rule on the issue. While the Solicitor General sided with the processors on the issues decided by the court, he supported cooperatives on the issue of a processor's right to deal with farmers on an individual basis, stating:

> We doubt that the AFPA (the federal act) was intended...to create or protect a processor's right to deal with the individual farmer of his choice. If handlers can insist on dealing directly, even with producers who have voluntarily appointed an association as their designated agent, the protections of the federal act would not be meaningful.[68]

The Michigan Act also requires that processors and a certified association bargain in good faith and in the event of impasse, submit to binding arbitration. Except for the provisions held unconstitutional, the Michigan Act continues to operate effectively.

State Fair Practices Legislation

Several states have adopted laws to facilitate agricultural bargaining within their borders. This section discusses State laws that do the most to support growers' bargaining cooperatives.

California

In 1967, California enacted an agricultural fair practices act which, like AFPA, only contained provisions prohibiting discrimination against a producer who asserted the right to join or not to join a bargaining association.

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[68] **Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Board, Case No. 82-1577, Brief for the United States, filed with the Supreme Court of the United States, September 1983, p. 12.**

Effective Jan. 1, 1984, California's Act was amended to require, among other things, that bargaining associations and their processing customers bargain in good faith. Section 5443 l(e) specifically provides that it is an unfair trade practice for any processor, handler, distributor or agent of any such persons or for any cooperative bargaining association or any agent of an association, or for any person to:

> . . .refuse to negotiate or bargain at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious attempt to resolve differences with a cooperative bargaining association 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, or refuse to negotiate or bargain at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious attempt to resolve differences with a processor for price, terms of sale, compensation for commodities produced under contract and other contract provisions relative to any commodity which the cooperative bargaining association represents.@

This language was adopted at the request of processors in place of language originally proposed that referred specifically to a failure to bargain in good faith. The processors did not want to use any term derived from labor union negotiations. The wording came from Federal court interpretations of the National Labor Relations Act, Section 8(b), that were consistent with traditional interpretations of "bargaining in good faith. "[70]

Bargaining associations sought to include provisions for mediation and arbitration in the event of an impasse. While this

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[69] California Food and Agricultural Code, § 54431(e).

[70] N.L.R.B. v. Insurance Agents International, 361 U.S. 477 (1960). See also N.L.R.B. v. Tmitt Mfg., 351 U.S. 149 (1955).

effort was unsuccessful, a compromise proposal was adopted. An agricultural bargaining advisory committee would be formed to study how the act, as amended with the requirement to bargain in good faith, was operating and whether a need existed for resolving impasse through mediation and arbitration. The committee submits a report to the California Director of Food and Agriculture each year about the operation of the act.

The advisory committee has six representatives of cooperative bargaining associations and six processor representatives. The committee studies and reports on virtually all aspects of the Act with particular reference to the bargaining process between processors and the associations.

The director assigned a staff representative to help coordinate the work of the committee. Members agreed to rotate the chairmanship between the processor and cooperative representatives annually and to have the committee proceedings transcribed.

The committee's value was established in its first year of operation, when it helped resolve a dispute'between a recalcitrant canner and the tomato bargaining association. A canner had requested grower-members of CTGA to accept a formula for determining the price of tomatoes for processing known only to the processor, who neither divulged all of the elements of the formula nor values ascribed to each element. The concept, as presented by the canner, was that the growers would be able to participate in the profits of the processor. Once a grower executed such a contract with the processor, no room for bargaining remained.

This presented a real problem for Zollinger, CTGA's manager. Growers, who signed the contract, placed the association in a powerless position. And it raised concerns with the other canners. They had no way of knowing whether this canner was getting product for less than they were paying.

CTGA asked the committee to recommend that the Act be amended to prohibit such a practice. Evidence presented confirmed that the formula was as represented by the association. By a unanimous vote the committee endorsed the recommendation of the association. The processor, feeling the pressure more from its competitors than the growers, then announced that it was discontinuing use of this hidden formula.

Bargaining association representatives on the committee continued to press for amendment of the Act to provide for mediation and arbitration. Extensive hearings were held in 1986. Expert witnesses from Michigan and Ontario shared their experiences with legislation providing for mediation and arbitration in their respective jurisdictions.

Predictably, bargaining cooperative representatives concluded that the evidence established that some method for resolving impasse was essential to meaningful bargaining, while processor representatives disagreed. The committee report reflected the different views.

However, the report unanimously commended the legislature for creating the advisory committee, which both sides agreed "has served as a valuable mechanism for the exchange of viewpoints between processors and the agricultural bargaining associations. "

Processors continued to object strenuously to proposed amendments to the California Act that would provide for arbitration. But, as a compromise, processors agreed to accept non-binding use of the services of a third party acting as a conciliator between the parties. A bill was drafted by bargaining association and producer representatives on the committee. Provisions called for the Director of Food and Agriculture to order conciliation if he determined that it would assist the parties in negotiating an agreement. The conciliation would be conducted by the regional office of the American Arbitration Association (AAA).

Since the enactment of this procedure," conciliation has been employed on eight occasions. In each, at the conclusion of several days of intensive negotiations conducted by a conciliator appointed by the AAA, the parties reached agreement.

The conciliation process is conducted in accordance with the AAA's Commercial Mediation Rules. It provides for the sharing of cost of the process. The act contains specific time limits for involving and conducting conciliation. The committee's annual report to the director for 1991 included the unanimous conclusion that the conciliation process had been effective in the instances in which it had been used.

[71] **California Food and Agricultural Code, §§ 54451-58.**

California bargaining associations have been generally pleased with the results of their State legislation. For example, Lindauer reported that before California had effective bargaining laws, evidence suggested packers may have discriminated against prune association members in a number of subtle ways--assigning preferred times for use of prune dryers only to nonmembers, making advance payments only to nonmembers, giving nonmembers preferences in the allocation of storage bins. Since California bargaining laws were enacted, Lindauer said these activities have seldom taken place.[72]

Michigan

In addition to the features of the Michigan Agricultural Marketing and Bargaining Act described earlier, provisions for mediation and binding arbitration are included in the event of an impasse in negotiations. Arbitration is conducted by an arbitrator designated by the Michigan Agricultural Marketing and Bargaining Board. Binding final offer arbitration is employed.[73]

Since the decision of the U.S. Supreme Court in ***Michigan Canners & Freezers,*** unaffected provisions of the State law have remained in operation. In many instances, nonmembers voluntarily contribute to the cost of the association and abide by the price and terms of sale negotiated.

Maine

In 1973, Maine enacted a bargaining law which defined unfair practices, required handlers and qualified bargaining associations to meet in good faith, set criteria for the qualification of producer associations as bargaining agents under the law, and established a bargaining board to administer the Act.[74]

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[72] Interview with Kenneth Lindauer on June 2, 1989.

[73] Michigan Statutes Annotated §§12.94(114)-12.94(123). The term "binding arbitration" means the parties must accept the determination of the arbitrator. In some instances, that can be whatever the arbitrator finds to be fair. But in final offer binding arbitration, each party submits a suggested decision and the arbitrator must choose one of those to final offers.

[74] Maine Agricultural Marketing and Bargaining Act of 1973, Maine Revised Statutes Annotated, title 13, §§ 1953-1959.

One section prohibited a handler from negotiating with other producers of product while negotiating with a qualified bargaining association.[75] In 1986, the Maine Supreme Judicial Court sustained a complaint filed by a poultry processor alleging that section gave the association significant advantage over individual producers and, therefore, conflicted with the policy objectives of the Agricultural Fair Practices Act (AFPA). The court held that provision of the Maine Act was preempted by AFPA, but the remainder of the Maine Act was not invalidated.[76]

In 1987, the Maine Bargaining Act was amended to provide a mechanism for the dispute resolution:

1. The parties can mutually or unilaterally request voluntary mediation; both parties are required to participate in good faith.

2. If voluntary mediation fails, any matters remaining in dispute must be submitted to mediation, which is to continue for no more than 5 days.

3. If mediation fails to resolve the dispute, all remaining unsettled matters are submitted to an arbitrator who is required to use final offer selection. The decision is final and binding on the parties."

The same poultry processor that was the plaintiff in the earlier case filed a complaint raising several Federal constitutional challenges to the Maine Act amendments, including the contention that the amendments are preempted by AFPA. It sought to enjoin the board and its members from enforcing the bargaining provisions, entering into mediation, and submitting to arbitration or contract with the poultry bargaining committee. The U.S. District Court held that it was premature to decide the Federal constitutional challenges to the amendments. The court felt that since the challenge involved a new and entirely uncharted State regulatory scheme, it should permit important issues of State law to be considered in the first instance in the State forum specifically designed for that purpose. It appears the litigation died at this point.

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[75] **Id., § 1958.**

[76] **Bayside Enterprises, Inc. v. Maine Agricultural Bargaining Board, et al., 513 A.2d 1355 (Maine 1986).**

[77] **Maine Revised Statutes Annotated, title 13, § 1958-B.**

Washington

In 1989, the State of Washington enacted its Agricultural Marketing and Fair Practices Act. The legislation defined unlawful practices of handlers and of associations of producers or members, provided for the accreditation of an association of producers to be the exclusive agent to negotiate for price for all producer members of the association within a negotiation unit, and required bargaining in good faith between an accredited association of producers and handlers. The scope of the Act was limited to sweet corn and potatoes. The Director of Agriculture was instructed to establish an advisory committee of six producers and six handlers.[78]

In 1991, the Potato Growers of Washington, a certified bargaining association, filed a complaint against Lamb-Weston alleging that the processor violated the Act when it executed agreements called Farm Lease and Custom Farming Agreements with individual association members. The association charged that in reality the processor was contracting for the purchase of potatoes grown by association members while refusing to negotiate for the price it paid for them. The processor contended that it simply leased the land from the grower, employed him to grow the potatoes on the land, and therefore was not purchasing the potatoes.

It appeared as if the Washington State Department of Agriculture would sustain the association's complaint. The processor indicated it would challenge the constitutionality of the Washington Act, particularly the requirement that the processor bargain in good faith with the association, on grounds that it conflicted with the purpose and language of AFPA and therefore is preempted by that Federal law. However, the association withdrew the complaint.

While the provision for the appointment of an advisory committee appears to have been patterned after the provision in the California act, in Washington State the Director of Agriculture elected to appoint the committee chairman and approve the meeting agendas. This inhibited the committee.

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[78] **Washington Agricultural Marketing and Fair Practices Act, Washington Revised Code §§ 15.83.005-15.83.905.**

Proposed Amendments to the Federal Act

As it became increasingly apparent that the AFPA was not providing the intended legal support for producers to join and bargain collectively through bargaining associations, pressure increased to secure amendments to the act.

At first, primary emphasis was on incorporating a requirement that qualified bargaining associations and processors bargain in good faith. More recently, producers have focused on the adoption of clarifying amendments to AFPA to (1) eliminate confusion caused by the dictum in ***Buk v. Lawson*** *Milk* (supra) and (2) rebuff efforts of processors to attack provisions of State fair practices legislation that require bargaining in good faith because they have been preempted by the Federal Act.

Extended to its logical conclusion, the *Lawson* dictum would lead to the frustration of the plain intent of AFPA, remedial legislation in which Congress recognized that only the right to join and bargain collectively through a cooperative would provide producers with any meaningful bargaining power. The desired result could most effectively be accomplished by repealing the disclaimer section or, at the very least, the phrase "nor require a handler to deal with an association of producers."

It seems unlikely that AFPA will be construed by the U.S. Supreme Court to preempt State statutes which require bargaining associations and processors to negotiate in good faith. The Act contains no preemptive language and does not reflect a congressional intent to occupy the entire field of farmgate price bargaining. In its declaration of policy, Congress said "because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together in cooperative organizations as authorized by law."[79]

The legislative history of AFPA is devoid of any indication that Congress sought to erect a barrier to State legislation to implement the purposes and rights established by the Act. Although the specific language of State acts that require bargaining in good faith is not included in AFPA, they are a mere extension into an area

[79] 7 U.S.C. $2301.

unregulated by Congress but nevertheless wholly supportive of congressional intent. However, many supporters of agricultural bargaining cooperatives believe that clear authority should be given to the states to enact fair practices statutes that require good faith bargaining by amending the present preemptive language relied upon by the Supreme Court in ***Michigan Canners and Freezers.*** Such an amendment might read:

> Nothing in this chapter shall preclude or deny any right of any state to adopt or enforce any statute, regulation or requirement establishing any unfair trade practice in addition to those established under this Act.

Other amendments which have been suggested include provision for an advisory committee similar to that in effect in California and Washington and for conciliation as provided in the California Act."

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[80] **For a discussion of various possible amendments, see Donald A. Frederick, "Agricultural Bargaining Law: Policy in Flux," Vol. 43, No. 3,** ***Arkansas Law Review 679 (1990).***

CHAPTER 4. TECHNIQUES OF PRICE NEGOTIATION

Successful grower bargaining does not just happen. Careful planning and coordination among a number of persons with an interest in the production and marketing of the commodities--growers, association directors, managers, and advisers--is essential. This chapter reviews a variety of strategies that have been used to help growers attain fair value for their products.

Know Your Facts

An effective negotiator cannot fly blind. Bargaining must be based on a firm foundation of knowledge about the industry and the environment in which it operates. The ability to acquire, analyze, and use information is the cornerstone of effective bargaining.

Ralph Bunje, former cling peach association manager, emphasized the need to know as much as possible about both grower and canner sides of the issues. He asserted that the more one knew about crop size, inventory carryover, processor costs, processor weaknesses, and other relevant economic factors, the better job one could do in arriving at a reasonable price.[81]

Girton repeated Bunje's point. The pear association relied on Professor Hoos' formula to determine its negotiation position. Considerable data was needed to use the formula, and then to sell the price to the canners.

Good economic data is particularly important when using a reasonable price contract. If a third party, be it an arbitrator or court, is asked to decide what is "reasonable," the association should be ready to prove its price meets that standard.

Bunje developed his own price book. It incorporated all of the available statistical data relevant to negotiating for the farmgate price for cling peaches. He first used his price book to educate his directors about what the market could afford. He later used it with the canners.

A problem confronting current bargaining association managers is the increasing difficulty of obtaining hard numbers about

[81] **Interview with Ralph Bunje on Nov. 17, 1989.**

their industry. Processors and processor trade associations are not providing key industry numbers, such as total packs and inventory carryovers, as they have in the past. Grower associations must rely more on their field staff to develop an accurate picture of the industry, and some necessary information simply is not available. This now places an unfortunate obstacle in the path of the accumulation and dissemination of sound data that can facilitate rational bargaining.

The likely size of the crop is one of the most important facts to be determined. Naturally, as the season for negotiation begins the processors tend to estimate the incoming crop as large and the growers will develop an estimate which is significantly lower. The association manager and the field staff will visit growing areas several times each year to gather information on current and future crop prospects. This is clearly their best source of such information. An important bargaining cooperative role is to gather information on the likely size of the crop, keep the members informed on the overall situation, and use the information as part of the negotiation process.[82]

Grower, Director, and Manager Responsibilities During Bargaining

Producer bargaining is a team operation. No clearcut system exists that best assigns roles among the growers, directors, and management of a cooperative bargaining association. This section covers various ways of dividing responsibilities used by different bargaining associations.

CTGA's Zollinger negotiated for the association with the processors. The association uses a variety of formal and informal committees to successfully complete its negotiation efforts.

District advisory committees provide way to exchange information directly with producer-members. Management conducts

[82] John C. Welty, CTGA executive vice president, surveyed bargaining associations about methods they use to discover price in their respective industries. His report was presented to the 38th National and Pacific Coast Bargaining Cooperative Conference on December 4, 1993, and is included in the conference proceedings published by ACS (Service Report 37).

informational meetings with each committee once or twice a year, but not during the bargaining period. Attendees discuss contracts, focusing on how to improve the contracts. The growers give input to the negotiators and the negotiators explain to the growers how bargaining has gone in prior years and where talks are likely to lead in coming negotiations.

An executive committee of the board acts as the negotiating committee. The manager and that committee work as a team during the bargaining process. While management conducts the face-to-face negotiations, conference calls are frequently held with the executive committee before and during bargaining with each processor.

When a tough problem develops -during bargaining with a specific processor, management will sometimes contact prominent growers who deliver to that processor and establish an ad-hoc committee for advice on resolving that problem. If the problem continues to worsen, a meeting of all member-growers who deliver to the processor is called. Zollinger considers this meeting of "a committee of the whole" effective in solidifying grower support during tough negotiation.

The wishes of these processor-specific groups are reported to the CTGA executive committee. The association, however, avoids getting into the position where a processor-specific committee has more authority over any issue than the CTGA executive committee or board of directors. The association places absolute priority on maintaining the continuity of bargaining with all processors and negotiating consistent agreements in the best interest of all association members. No single group of grower-members is allowed a special contract provision that might lead to negative implications for other grower-members.

Zollinger noted that Ohio tomato growers have used a different approach, forming separate bargaining units of growers for each major processor to negotiate only with that processor. At one time when California negotiations were difficult and Ohio bargaining was going smoothly, CTGA considered adopting the processor-specific approach. However, some years later Ohio negotiations became difficult and CTGA decided not to pursue a structural change.

Under Bunje, the cling peach growers used a different approach. Bunje organized a price committee of directors directly involved in the negotiations.

Bunje felt he had to negotiate with two entities, his own board and the processors. He took the data developed for his price book and met first with his directors and then the canners. Initial meetings involved no discussion of possible contract terms, only the data in his background book. He wanted both sides to agree on the numbers before they began serious negotiation. This lessened the prospect of disputed economic facts when the time came to discuss price.

After these meetings, Bunje invited each processor to meet with the price committee. While no firm prices were negotiated, the parties had a chance to probe the other's position. At least one prominent grower, who usually shipped to each major canner, was on the price committee. Occasionally, Bunje had to urge the processors to take a hard line at these meetings so the grower-directors would have realistic expectations when they sat down to set their asking price.

After these sessions, the entire board met to determine an initial asking price. The processor response was usually close enough to the association price, so that, after some give and take, negotiations were complete. Bunje said he never had to resort to litigation to settle a negotiation impasse. His emphasis on collecting and sharing economic data was, undoubtedly, an important factor.[83]

Because he made heavy use of his board during the negotiation process, Bunje devoted considerable resources to director education. He formed advisory committees to work younger, college-educated growers into the decisionmaking process. He took the board to major markets to talk with retail chains and wholesale distributors and to help them understand the entire marketing process.

Bunje also made a good point about how a manager should deal with association members. He said that managers must be absolutely honest and forthright in talking to growers. When the facts won't support a higher price, lay the facts on the line rather than tell people what they want to hear.

Since Ron Schuler has managed the cling peach association, the roles of the parties have moved more toward those of the tomato growers. Schuler negotiates directly with the canners and then meets

[83] Information in this section is based on an interview with Ralph Bunje on Nov. 17, 1989.

with the board to inform them of the bargaining progress. The board's role is more advisory than under Bunje.

The pear association also operated along these lines. For many years, the association secretly polled directors about where they thought price should be set. Each year, a range would develop. Discussion clearly indicated farmers in areas where the per-acre yield was generally better were more amenable to a lower price than those from areas where the yield was not nearly as good. Again, the manager developed a good relationship with the customers. The hardest job was often maintaining the confidence of the growers when advising the board that the price level it had set was unattainable.

Lindauer said PBA relies quite heavily on directors to conduct the negotiation.[84] With only one major noncooperative packer in the industry, many prunes are processed by Sunsweet Growers, Inc., or local firms with management well known to the growers. The prune association has, at different times, used professional negotiators hired on a fee basis and even the manager of another bargaining association to coordinate bargaining efforts. At other times, the association has operated without a manager or an outside adviser and the board conducted all bargaining functions.

Lindauer suggested the prune association functions most effectively when it has a hired manager to facilitate negotiations, but uses directors liberally in the negotiation process. In bargaining with a family-owned packer, if the association brings in a professional, then the packer also feels obligated to do the same. He feels that there is less posturing and delay, and more serious negotiations, when the actual participants know that a price has to be established in a timely manner.

By bargaining as an association, Lindauer said the prune growers could negotiate aggressively without antagonizing their packer. A three-person price committee meets with each packer. Each committee member sells to a different packer. When the committee meets with a packer who buys from a committee member, that producer can generally abstain and let the other members do the bargaining. The packer knows the group is bargaining on behalf of the industry. This avoids personal antagonisms that can develop in one-on-one negotiation between a grower and a packer.

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[84] Interview with Kenneth Lindauer on June 2, 1989.

There are compelling reasons for leaving the face-to-face bargaining in the hands of a professional. Growers generally lack the expertise and the objectivity of a good professional negotiator. If the manager can develop the confidence of the processors, they will tell a manager things they won't tell growers. Processors know a good manager will not betray their confidence at the coffee shop.

Development of the Reasonable Price Contract

Certain breakthroughs play a special role in the nurturing of many important concepts. The development of the "reasonable price" contract was such an event for agricultural bargaining.

Many agricultural products are perishable in their unprocessed state. Unless they are manufactured into storable products within a short time of ripening, they are lost forever. Product spoilage is bad for the grower, processor, and consumer. The reasonable price contract became a mechanism to permit growers to deliver product to processors and have it changed into a storable and marketable form, even if the parties had not yet agreed on the price to be paid growers for that product. At the same time, grower interest in attaining a fair price was also protected.

A major problem faced the canning peach association when Bunje became manager in 1951, namely the standard canner "open price" contract between the canners and individual growers. Both the producers and processors wanted an enforceable contract in advance of harvest for a specific tonnage of a given product, modified to accommodate the vagaries of nature. The problem was that it was normally impractical to reach agreement concerning price very far in advance of harvest.

The canners' open price contract met the problem of determining price in one of two ways -- (a) the highest price generally paid by processors in a designated area, such as a district or State, or (b) the highest paid by the contracting processor in a designated area.

The open price contract, however, deterred effective producer bargaining. While the producer had a home for his fruit, the processor was assured a source of supply. The producer had relinquished his power to offer his produce to another processor. In the absence of a provision for price to be determined by a third party, such as in arbitration, for practical purposes the price became what

the processor determined. This contract was therefore anathema to establishing an effective bargaining cooperative because the cooperative stood in no better position than the growers it represented.

Bunje reported canners often induced growers to sign open price contracts by financing orchard acquisitions and new plantings. As part of the package, the growers signed long-term, open-price contracts.

The validity of the canners' open-price contract was upheld in *Hunt Foods, Inc. v. O'Disho*.[85] Hunt Foods and the defendant grower reached an agreement in which Hunt promised to buy and the grower promised to sell a specified tonnage of peaches for the 1949-53 seasons.

The pricing provision in part read:

> . ..Seller agrees to deliver his Cling Peaches under Buyers seasonal contracts and the price or prices payable under this contract **shall** be the Buyers average net high price or prices Roadside, paid for the current season in Stanislaus County for Cling Peaches of the size, grade, variety and quantity delivered hereunder during said current **season.**[86]

Both parties performed their contract in the first 2 years. However, when the grower decided to sell his peaches to another party at a higher price in the third year, Hunt Foods sued for specific performance. The grower contended that the contract was unenforceable because it left uncertain the price to be paid. The Federal District Court rejected the grower's contention and held:

> . ..the contract does not give the Buyer any absolute or arbitrary right to fix prices. To the contrary, the price to be paid is the average price to be paid to such growers. In other words, the plaintiff is required to go into the open market, to compete with other **canners** in the buying of peaches. Out of

[85] 98 F. Supp. 267 (N.D. Cal. 1951).
[86] 98 F. Supp. at 271.

> this market eventuates the average ***price*** to be paid peach growers -in Stanislaus County (italics ours). Indeed it is inconceivable that the plaintiff, as a single canner, out of (presumably) many could loom so large as to exercise such power.
>
> The average price is a matter of mathematical calculation. The contract here is a term contract and as such is related to the average price paid under plaintiffs ***seasonal*** contracts as well as term contracts. ...(italics ours).[87]

The judge relied upon Section 1729, Civil Code of California, which provided:

> (1) the price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties...(4) where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case.[88]

The fallacy in the court's reasoning was that it assumed free and open competition in the marketplace between the growers and canners; evidence, however, indicated that prices generally resulted from tacit if not express agreement among leading processors. Moreover, because the open price contract was widely used, canners were assured of their needed supply and growers were in no position to bargain with one against another.

Bunje attributes Joseph Wahrhaftig, association attorney at the time, with the assistance of Moses Huberman, formerly of the Antitrust Division of the U.S. Department of Justice, for developing of legal tools that satisfied the desire of the parties for an enforceable contract in advance of harvest. Both the grower and the bargaining

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[87] Id. at 269.

[88] Id.

cooperative were placed in a significantly stronger bargaining position with the processor.

As grower contracts with their processor expired, a new form of contract was offered to the processors that better met grower needs. Relying upon Commercial Code Section 2305,[89] *the* association proposed that the parties agree that the price would be a ***reasonable price.***

To structure the bargaining between the parties, the contract provided-that the cooperative had to offer each processor who signed the contract a price the processor would accept or reject within a designated number of days. If processors representing a designated percentage of tonnage accepted the price, it would become binding upon all signataries to the contract. If the price was not accepted, a second round of negotiation was conducted. If price was not established, the contract was silent. The parties could continue to negotiate, but now either party had the right to file suit to determine the price.[90]

Bunje explains his success in persuading the processors to agree to this form of contract was because it was offered to them at the time of the Korean War. A sudden increase in demand for canned fruit occurred. The canners disregarded their concerns about the contract to be in a better position to take advantage of this more favorable market for their processed products by being assured of a sufficient source of the raw product.

Shortly thereafter, the California Canning Pear Association and the California Freestone Peach Association were organized and used the same contract with which processors were now familiar. It also was adopted by the Washington-Oregon Canning Pear Association and the Washington Asparagus Growers Association. In 1960, the newly formed Apricot Producers of California used this contract scheme.

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[89] References to **the California Commercial Code are provisions of the Uniform Commercial Code adopted by California and many states.**

[90] **The contract said "it is understood that the commencement of a legal action for the determination of a price under the provisions of said Section 15 shall not be a bar to the establishment of a reasonable price prior to the conclusion of such legal action. " This was the only reference to legal action.**

Subsequently, the cling peach association developed two membership agreement provisions to take further advantage of its improved bargaining power under the reasonable price contract:

(a) If a grower was committed for a term of years under a contract with a commercial processor when he joined the association, the grower could honor his contractual obligations upon the condition that he would not renew or extend the contract.

(b) While the member was still bound to honor his contractual commitment to a processor, he agreed that the association would be his agent to negotiate prices. This meant that if the contract was an open price contract the association would have an opportunity to affect what the price would be.[91]

Litigation Over Reasonable Price

Until 1966, all associations using the reasonable price contract reached agreement each season about price with their processors without resorting to legal action.

In 1966, however, the pear association and its members' major processor customers reached an impasse in negotiations on price. Eight of the nine leading processors had signed reasonable price contracts with the association. Processors were obligated to accept pears committed to them, even if no agreement was reached on price.

For years the ninth processor, California Packing Company (CalPack), had refused to sign an association contract on the alleged grounds that their lawyers felt the contract violated antitrust laws. Consequently, CalPack met its needs from non-association growers and its field staff reportedly told growers they would buy their fruit if they were not in the association.

As legal counsel, we advised the board that the association had the option of suing the eight canners in the State court to request a Superior Court judge to establish the reasonable price or to file a claim before the Bureau of Market Enforcement of the State Department of Agriculture.

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[91] A modem canning peach association master contract of sale to canner, including a reasonable price provision, is included in the appendix.

The board liked the idea of proceeding before the bureau, thinking it would be more expeditious and less expensive. Under provisions of the California Food and Agricultural Code, processors are licensed by the Director of Agriculture who is responsible for processing complaints by growers against a processor that had not paid the contracted price by the parties. The bureau is not a collection agency but has the power to suspend or revoke a processor license if it finds that a complaint is justified. This is a powerful weapon.

The theory in proceeding before the bureau was that in accepting produce without a specified price the eight processors were obligated to pay the reasonable price as specified in the commercial code; that the processors did not pay the reasonable price and therefore failed to pay for the produce as required under the provisions governing the licensing of processors.

While this seemed the best way to challenge the processors under contract, it left unsolved the issue of how to deal with CalPack. The eight canners, who were accepting the association fruit, argued that if CalPack could disregard the association, they were being punished for having been cooperative with the association by signing its contract.

We advised the board that if we could find growers to testify that CalPack field staffers were telling them CalPack would buy the growers' fruit if the growers left the association, we could file a suit against the cannery. We knew that a grower, who had withdrawn from the association to sign a term contract with CalPack, or a nonmember grower, who elected to sign a term contract on the condition that he did not join the association, would not likely testify against the processor. Grower-members, who had been told they could have term contracts if they withdrew, would generally be unwilling to testify for fear of future reprisal.

Joe Mapes, assistant manager of the cooperative, and I spent a day visiting association members but none was prepared to testify out of concern for inevitable reprisal. Finally, we found one grower, who when faced with the question, said he was religious, lived by the "good book," and if called as a witness would tell the truth.

We reported back to Girton and the board and received permission to sue CalPack. Girton rented a room in the Palace Hotel in San Francisco and sent an invitation to financial editors of all bay

area and valley newspapers to attend a briefing. You better believe they came. Girton read a prepared statement announcing that the association was on that day filing a suit against CalPack for $10 million in damages, charging it with attempting to destroy the association. The complaint against CalPack alleged unfair trade practices in violation of the California Agricultural Fair Practices Act and tortious interference with the business relationships of the association and its members. The suit sought a temporary and permanent restraining order and general and punitive damages.

Girton also 'announced that CCPA was filing claims against the other eight leading canners before the Bureau of Market Enforcement, requesting the Director of Agriculture to suspend or terminate their licenses on the theory that they had failed to pay the reasonable price for the members' pears. Both actions were widely publicized in the financial pages of the press in San Francisco, Sacramento, and the San Joaquin Valley.

My partner, Art Bridgett, and I were busy planning strategy in the succeeding days for combat with the largest law firm in California, which represented CalPack. To our surprise, we received a call from the senior partner in charge requesting a meeting. When we met, they requested us to advise them what the association would consider as a basis for settlement of the suit. With the authority of the board, we advised them that if CalPack would agree to a price of $80 per ton for the current year and sign a 5-year, reasonable price contract with the association, we would waive all claims for damages. Without further delay the lawsuit was settled.

We believe that CalPack's chairman of the board in New York saw reports of our lawsuit against his corporation in the financial pages of the eastern press and, valuing the firm's reputation more than the possibility of success in the courts, ordered the matter to be resolved.

Next came a hearing with the Department of Agriculture attended by five law firms representing the other eight canners. The department called the hearing to discuss with the parties how to handle what was a novel proceeding and, to the best of my knowledge, one that has never been duplicated. By now, the difference between the canners and the association was $5 per ton. The canners refused to budge from their initial offer of $75 while the

association had come down from $90 to $80, consistent with the settlement it had reached with CalPack.

In preparing for a hearing, we had a problem obtaining an expert witness to testify that the association price was reasonable. We could not use Professors Hoos or Kuznitz because this would have compromised the Giannini Foundation which was supported by both processors and growers.

Consequently, ever resourceful Girton went to the Stanford Research Institute and hired an economist. In a short time and despite his lack of information about the canned pear industry, he became our expert. At our memorable first meeting, we told the hearing officer that among witnesses we proposed to present was an expert whose name we refused to disclose to the canners' attorneys. In those days we did not have the kind of discovery we have today.

Action by the Department became stalled. November came and went. Pat Brown was succeeded by Ronald Reagan as governor. With the changing of the guard, the Department of Agriculture did not call another hearing. In early January, Earl Coke was appointed Director of Agriculture by Governor Reagan. The association officers, Girton, and I visited Coke and asked him to proceed with our complaint. By this time, the pears had long since been canned. In a tone of disbelief, the director asked "Am I expected to establish the price for 1966 canning pears?" We assured him that indeed he was.

A second hearing was scheduled, but soon the canners announced that they would accept the $80 price and the matter was settled. The most serious legal challenge for the reasonable price contract had ended.

The only known suit filed by a bargaining association against a processor to establish the reasonable price under the contract was filed by the pear association against Ogden Food Products Corporation, Tillie Lewis Foods Division. In 1981, the association requested a price of $165 per ton for number one canning pears. All of the major canners agreed to that price except Tillie Lewis. It held out for $120.

At that time, the contract provided, "In the event that the parties did not determine the reasonable price at the time pear deliveries were made to the canner, the canner would pay 50% of the average of the price paid for pears of the same grade and variety

during the five harvest seasons immediately preceding the current harvest season with the balance of the reasonable price to be paid within 15 days after the same had been determined. "

The canner paid $74 per ton to the grower association in compliance with the provision.

The association amended its complaint to allege that the canner had breached an implied covenant of good faith and fair dealing because, while it had conceded that the reasonable price was $120 per ton, it had only paid the association growers the average of $74 per ton.

Although every California canner except Tillie Lewis recognized and paid the association $165 per ton its pears, Tillie Lewis had refused to do so. The association contended that, as a result, the processor had conceived a bad-faith plan to compel the association and its member growers to make in effect an unsecured loan of exceeding $500,000 to the canner at an interest rate of 7 percent per annum, the legal rate allowed on any judgment. The prevailing annual interest rate was between 14 percent and 18 percent.

The association demanded a declaration that the reasonable price for the pears for 1981 was $165 per ton, that it receive damages based upon the difference between what the canner had paid and what was due under such declaration, plus accrued interest and punitive damages in the amount of $10 million. Soon after, the canner agreed to pay $165 per ton and the matter was settled!

An innovation to the pricing provisions of the contract was adopted in 1985 to provide for binding final offer selection arbitration in the event that the parties did not reach agreement concerning the reasonable price.[92]

In 1993, the pear association invoked the binding arbitration clause in its contract with Del Monte to resolve an impasse in negotiations over the price and terms of sale for the 1993 crop. The contract provides for three arbitrators, with each party selecting one arbitrator and a third being named by the two selected by the parties. Substantial time was spent by the parties in trying to agree upon the impartial arbitrator, and finally the matter was submitted to the Presiding Judge of the Superior Court in San Francisco who made the

[92] The pear association revised canner contract provision for arbitration of reasonable price, adopted in 1985, is included in the appendix.

appointment. A retired Superior Court judge was selected as the impartial arbitrator. After 4 days of hearing, she selected the association's final offer as the reasonable price.

Although the growers prevailed, in retrospect, I believe it would be wiser to expedite the process by eliminating the appointment of partisan arbitrators. As an alternative, the contract could provide that the parties have a limited time to agree upon an impartial arbitrator. If they fail to agree, either party could request a judge or the AAA to appoint an impartial arbitrator.

Determining Price of Noncontract Product

The reasonable price concept can be applied in another context, where no contract has been signed and no price determined, but the processor has accepted delivery of the growers' produce. In that situation arises in California, the price can be determined by the Superior Court.

The authority for this is in Section 2305(1) of the California Commercial Code: "The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if.. .the price is left to be agreed by the parties and they fail to agree. "

A more difficult problem is presented when the processor takes the position that if the association is unwilling to accept its price proposal, the processor will only be obligated to follow its own "standard form contract" and any modifications the processor makes in its last and best offer. The processor in this situation contends that it has not agreed to pay a "reasonable price" and points out that under the provisions of California Commercial Code Section 2305(1) the reasonable price provision is inapplicable because the parties' *actual intent* differed and therefore no contract was concluded.

The validity of this argument depends on whether an obligation of the producer to sell and the processor to buy the produce ever existed. Normally, in the absence of a written agreement, the law only imposes such an obligation if the parties had an oral agreement to conduct business as they had in prior years.

In one situation, the processor sent a telegram to association growers saying it would accept delivery only with the understanding that the grower was agreeing to the processor's price. The

association successfully contended that because the processor was already obligated to accept the produce, its action violated the agreement between the parties and the California Agricultural Fair Practices Act. This law prohibited a processor from inducing a grower to breach his membership agreement with a bargaining association.

This problem rose in connection with bargaining cooperatives that only establish price but do not contract for the sale of a commodity.

Market Impact Strategies

Sometime bargaining does not go smoothly. The grower association may need to take more forceful action to convince processors the association is serious and has solid grower support. This section discusses use of two courses of conduct, product diversion and custom packing, that go beyond normal grower negotiation strategies.

Product Diversion

Whether the cooperative takes title to member product, or simply serves as negotiating agent for its members, the members normally deliver their product to the same processor each year. A comfort level develops for the growers that this is home for their product. They don't like to have that relationship disrupted. Thus, the threat of a bargaining association ordering grower-members to withhold product from a recalcitrant processor, or even divert that product to another processor, is a tactic used only with great caution.

At one time, the canning peach association "reasonable price" contract provided that one of the three largest canners had to be among the processors accepting the association price before that price became the industry standard.

One year price negotiations were stalled. Bunje recalled knowing that one of the largest canners was aggressively trying to increase its market share. The association ordered growers of the fruit most coveted by that processor to ship their product to other processors. The canner was livid, but in a few days agreed to the association price.

While the association took advantage of dissension in the canner ranks to achieve its price, the strategy led to some unwanted member relations problems. Growers liked dealing with their regular canner. The processor's field staff told the growers the association staff had been arbitrary. At the time of our interview, Bunje still harbored some second thoughts about the wisdom of the action. In the future he said he used canner diversion as a threat, but not a tactic. But having done it once, the threat was taken seriously.

The same grower-processor relationships that make product diversion distasteful can be used to the benefit of the association. When a given canner holds out for an unacceptably low price, management can call on those growers who have long, established relations with that canner for assistance. The growers can contact the processor's field staff, or even meet with the processor's manager, to tell them the growers are unhappy and thinking of making changes in what are otherwise valued relationships. This kind of grower support is of vital importance to successful negotiation.

Custom Packing

In the early 1980s, T. H. Richards, a packer serving the cling peach industry, became embroiled in financial difficulties. Under Ron Schuler's leadership, the association rented the cannery and processed member product for 3 years. This protected the members' home for their peaches until the facility could be sold to another canner.

The question is often raised about the viability of bargaining associations using custom packing as a strategy to increase market power with processors. The theory goes that by showing the packers the association can compete with them if they are not responsive to grower needs, it will have more negotiating strength.

Bargaining associations generally reject this idea. They consider custom packing as a tactic of last resort. The associations recognize they are not equipped to be a processor. They have neither the facilities to process, financial resources to carry inventory, nor the expertise to market processed products. The associations need processors to be successful so growers can be successful. The associations want to work with their canners and packers. Competing with them is seen as destructive to their ongoing relationships.

The peach association, incidentally, has not engaged in any custom packing since 1984. As Schuler explained, the processors have been making money and serving the growers, so there has been no need to be in the canning business.

Some associations, such as those serving apricot and olive growers have, like the peach association in the early 1980s, faced times when no other home existed for member product. This is the only instance I know of when custom processing is an acceptable marketing strategy.

CHAPTER 5. TECHNIQUES OF ADJUSTING SUPPLY TO DEMAND

Wise managers know that their objective in negotiations is for a reasonable price. It may not necessarily be the highest possible price, but the 'best price justified in the economic circumstances. These circumstances, of course, include the relationship between supply of the product and demand for it by the association's customers.

Grower leadership knows that in years of short supply, prices increase and in years of large supply, prices decline.

They also know that consistently higher prices over a period of years prompt increased plantings, both by established growers and new producers entering into production. Established tree fruits growers are also encouraged to postpone pulling old trees nearing the end of their productive life, to maximize current gross returns from their orchards.

Unless processors can consistently increase production and sales of processed product, the expanding supply of raw product will exceed demand and lead to depressed prices.

Severe fluctuations in prices for the raw product are not desirable for growers or processors. As indicated earlier, the wild fluctuations in prices for pears in the late 1940s and early 1950s led to the formation of the pear association and the agreement of reasonable processors to recognize the association and pay a service charge supporting it in the hope that greater price stability could be achieved.

Grower leadership must be ever watchful on anticipated production so that supply will not become substantially unbalanced with the demand from the processors. This is done by obtaining periodic reports from their members and their field staff well in advance of harvest and closely studying available economic data including the movement of the processed product.

Over the years, associations have used various methods to attempt tailoring supply to demand. For some years, the cling peach association used a California marketing order to induce the Director of Agriculture to implement a "greendrop." Growers were required to remove a percentage of green fruit from their trees. The State

order also required canners to divert a percentage of fruit delivered to them from processing to other uses.

The "greendrop" and cannery diversion of cling peaches was terminated after several years because of adverse public reaction and opposition by growers and canners. As Bunje observed, "We were digging our own grave."

The prune, raisin, and almond industry marketing orders provide for set asides, holding surplus product off the market until sufficient demand exists for the product to be sold without severely depressing prices. Use of set asides in Federal marketing orders is now greatly limited because of Government policy. Unfortunately, other methods of tailoring supply to demand have met with limited success.

In the early 1950s, the association sponsored State legislation to limit entry in the growing of cling peaches. A bill was passed by the legislature but vetoed by the governor. No similar effort has since been made.

Use of a third party to establish and administer minimum grade standards acceptable for processing can have a direct effect on the supply of produce for processing. But the impact is mitigated by adjustment of grades to keep them acceptable to growers and processors. In years of large supply, it's common to tighten grades and in years of short supply to relax them.

One function of bargaining association leadership is to try discouraging increased or new production where the danger of oversupply exists and to convince the board of directors to support the effort.

The power of leadership persuasion is probably more effective with tree fruits than annual crops. The cost of planting additional acreage of fruit trees is substantial and the growers know it will be several years before the trees bear fruit in commercial harvesting quantity. The market could be entirely different by the time the new trees reach that point.

Some tree fruit associations have attempted to avoid an over supply situation by encouraging growers to pull out productive trees. At one time, the pear association encouraged tree removal by offering early revolving of retains in exchange. The cling peach association has used some of its reserves to pay for pulling trees. Michigan

cherry growers attempted, unsuccessfully, to form a nationwide tree pulling cooperative.

With an annual crop such as tomatoes, growers can react to a strong price by immediately planting more acres. The manager must communicate with the growers, as Zollinger frequently did, urging them to cut back. If the acreage planted in other annual crops appears less profitable than tomato yields, the manager will have a difficult time achieving some effective reduction.

A bargaining association can provide leadership for the growers of a commodity where none previously existed to attempt to tailor supply with demand. Management can collect relevant economic data and make it available to all growers of the commodity. It will make certain that this data is understood by the board of directors. And with the support of the board, it can discourage increased production when necessary or urge moderation in pricing negotiations in years of short supply.

Pooling

By the end of 1956, it was apparent that the canning pear association faced the prospect of having fruit without a home. Increased production of pears and a large carry-over made processors reluctant to increase the processed pack.

Because the association, under its membership agreement, actually sold its members' fruit, this presented a problem of what would happen if the association was unable to sell all of the pears under contract.

The agreement was silent in describing the duties of the association, but clearly it was the exclusive sales agent for its members and presumably would be expected to use its best efforts to sell the fruit. If some fruit was unsold and fell on the ground, serious concern existed about the association's legal responsibility. Even if it seemed reasonable that the association was not guaranteeing a home and only could be held to use its best efforts, a question could be raised about why the fruit of some members and not others was sold.

Even worse was the effect on the association's ability to negotiate a price. If it had succeeded in establishing a price, but a member whose pears were unsold had an opportunity to sell them to

a canner for less than the association's price, would the association be able to get a court order restraining the grower?

Any failure by the association to enforce its membership agreement courted disaster. In 1956, the California Freestone Peach Association (CFPA) faced this problem. A member whose peaches had been sold by the association to a canner, had an opportunity to receive a better price in the fresh market. CFPA had to establish its credibility as an association that honored its contractual commitments to processors. It filed suit in the Superior Court of the county where the grower resided seeking a temporary restraining order to prevent the grower from diverting his peaches from the canner. Fortunately, CFPA obtained the order and avoided a crisis.

But what were an association's chances of enforcing the membership agreement of an unfortunate grower whose pears were unsold and who had an opportunity to bail out just before harvest at below the association price to a processor? He had no alternative home for his fruit and the prospects of persuading a judge to, in effect, order the grower to let his crop fall on the ground were poor, despite the provisions of membership agreement.

The association could have released the grower from his membership obligation for the season. In that event, the association was advised that it would have to extend the same right to all members in the same position. This would most certainly break the association's price because there is nothing more distressing to a processor than to have his competitors acquire fruit at a lower cost.

Faced with this dilemma as the 1957 season approached, the pear association board considered a provision in the membership agreement which gave it the authority to pool. This provided as follows:

> In carrying on its business as exclusive sales agent for the handling and marketing of Member's signed pears, and in determining the net proceeds therefrom for return to the members furnishing the pears, the Association may pool the pears pursuant to such rules and regulations as the Board of Directors of the Association (hereinafter called "Board") may, from time to time, prescribe. Such pools shall open and close as such times as the Board may decide; and

the Board may, at any time, for reasons by it deemed sufficient, close any pool, or extend the time for closing any pool. The Board may also exclude from any pool any pears because of difference in quality, damage by elements, or for other reasons satisfactory to the Board.

Subject to the right of the Association to retain and deduct its charges and such amounts as may be required for the Association Stabilization Fund, and subject to provisions of Section 4 hereof, the net proceeds of the pears in any pool shall be returned and paid, at such time or times, and from time to time, as the Board shall determine, that the members furnishing pears for that pool, and in such manner that the net proceeds from each class of pears in the pool are prorated among the members supplying that class and in the proportion furnished by each.

Any premium in net returns for pears paid or realized on account of, or in relation to, the district or cooperative association from which any signed pears come, shall be reflected in the returns ultimately payable to the pear growers of such district or cooperative association. The Association shall make equitable adjustment by way of compensation in favor of a Member which is a cooperative association for services rendered which, in relation to grower-members, are rendered by the Association itself.

The various classes in a pool shall be as established by the Board, and shall take into consideration and be determined by kind, quality and size of pears.

The Board may, in its discretion establish one or more pools or separate classifications within any pool and administer the same in such manner as it shall deem to be reasonable and desirable and in the best interests of the Association. In establishing separate pools or classes within a pool, the Board

> may, without limiting the generality hereof, take into consideration such factors, among others, as variety, quality, size and utilization of pears or it may establish one or more pools of pears composed exclusively of pears supplied to any other cooperative association for processing or marketing. Further the Association may pool pears which it has been unable to sell at its established prices after using its best efforts to do so.

This language was based on a similar provision in the canning peach membership agreement. But while pooling was mandatory under the peach association's membership agreement, the pear agreement made it discretionary with the board.

While the canning peach membership agreement provision was mandatory, it had not for practical purposes been operative. Cling peaches are a single-use crop for canning. Under a marketing order, supply was tailored to meet demand.

Pooling under the pear provision was on a "dollar" basis rather than physically pooling the pears. Theoretically, the result was the same. Proceeds realized from the sale of all pears in the pool would be prorated on the basis of tons in the pool. Thus, growers whose fruit was unsold would share in the pool on the same basis as those whose pears were sold after deducting harvesting costs.

This was only theoretical because not all sale proceeds were paid into the association. Under provisions of the membership agreement and the association's contract with the processor, only 5 percent of the sale proceeds were paid by the processor to the association as retains. The balance was paid directly to the grower.

If such a substantial number of tons went unharvested that the 5 percent was not sufficient to give those growers their prorata share of the pool, the association would be in the awkward position of billing growers whose pears had been sold for the overage they had received.

Net proceeds in the pool could be augmented by sales of the unsold pears by the association for other than processing as canning pears, such as for drying or the fresh market or conceivably some custom processing by the association. Or the board could decide to make a contribution to the pool from its unallocated reserves, realized

from an excess of service charge income over operating expenses on which the association elected to pay the corporate income tax. The board could also make a supplementary payment to the pool using the retains of growers from previous years.

The advantages of such pooling to the association were that it could avoid the dilemma presented by growers with unsold fruit and maintain its established price. Moreover, it gave management greater flexibility in deciding which pears to sell first. For example, pears ripen faster in so-called early districts. Management facing a prospect of unsold fruit could sell the early pears first, hoping, as frequently happens, that as the season progressed the fruit would pick out lighter than anticipated or there would be some increased demand so that there would be little or no unsold tonnage. In any event, growers whose fruit ripened later were protected.

In 1957, after extended debate, the board adopted a comprehensive plan for pooling No. 1 canning pears to assure the growers of fair and equitable treatment.[93]

Anxiously, the board conducted post-harvest meetings with the members in each of its eight districts. It was relieved to find that the program met with widespread approval. This program remained unchanged. until 1974, despite concern by the board about the ever-increasing supply of pears due to increased planting and caution by the processors about increasing the pear pack commensurate with the increase in production of the fruit.

The prospect of huge surpluses was temporarily avoided by the incidence of a pear disease that had devastating effect upon many trees in 1960, 1962 and 1964. This was offset, however, by increased plantings. By 1974, the board, reflecting the concern of members whose pears were regularly sold, reduced the retain to 2 percent.

In 1977, the membership agreement was amended to reduce the board's authority to retain no more than 2 percent. This made pooling impossible. The board terminated pooling because the cost of handling the anticipated oversupply of pears threatened to undermine the financial viability of the association.

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[93] The pear association pooling policy, adopted in 1957, is included in the appendix.

In its place, the board established a pool for pears that had not been sold by a specified date. Growers with unsold pears could elect to be freed of the obligation to sell their fruit through the association or choose to place their fruit in the unsold pool or "unsold lot" as it was called. Fruit in the unsold pool shared on a prorata basis whatever proceeds the association could generate from disposing of the pears plus such sum as the board elected to contribute to these proceeds from its reserve. Almost all growers with unsold fruit elected to enter the "unsold lot.""

The only litigation resulting from pooling unsold fruit was a suit filed by a member in 1983.

The essence of the complaint was that in 1980, 1981, and 1982 growers whose pears were in the unsold pool received about $100 per ton while the prevailing market price for pears sold in normal channels for processing was substantially higher. The plaintiffs theory was that the association was obligated to use retains and its reserve fund to equalize the prices realized by members in the unsold pool with those whose fruit had been sold through normal channels.

After exhaustive depositions and examination of the records, the plaintiff was satisfied that the association had treated all its members fairly. The case was settled in 1984 with a nominal payment of attorneys' fees to the plaintiffs legal counsel and no payment to the plaintiff.[95]

Girton reflected that pooling was a fair and equitable way of treating all members equally when it came to distributing returns from pear sales. But the economic realities of an oversupply of product and a declining number of canners made it impossible to continue the original program. A promise to make the best possible effort to sell all member fruit was the extent of the obligation the association could afford to make;

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[94] The pear association board policy implementing the unsold pool program, adopted in 1976, is provided in the appendix.

[95] The association refused to make any payments to the plaintiff since it had to treat all growers in the unsold pool equally.

Marketing Orders

Marketing orders are Government regulations used to promote the orderly marketing of agricultural products. These programs may be organized and administered by either USDA or a State agency. Market orders can cover a variety of subjects. Some orders regulate the quantity and quality of product that can be sold. Others may have an impact on market prices. Orders may be used to collect fees to finance research, product promotion, disease control, grading, and virtually any other function to benefit the industry.

Market order programs are somewhat unique in that their adoption and continued administration involves a vote of approval from the affected growers. Often the regulations under the program are established by growers and processors, through market order administrative committees, although they must be approved by the Government agency responsible for the program.

Some marketing orders impact the supply-demand situation directly by limiting the amount of product that can go to market, so the supply will tend to balance anticipated market demand. Other orders attempt, through research and promotion programs, to stimulate greater demand for the product. It is common for both types of programs to operate for the same commodity.

Groups of growers have reacted differently to market orders. For example, California tomato growers generally have not endorsed orders. Zollinger reported that in 1970 an order was proposed to limit production, potentially control the supply, and, hopefully, boost market prices. Growers overwhelmingly rejected the concept. It has never since been seriously considered for tomatoes.%

In 1972, an order was proposed dealing with research, promotion, and the eradication of broomrape, a parasitic plant that attacks tomato plant roots. The research and promotion program was voted down, but the broomrape eradication plan was adopted. However, shortly thereafter it was abandoned.

In recent times, an order was adopted by the tomato growers to provide third-party standard grading. But even this order reduces Government involvement in the tomato industry. The State of California had been administering a tomato grading program, financed

[96] **Interview with David Zollinger on March 25, 1989.**

by assessments. The costs of that program became so high that growers decided they could do a better job with their own program. Zollinger made it clear that the program is charged with grading product, nothing more.

Raisin growers, on the other hand, depend on both a Federal and a State marketing order to facilitate association objectives. Kalem Barserian, the first manager of the Raisin Bargaining Association (RBA), reported that the Federal order performs two functions for the growers, quality control and volume control. The Federal order, first established in 1949, preceded RBA's formation by nearly two decades.

Quality control standards apply to both raw product delivered by the growers and manufactured product shipped out by the processors. USDA performs the grading.

Volume control standards can require a substantial set-aside during years of high raisin production, as much as one-third of the crop. Every grower is essentially guaranteed a home for the grower's raisins, less the set aside. Surplus raisins are used in school lunch and commodity distribution programs, Indian feeding programs, and exported.

Barserian asserts that the marketing order, combined with the nature of the raisin, gives the bargaining association considerable leverage in the negotiation process. Once dried, raisins can be stored for up to 3 years. Thus, raisins can be withheld from packers if necessary. The order means only a limited supply will be available to packers, so the market stays in balance.[97]

Barserian suggests the order is justified because of the excessive vagaries of the raisin market. Most raisins are made from Thompson grapes. Their principal uses are for wine, fresh market, canned in fruit cocktail, and dried into raisins. Thus, in addition to the impact weather can have on the size of the crop, neither RBA nor Sun-Maid Growers, the raisin processing cooperative, knows how much product they will have each year until the growers start to dry their grapes.

Growers do not sign agreements committing any portion of their production of grapes to either association. Sun-Maid grower-members only commit that if they make raisins, the raisins will be

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[97] **Interview with Kalem Barserian, May 12, 1989.**

marketed through their cooperative. Thus, the order permits whatever supply is produced to be marketed efficiently without infringing on the flexibility growers have to place their product into whatever marketing alternative they desire. Barserian believes the Federal order is the key to the success of both the bargaining association and the Sun-Maid processing and marketing program.

Raisin growers and processors also contribute to a State market order program to promote raisin consumption. The State program developed in 1949. At the time, no comparable Federal program existed. The raisin industry makes a substantial investment in product promotion. Growers and processors each contribute $28 per ton of grapes processed, creating an annual fund of roughly $30 million.

Prune growers also make use of both a State and a Federal marketing order. The State order is used for trade promotion--advertising, public relations, and research. Prune growers are generous supporters of these activities, regularly voting to assess themselves up to 5 percent of the payments for their crop. The Federal order authorizes quality and quantity controls. Grade standards are established and administered under the auspices of a Dried Fruit Association. Prices are negotiated based on grades, so grading is an important association activity.

While set-asides are authorized under the Federal order, one has not been used since 1974. In 1985, substantial support existed for asking the Secretary of Agriculture to authorize a prune reserve pool. However, the market order administrative committee could not agree on program details. The most popular alternative failed to receive committee approval by one vote. Ken Lindauer, current PBA president, said prune growers are less supportive of set asides than raisin growers. Prune growers face considerable costs in drying their fruit and, unless backed to the wall, would rather accept a lower price and sell all their product.

Marketing orders help all cooperative marketing organizations overcome the problem of providing an umbrella for the freeloader. Even the tomato association accepted a marketing order for the industry-sponsored grading program so that nonmembers would have to financially support it.

Whether a grower group wants to use a State or a Federal order depends on the circumstances. Generally, it is a little easier for

a commodity group to work with State officials, especially on the West coast where the associations are close to the State capital but far from Washington, DC. If a commodity is grown primarily in one State, then a State order may work well. -But if the commodity is grown in several States, and the growers want uniformity of treatment, they really need a Federal order.

CHAPTER 6. RELATIONSHIPS AMONG COOPERATIVES

Persons outside the industry frequently ask why the various bargaining associations do not merge, to combine market power and save expenses through joint use of staff and facilities. At first glance, this concept may have appeal. But a long history of abortive attempts to consolidate association functions and a thoughtful examination of the nature of the industry suggests the benefits of consolidation, with few exceptions, are illusory. This does not mean bargaining associations should not or cannot work closely together. They do so on a regular basis. But each group of growers seems best served by its own bargaining cooperative.

Why Associations Remain Autonomous

From the inception of bargaining associations on the Pacific coast, their leadership expressed an interest in working together. The minutes of the first California Canning Pear Association in 1917 reveal that the board was approached by leaders of the newly-formed California Tomato Growers Association (CTGA) about sharing facilities and otherwise working together. No known explanation exists for why an agreement was never worked out.

In December 1953, Jack Z. Anderson, president of the newly organized California pear association, spoke before groups of pear growers at Yakima, WA; Medford, OR; the Oregon State Horticultural Society; and the Washington State Horticultural Association of Wenatchee. He spoke of "Organization for Self-Preservation" and urged Washington and Oregon growers to organize and then join with the California associations to conduct bargaining and industry planning on a three-State basis.

Anderson foresaw an organization of the producers of all of the commodities grown in the three Pacific states:

> Then, through an interlocking directorate or an association of directors of each of these commodity groups, a top board of directors who can represent effectively the wishes and desires of the

> growers who selected them. Then, and then only, we will have an effective voice speaking for California, Oregon and Washington agriculture.[98]

This dream never came to pass. In the 1960s, merger discussions were started among associations representing cling peaches, freestone peaches, pears, and tomatoes. In 1968, Professor Hoos of the University of California's Giannini Foundation was retained to prepare an analysis of a proposed merger of those bargaining cooperatives. After he submitted his report in February 1969, a special committee was formed composed of the president and manager of each of the four associations to evaluate his report.

Hoos described five different types of merger: the first provided for integration only to the extent of including common services and activities; the second provided that each commodity section would develop its proposed price offer with an overall "price committee" having the authority to comment on and suggest modifications in those offers; the third would empower the overall price committee to sanction or approve the price offers proposed by the individual commodity before the price offers could be promulgated; the fourth would empower the merged cooperative to bargain to sell its customers "package sales" or "combination sales" of the quantities of the several products represented in the merged cooperative; and in the fifth, returns to the merged cooperative's farmer members would be based on a "single pool" concept used by the cooperative processing associations.

Hoos recommended starting with the third type. A draft of the bylaws was prepared and reviewed by the boards of directors of each participating association. In 197 1, the pear association board, without comment, decided not to proceed further with merger discussions and the other associations followed suit. Although no formal statement was ever adopted explaining why the project was abandoned, it appears that the smaller associations were concerned about preserving their respective identities.

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[98] The text of Anderson's speech is printed in the 1954 Annual of the Pear Growers and Central Coast Pear Association, pp. 3-7. The speech is included in the appendix.

The possibility of a merger between the cling peach and pear associations was explored in 1983 and 1984, but never implemented.

Also in 1983, the Prune Bargaining Association (PBA) hired the California Canning Peach Association to handle membership solicitation and bargaining for prunes. After a year, the two sides agreed to terminate the arrangement. Apparently the prune growers believed they could not get the proper attention from a staff hired by another grower group, and the peach growers felt the prune growers were not paying enough for the services provided.

In 1986, the California Freestone Peach Association contracted with the cling association to provide management. This arrangement continues to the satisfaction of both organizations.

Sound reasons exist for the failure of efforts to combine bargaining associations. Major differences exist among the various commodities with effective bargaining associations. There is a great deal of work involved in grower association activity for each commodity.

For example, PBA has more than enough for its field staff to do with prune problems. Other associations say the same thing. So having field staff working with growers of several crops would not necessarily produce savings. And the training they would require to work with several crops would spread them too thin to do the best job with any crop.

Likewise, office staffs generally are small and combining them would not produce significant personnel savings.

Some savings might result from consolidating computer operations and employee benefit plans. But now it is easy to set up a small computer operation in each association office. And with so few employees, benefit cost savings are not enough to induce the boards to consider merger proposals.

While the various fruits, in particular, compete with each other to some extent in the marketplace, sufficient differentiation exists to minimize any benefits their growers might receive from a consolidated bargaining effort. Moreover, growers of one commodity fear management will favor another. But growers are concerned that too much price weakness in a competing fruit will drag down the price they receive for their product. As illustrated in the next portion of this report, associations of growers of one commodity have helped

growers in other commodities organize bargaining associations, to support the price of that product.

While growers generally have not wanted to surrender control over their own marketing to a centralized bargaining effort, a few multi-commodity bargaining associations do exist. The Vegetable Bargaining Association of California and the Western Washington Farm Crops Association bargain for several crops with volumes too small to support an independent association for each.

The freestone peach association has hired the cling peach association to manage its operations. Again, the freestone association felt it simply was not big enough to afford the caliber of management the growers wanted. However, it has retained its separate identity with its own board of directors.

The business reasons cannot be emphasized to the neglect of the people problems in merging cooperatives. Girton commented quite candidly on the suspicions of pear growers about growers in other geographic regions, both within California and between California and the Pacific Northwest. While this at times works to the detriment of growers in dealing with processors who can buy in any area, it has been a reality management must deal with.

Cooperation Among Bargaining Associations

While formal mergers have not occurred, bargaining cooperatives have a long tradition of joint efforts to promote grower interests. This started with the efforts of early bargaining associations to form similar cooperatives among other grower groups.

In the early 1950s, when the California Canning Peach Association (CCPA) was being reorganized under Bunje's leadership, it expressed interest in organizing other competing fruits so they could bargain more effectively. This, in turn, would strengthen the position of the cling association. Clings played a role in helping the new California Canning Pear Association in 1953 and in organizing the California Freestone Peach Association in 1955.

The California pear association's role in helping Northwest pear growers organize the Washington-Oregon Canning Pear Association and the subsequent relationship between the two associations relating to marketing is discussed in the report on the California Pear Growers in Chapter 2.

In 1968, the two pear bargaining associations agreed to sponsor a bill in Congress to amend the Agricultural Marketing Agreement Act of 1937[99] so that a Federal marketing order could be promulgated to cover canning pears. This bill was defeated in the U.S. House of Representatives that year but reintroduced in succeeding years.

After a number of amendments were added, the bill was finally enacted in 1972. Among its provisions: processors would be entitled to 50 percent representation on the advisory board; growers from each State would have a veto power over any proposed marketing order; -and the marketing order could not contain a provision for volume controls. [100]

However, the authority to develop a marketing order for Pacific coast pears has never been used. The groups have been unable to agree on uniform size requirements and provisions of third party grading. The pear associations have continued to exchange market information and to work together for trade promotion.

Potato growers, through their various bargaining associations in the United States, have met regularly to exchange economic data with Canadian potato growers through an informal organization called the North American Potato Growers Council.

Similarly, CTGA, Ohio tomato growers associations, and tomato growers from other states meet annually as the North American Tomato Conference to exchange information concerning the production and marketing of canning tomatoes.

Asparagus growers in Washington and Oregon have considered organizing into a single bargaining association and the Washington Potato Growers now include some Oregon growers.

The Catfish Bargaining Association, consisting primarily of producers in Mississippi, is considering including catfish producers in neighboring Alabama, Arkansas, and Louisiana.

In 1956, bargaining associations on the Pacific coast and Idaho began meeting annually to exchange information about how each organization operated and how it attempted to solve its problems. In 1957, a National Conference of Bargaining Associations was sponsored by the USDA's Farmer Cooperative Service,

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[99] 7 U.S.C.A. § 601 *et seq.*

[100] 7 U.S.C.A. § 608(c).

predecessor to ACS, for a similar purpose. ACS has continued to support this annual conference.

In 1990, the conferences were combined into the National/Pacific Coast Agricultural Bargaining Conference. This event is held each December in a West coast location.

The annual conference has proven to be invaluable as a forum in which management, directors, and members of the bargaining associations discuss mutual problems, obtain insights into legal problems of special significance to bargaining associations, and otherwise obtain information covering a broad range of subjects important to them.

In addition, ACS has provided and sponsored research into a number of subjects of importance to bargaining cooperatives. The services ACS provides are not available through any other Government agency or farm organization. I hope that despite increased USDA budgetary pressure, Congress and the Federal administration will enable ACS to continue to perform its vitally important role.

Relations Between Bargaining and Processing Cooperatives

Most commodities with effective bargaining cooperatives are also handled by one or more processing cooperatives. In some instances, the processing cooperative evolved totally separate from the bargaining association. In other cases, a bargaining association played a key role in organizing the processing cooperative.

Autonomous Processing Cooperatives

In those commodity industries where the processing cooperative and the bargaining association developed separately, a generally supportive relationship has emerged. Producers normally benefit from both associations.

Lindauer reported the prune association has a good relationship with Sunsweet Growers, a cooperative processor whose members produce about half of the prunes covered by association contracts. Sunsweet pays a lower fee to the association than do other packers for prunes delivered to them.

Lindauer places considerable emphasis on the value of an informed membership. He says Sunsweet provides good information to its growers about the industry and the joint members of the two associations show a level of concern about the overall health of the industry not always exhibited by growers who belong only to the bargaining association.

Similarly, Barserian indicated RBA works well with Sun-Maid Growers. While Sun-Maid is one of the older cooperatives in the country; RBA was not formed until 1967, after a large crop and disastrous price in 1966. Growers are either a member of the bargaining association or Sun-Maid, but not both. RBA deals with Sun-Maid just like other processors. Sun-Maid pays the same 1-percent service charge to RBA for all free tonnage delivered as do the other raisin packers.

Girton reported that when the canning pear association was organized there were two processing cooperatives, Turlock Cooperative Growers and Tri/Valley Packing Company. Many pear growers, who belonged to a processing cooperative, also joined the pear growers' association even though membership in the processing cooperative assured them of a home for their fruit. In so doing, they authorized the 5-percent retain for the pear association in addition to the retains held back by the processing cooperative.

The growers were persuaded that this was in their self-interest because through the pear association the wild price fluctuations that were disastrous for the entire industry could be avoided.

In 1963, the two processing cooperatives merged, forming Tri Valley Growers (TVG), a multi-commodity cooperative. In determining returns for the growers of a given commodity, TVG used as a base the commercial price established with proprietary processors and the bargaining association, to which it added or subtracted an amount reflecting TVG's earnings. This was to the advantage of the processing cooperative that otherwise would have a political problem with producers of the various commodities within their organization arguing for a larger share of the profits.

After the first 2 years, TVG agreed to pay a service charge plus withhold 5 percent from the cash paid by it to its pear growing members who also were members of the bargaining association.

While sometimes the management of processing cooperatives reacts with suspicion to the formation of a grower bargaining group,

Girton asserted good relationships developed between TVG and the pear association because the grower leaders openly courted the processing association executives.

The confidence early bargaining association leaders such as Bunje and Girton were able to instill in the emerging leaders of the cooperative processors paved the way for bargaining cooperatives to be leaders in the development of much larger processing cooperatives.

Processing Cooperatives Initiated by Bargaining Associations

Bargaining associations played an important role in forming various cooperative processors. The results have been checkered at best. Pacific Coast Producers (PCP) has provided a valuable outlet for producer products. The failures of Cal Can and Glorietta Foods cost growers millions of dollars and disillusioned producers about the value of cooperation.

In the 1950s, phenomenal changes began to take place in the food industry. First, successful local canners were bought out by conglomerates caught up in "merger mania." Many family-owners of local canning facilities were growing older and had reached the point where they were concerned about estate and inheritance taxes. They cashed out their investment by selling to the new wave of anxious buyers.

So long as the new owners took canning seriously, the ventures did well. - Some even prospered from more sophisticated management. But, in time, most became adjunct to a large conglomerate that cared little about canning and only looked at the short-term bottom line.

Second, consumer tastes began shifting away from canned fruits and vegetables to fresh and frozen product. Absentee owners were unwilling to make the investments in food processing to adapt. For example, the manager of a canning facility might suggest to his faraway boss that the use of heavy syrup should be reduced and new liquids developed to replace it, or that cans ought to be replaced by pouches. This would cost money to invest in new facilities, and there would be some decline in income. Invariably, the manager's suggestions would be rejected and ultimately the plant might just be dumped on the market or closed.

Third, many mergers and consolidations of wholesale grocery companies and regional chains were taking place. This had an impact on the canner customers of producers and their associations. For example, a canner might have an important regional chain store customer that it supplied with all of its private label merchandise. This enabled the canner to sell in carload lots.

Without warning, the customer sold out to a competitor. If the competitor was doing business with a different canner, the first canner might lose a substantial share of business. This regularly happened. Old, well-established trade ties were lost overnight. The only way a canner could replace that lost business was to dramatically cut price.

While the changing market was difficult for the branded product canners, it was devastating for private label firms. The loss of a major account made it very difficult for a private label canner to meet even variable costs.

Bargaining associations saw most of the private label canning firms being offered for sale, with no one anxious to buy them. In 1957, the cling peach, pear, and tomato bargaining association leaders put together grower groups and arranged bank financing to purchase two of the most profitable private canners, The Richmond Chase Company and Filice and Perelli. These firms were merged to form Cal Can as a processing cooperative.

Bunje reported the growers had two objectives. The first was to make sure enough canning capacity existed so they would have a home for their fruit. The second was to keep a healthy private label segment in the market to help firm up prices by providing competition for the few remaining branded canners. Girton suggested the growers wanted a home--period.

As the number of proprietary processors declined, Cal Can grew through acquisition. The San Jose Canning Company--a tomato canner--and Thorton Canning Company were acquired in 1960, and Schukle & Co. in 1963. Soon Cal Can was the largest cooperative canner in the United States.

Two more processing cooperatives were organized. In 1960, largely though the instigation of pear growers, PCP was formed to acquire the West coast canning facilities of Stokely-Van Camp. In 1978, Glorietta Fruit Growers was formed to purchase the pear facilities of National Canning Company.

In 1981, the market was depressed by a record 1980 fruit carryover. Libby, McNeil & Libby sold its operations to Cal Can, including its Yakima grade-pack pear plant. Glorietta, unable to continue operations, became a member of TVG under a special arrangement.

While Glorietta began with the purchase of an excellent small cannery, it was a virtual disaster. The buyers were too highly leveraged and lacked expertise to market their product. Growers have to be careful when they acquire a proprietary facility and be sure that they have adequate capital and skill to operate the facility and market their product. Marketing will become even more complex and demanding as the marketplace becomes more international.

By 1982, about two-thirds of the California pear tonnage was processed by grower-owned cooperatives, the only California manufacturers of grade-pack pears.

In 1983, in a period of continuing recession and extremely high interest rates, Cal Can went into bankruptcy. This sent shock waves through the entire industry. Various explanations have been offered for the collapse of Cal Can.

One expert pointed out that the canning industry manufactured all of its products in a 2-month period and then had to warehouse the pack for the balance of the year. The required financing became extremely costly in the face of record interest rates during a time of surplus crops, lower margins for the processors, and a decline in consumer consumption of canned fruits.

Another observer suggested that management expanded operations at a time when it was undercapitalized. The Libby, McNeil, and Libby acquisitions added substantial management and financial burdens when the company was already thinly staffed and funded.

Cal Can also sustained a serious blow when the Government, without warning, outlawed use of cyclamates. The cooperative used cyclamates in processing a substantial portion of its pack. It was unable to market $15 million of canned product.

As an original director of Cal Can, I knew that the firm was highly leveraged from the day it started. Growers purchased two excellent canneries for an investment of only 5 percent of the cost, with the remainder of the purchase price met with borrowed funds.

Also, it has been suggested that management might have been too interested in keeping the members happy. When the cooperative faced a period of declining margins, management did not take the prudent step of telling members their returns would have to be reduced. It avoided that political problem by continuing to distribute money which turned out not to be fat but sinew of the organization.

As a result of the bankruptcy, the cling peach and pear associations and the grower members lost millions of dollars from which many growers never recovered.[101]

While PCP operated successfully for many years, it recently approved marketing and purchase option agreements with Del Monte. Thus, the last operating processing cooperative started by bargaining associations may also soon slip from being a grower-owned enterprise.

In retrospect, the demise of processing cooperatives initiated by grower associations probably stemmed from the fact that the growers may not have understood the complexities of operating canning facilities. They were primarily interested in protecting the home for their product.

Once the growers were sitting on the board of directors of a processor, they began to realize that simply converting the business to a cooperative did not guarantee success. Also, outside management was frequently hired that was not familiar with the cooperative way of doing business. As a result, problems of the bargaining associations received little sympathy.

In many instances, the finances provided for maintaining a grower-owned processing venture were not sufficient to overcome the challenges confronting the firm. The growers have returned to a greater comfort level, relying on their bargaining association to negotiate favorable contracts while leaving operation of the processing facilities to someone else.

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[101] Subsequently, the Trustee in Bankruptcy was able to recover a substantial sum in the U.S. Court of Claims, but by that time Cal Can had long since ceased operating and the damage was done.

CHAPTER 7. NON-PRICING ACTIVITIES OF BARGAINING COOPERATIVES

Bargaining associations seek to assist members receive a reasonable return on the their products. Price negotiation does not occur in a vacuum. Successful bargaining associations recognize the need to be active in other areas that affect the price their members can attain. These influences include consumer demand, both in the United States and in foreign countries; U.S. trade policies with countries that both import and export product grown by members; regulatory policies, such as food safety rules; and the overall impact of public policy decisions on their business. As an attorney, I would be remiss if I did not mention the role of the bargaining association as a litigator on behalf of its members.

Market Development

When I first became active in agricultural bargaining, in the 1950s, I was surprised to find the pear and peach associations taking money raised through marketing orders from their growers to promote the canned product. Soon, I began to realize that this activity was elementary. If the canner was not successful in selling its product, there was no home for the grower.

Growers and processors benefit from new product development and other advances that stimulate market demand for products made from grower production.- Use of market orders to fund research and promotion efforts was discussed in chapter 5. These funds are used to test the feasibility of new products. For example, Girton mentioned funds were used to develop pear taffy and dehydrated pears. Bargaining associations have also worked to develop markets outside the regulatory process.

Pear industry market development dates back to at least 1955. The Washington State Horticultural Society, the Oregon pear growers, and the California Pear Prorate Committee agreed to provide funds for research and trade promotion under the name the Pacific States Canned Pear Service. The service continues to operate with financial support from the three groups.

In 1978, the California Canning Peach Association developed its so-called "juice" program as a market for otherwise unmarketable peaches--excess production, off-grade, and storm-damaged fruit. The fruit is sold to concentrators, for use in manufactured fruit juices and pureed products, primarily baby food. Schuler reported that the association manages the sale of this fruit on a pool basis, generating up to $2 million a year in increased income for both the grower-members and the cooperative.

Most bargaining associations are involved in developing an overall favorable environment for consumer acceptance and purchase of the products made from the commodities their members grow.

The Prune Bargaining Association, although relatively small in size, encourages its members to be actively involved in all market promotion committees organized under its State market order promotion program. Lindauer places great importance on advertising and promotion, functions he finds essential for grower product to find "shelf space" in the minds of consumers as well as retail buyers.

This action is essential to the overall future of the bargaining association and its grower members. Growers cannot assume the processor is doing the best job of promoting expanded markets for the product. They must seek to open new doors in this country and abroad to protect their own best interests.

International Trade

The shrinking of the world, in terms of ease of moving products among nations far and near, is a real concern to grower associations. Often, their products can be grown and processed in foreign countries with noticeably lower costs of production and processing. Sometimes growers in other countries also receive national subsidies to encourage greater production and to keep cost down so export markets can be developed. While the U.S. processed food industry looks for export opportunities, the threat of imports dominates much of its outlook toward international trade.

In 1985, imported pears became a matter of concern to the domestic pear industry. As a result of a strong U.S. dollar and government rebates, Spanish canned pear producers shipped about 500,000 cases into U.S. markets. Another 500,000 cases were imported from other sources including South Africa and Australia,

and overnight the U.S. market went from a negligible amount of foreign canned pears to nearly 12 percent of the domestic market. The California Pear Growers (CPG), lead by Peltier, became active in efforts to prevent foreign-subsidized imports and opposed granting duty-free access to imported pears that normally had an 18-percent duty.

When Argentina requested that it be granted duty-free access for canned pears, CPG filed a brief objecting to the proposal with the U.S. Trade Representative, Generalized System of Preferences Subcommittee, on behalf of the Bartlett pear industry in California.

CPG has followed pending General Agreement on Tariffs and Trade negotiations and other matters before Congress pertaining to Bartlett pears. The association was instrumental in forming the Pear Growers for Responsible Government as a separate organization legally able to raise and contribute money in Federal elections.

In the early 1980s, CTGA became increasingly aware of the fact that in a given year only between 42 percent and 48 percent of the total world supply of processing tomatoes was produced in California. The balance was produced in European Community (EC), Middle East, and Pacific basin nations. This had a direct bearing upon the price in California. The association realized that it needed to take a more active role in controlling imports. This led to the formation of the National Association of Growers and Processors for Fair Trade.

This trade group is an alliance between growers through the association and leading tomato processors. Through its efforts, a fair trade agreement was negotiated between the United States and Israel on tomato products. Also, imports from the EC decreased as a result of a 1986 quota imposed on subsidized production. Duties imposed on EC imports were in retaliation to EC's ban on exports of U.S. meat.

Food Safety

Growing attention to the safety of our food supply concerns all segments of the food industry. As the cyclamate and alar scares have illustrated, an entire food product or company can face sudden decimation because of a consumer perception that food is unsafe.

Bargaining associations are now taking a part in protecting the safety reputation of the food their members produce.

A major innovation in the growing and processing of pears was the formationin late 1991 of the Pear Pest Management Research Fund jointly by the CPG and pear processors in California. This was an industry response to concerns by growers and processors about Government regulations restricting pear growers' use of pesticides and fungicides.

The fund supports scientific research, demonstration projects, and disseminates information to educate interested persons about new methods of growing and processing pears that are economical and safe to the consumer and the environment. Special attention is focused on laws, rules, and regulations of Government agencies applicable to growing and processing pears.

The board of directors of this nonprofit corporation is composed of the chief executive officer of CPG, five growers designated by the association, and representatives of participating processors. The fund is supported by contributions from growers and processors.

In 1992, the fund provided about $167,009 in research grants related to pest controls. For 1993, the fund solicited requests for proposals for additional research grants on coddling moths, mites and psylla, skin worms, and scale.

Under Peltier's leadership, the pear association has developed support by processors and growers to produce pears for processing that will meet the increasing concerns of the consuming public about its health and safety.

CTGA is also concerned about food safety. The association recently joined tomato processors to form the Processed Tomato Foundation to encourage reduced pesticide residues through sound management practices, judicious use of some pesticides, and increased use of integrated pest management. The foundation will also fund research at University of California at Davis to develop tomato varieties more resistant to mold and fungi and less dependent upon fungicides.

Political Action

Involvement in the public policy process is part of the overall business plan of many bargaining cooperatives. As small, grower-

financed organizations, bargaining associations often need governmental support to balance the market power of the national and multinational firms with whom they deal. They actively seek that support. [102]

For example, Barserian credits the effective political action program of RBA and others in the raisin industry with protecting the raisin marketing order when orders with quality and quantity standards are under severe attack. He makes a very good point, that the growers' interests are not going to be adequately reflected in laws and programs unless growers tell their story. He credits Sox Setrakian, who led the battle to establish the raisin marketing orders in the late 1940s, with instilling a respect for the value of political action in the entire raisin industry.

Government purchase programs are important to several industries with bargaining associations--peaches, pears, and raisins, among others. Again, purchasing authorities must continuously be educated on the value of these programs to the growers and the value of the commodities to the recipient school and welfare agencies.

While political action is hard work, it can also be the source of some great moments and stories. In the 1960s, pear growers were working to obtain an amendment to the Agricultural Marketing Act of 1937. It would enable the USDA to issue a Federal marketing order for Pacific coast canning pears. The impetus largely came from the California association. It hoped such an order could cover promotion and research and provide for grade standards and third party grading.

Sometimes political action can produce unexpected results. The 1968 annual meeting of the National Council of Farmer Cooperatives and the National Bargaining Conference were held in Washington, D.C. Someone suggested that while in Washington it might be helpful to get support from then-Vice President Hubert Humphrey.

Girton and I met with the Vice President in his offices in the Senate Office Building. As we were explaining our mission to him,

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[102] For guidelines on establishing an effective cooperative public policy program, see Donald A. Frederick, ***Co-op Involvement in Public Policy,*** Agricultural Cooperative Service, USDA, Cooperative Information Report 42 (May 1993).

his eyes focused on a pear tie clasp Girton was wearing. Without hesitation, Girton took it and his handsome pear cufflinks off and gave them to the Vice President.

Humphrey, in turn, removed his two handsome cufflinks bearing the official emblem for the Vice President and gave them to Girton--a memorable scene indeed.

We also learned some important political lessons while promoting legislation to authorize a Federal pear marketing order. In 1968, appropriate legislation was introduced in the U.S. House of Representatives and subsequently defeated, 165 to 111. We discovered that while the Democrats had supplied a majority in favor of it, the Republicans had voted against the bill by a margin of nearly 10 to 1.

Subsequently, Girton and I talked with the Republican legal counsel for the House Agriculture Committee. He was well respected on both sides of the aisle. He explained that the bill was strongly supported by Democratic congressmen from California's Central valley and Tom Foley of Washington. But, no important Republican congressmen supported it, so it was regarded as a Democratic bill. To overcome this, he suggested having a Republican congressman prominent in agriculture co-sponsor the bill. When the bill reached the floor, a "dear colleague letter" could be on the desk of each congressman urging support for it by Republican and Democratic sponsors.

In due course, we discovered a solution to our problem. The father of Rep. Charles Teague of southern California had been a founder of Sunkist. He had the stature we needed and agreed to support the bill. Compromises were made in the language of the bill to ensure more enthusiastic support from Oregon and Washington growers. It was reported out favorably by the House Agriculture Committee. In 1972, the House Rules Committee sent it to the floor for a vote.

Leroy Thomas, Bob Collins, Girton, and I were authorized to go to Washington. We met with Rep. Bob Leggett, floor leader for the bill. The night before the vote, we met in his offices in the House Office Building. I was assigned the task of preparing brief speeches for various congressmen to make on the floor. I was making pretty good progress until Girton and Leggett discovered that each was a lip man, that is played the trumpet. The congressman

removed a trumpet from his closet. Each took turns showing his prowess. There apparently was insufficient resonance inside the office, so they went into the hall of the building where "When The Saints Come Marching In" was played as never before!

The next day, we were seated in the House gallery and listened to the speeches, two of which sounded familiar. The Speaker then called for the vote. To our surprise, it was approved on a voice vote. Leggett explained that the outcome was a foregone conclusion and in those circumstances there frequently was a voice vote rather than a roll call to avoid embarrassing congressmen.

Sen. Allen Cranston (CA) had assured us that if the bill got through the House, he would see that it got through the Senate, and he did. It subsequently was signed and became law. But to this day, no Federal marketing order for canning pears has been issued.

The Role of Litigation

The use of litigation to protect grower-member interests in dealings with processors is a strategy to be used sparingly, but still available.

Zollinger observed that litigation is more traumatic for the association than its management. Management understands lawsuits are a part of doing business. But the cost and time it takes to conduct litigation drain valuable association resources.

This section of the report looks at the role bargaining associations may play in protecting members' legal interests during the bargaining process and in related activities.

During Bargaining

Litigation as a part of the bargaining process requires some special understanding of grower concerns. For example, the timeliness factor is often more important to a bargaining association than the cost. Litigation begun during one crop year may remain unresolved right up to, or into, the next crop year. This not only complicates relations with the processor(s) being sued, but other processors may hang back from settling on a contract until they see how the issue in contention with one of their competitors will be resolved. This uncertainty makes it difficult for the association to keep member-growers in line during this long period of time.

But, the processors seem intent on periodically testing the will of bargaining associations. To protect existing contracts with all processors, an association may occasionally be forced to initiate a lawsuit.

In the early 1990s, for example, the tomato growers had to sue some longtime friendly processors to get a favorable interpretation of their contract. The product was quite late in ripening and the pack was at record levels. The industry was facing oversupply and weak markets. Some processors refused to honor their contract commitments to pay late-season premiums to growers.

Although the position may seem harsh in the circumstances, the association initiated legal action to protect the integrity of the contract. Processors, who honored their contracts, were watching closely to make sure competitors did not acquire tomatoes for as much as 25 percent below their price. The association had to make sure it was treating all processors alike, to protect the integrity of the association among the processor community.

Litigation, unfortunately, may not always be against a party outside the association. The association must also be ready to sue its members to protect the integrity of membership agreements. Association leadership has a duty to act in the best interests of the entire grower membership. Members who violate their contracts with the association threatened that common good. Associations that teach the members that it will insist they honor their contracts have only rarely had to use litigation.

As Bunje pointed out, a bargaining association sometimes must sue its growers not only to show other growers they must honor agreements with the association, but also to establish credibility with processors. The association reputation in the industry is at stake, especially when a grower does not deliver product in accordance with the association contract with a processor.

Normally, problems with growers delivering under their contracts occur when supplies are short and prices are rising. Processors desperately need committed product to operate their facilities. Processors watch growers and notify the association if they believe product diversion is occurring. The association must act to keep other members in line and protect its relationship as a dependable business partner with the processors.

Nonbargaining Litigation

Litigation to protect grower rights under California's Producers' Lien Act illustrates how bargaining association involvement in litigation outside the negotiation process can serve members interests. [103]

In 1981, many pear and tomato growers sold their produce to T.H. Richards, a Sacramento processor, under deferred payment plans with 50-percent payment upon delivery and the rest payable 1 year from the date of delivery. Because tomatoes and pears had been delivered generally in August and September of 198 1, payment of the deferred 50 percent was not due under the contracts until August or September 1982. The canner filed for reorganization under chapter 11 of the Federal Bankruptcy Act before the deferred payments were made.

CTGA and the canning pear association retained our law firm to protect grower-member rights under the California Producer's Lien Act. [104]

The producer's lien is a security interest granted by law to a grower to secure payment for product sold to a processor. It is equal to the amount of the debt owed. The lien attaches to any processed form of such product that the processor maintains in inventory. If the processor fails to pay the grower, the grower can sue the processor and have a court order the processor to sell enough inventory to pay off the debt owed to the grower.

At that time, no California cases had interpreted the State's lien law and Federal cases dealing with liens in other jurisdictions were split on whether State-created liens survived in bankruptcy. The issue was of paramount importance to 34 pear and tomato growers with claims in excess of $2.2 million.

Each association initiated litigation by filing a complaint alleging that the growers' liens were valid in bankruptcy and that the

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[103] This section is adapted from a speech by William J. Bush entitled "Survival of the Producer's Lien In Bankruptcy," delivered to the 36th National Conference of Bargaining Cooperatives. The full text is published in ***Proceedings: 36th National Bargaining Conference,*** Agricultural Cooperative S&vice, USDA, Service Report No. 32 (1992), pp. 55-59.

[104] California Food and Agricultural Code, §§ 55631-55653.

growers were entitled to attach and secure part of T.H. Richards' pear and tomato inventory up to $2.5 million as security for the debt.

Grower claims were opposed by three other parties claiming an interest in the inventory: (1) The debtor, T.H. Richards, who contended that the liens were not valid in bankruptcy and therefore the growers were, at most, unsecured creditors; (2) other marketing firms to whom Richards had sold but not yet delivered the inventory; and (3) three banks that claimed an interest in the product and other assets of the canner as security for outstanding loans exceeding $10 million.

Without going into the details of the litigation, growers as individuals would have had a difficult, if not impossible, time persevering through the 9-year process against such formidable opponents, without the financial and moral backing of their grower associations. The rewards were worth the effort. The bankruptcy and Federal district courts failed to protect the growers. But the growers further appealed to the U.S. Court of Appeals for the 9th Circuit.

In 1990, the appellate court held the grower lien is not released by merely agreeing to a deferred payment arrangement.[105] Further proceedings before the bankruptcy court resulted in the growers being awarded not only the full amount of their claims but also prejudgment interest of nearly 9 percent, compounded annually for the 9-year period of the litigation. This doubled their original claims and produced a total payout of about $4.5 million.

While the Richards litigation was pending, the Apricot Producers of California (APC) filed suit in behalf of its grower-members who sold fruit in 1984 and 1985 to Sacramento Foods, Inc., Richards' successor, that also was now in bankruptcy. Again, the lower courts ruled against the growers. Again, the growers relied on their bargaining association for assistance in carrying their claims to the U.S. Court of Appeals.

While this and the Richards appeals were pending, the Ninth Circuit, in a similar case, ruled in favor of grape growers attempting to assert producer's lien claims against a bankrupt grape processor. The court held that in a contest between the growers holding lien claims and bona fide purchasers of the processor's product, the

[105] In re T.H. Richards Processing Co., 910 F.2d 639 (9th Cir. 1990).

growers would prevail and, therefore, the lien was good in bankruptcy. [106] On the strength of this ruling, the APC case was remanded to the lower courts where the growers received awards totaling several hundred thousand dollars.

These cases, initiated by bargaining associations, produced substantial cash returns for their members. They established an important legal principle for all California producers, that if they act promptly, growers who deliver product to processors will be paid, even if the processor files for bankruptcy protection.

I have discussed this subject at some length because it represents a breakthrough on the continuing concern of how growers can protect themselves when the processor customer fails to pay the full purchase price when produce is delivered.

Two lessons should be apparent from this experience of the various California growers:

1. Growers in other states should give serious consideration to the enactment in those states of legislation similar to the Producers Lien Act in California.

2. Bargaining cooperatives can play a major role in initiating action in behalf of their grower members to enforce producer lien rights under the legislation because failure of producers to take appropriate action to enforce their rights can amount to a waiver of their rights.

[106] In re Loretto Winery Ltd., 898 F.2d 715 (9th Cir. 1990).

CHAPTER 8. BARGAINING IN THE WORLD OF THE FUTURE

While my crystal ball has always been a bit on the foggy side, my years in working with agricultural bargaining associations suggested certain courses of action will be necessary in future years for them to be viable and constructive elements on the food marketing industry. I doubt if any of these thoughts are novel. I just hope they reflect a common sense view of how the past lessons can be translated into future margins for growers.

The Need for Statesmanship

Several "megatrends" are converging to make the job of the agricultural bargaining association more challenging tomorrow than it has ever been--growing environmental awareness; changing consumer preferences; continuing concentration in processing; internationalization of agricultural marketing; and reduced political clout caused by the declining share of our population residing on producing farms and in rural areas. For growers to survive, let alone prosper, leadership will have to evolve that is sensitive and responsive and can build consensus support for grower concerns.

Even though associations may disagree strenuously with processors over price at a given time, it is essential that an association manager establish and maintain a good working relationship with the processors. In this way, the association can provide effective leadership for its members because growers and processors must live together.

Thus, price negotiation will require a statesmanlike approach. For many years at the annual conference of bargaining cooperatives, there has been a custom to present a so-called Toga award to the manager who is considered to have been most statesmanlike in negotiations with association customers. This is not an award a manager enjoys receiving, but points out the fine line drawn between being reasonable in price negotiations and "giving the store away."

Bargaining associations will have to recognize tough times for processors. Headstrong negotiation when processors are at a low ebb

can make it difficult to move product, sour future relations, and even drive processors out of business.

Joint efforts with processors, such as the trade alliance between tomato growers and processors, must be duplicated whenever the mutual interests of all segments of the industry will benefit.

Bargaining associations should also be alert for opportunities to help processors out of difficult situations. In a short crop year, a processor may have trouble finding enough raw product to meet its needs. The bargaining association can often locate available tonnage. It is important that the processors have sufficient quantity of product on hand to avoid being sold out a month or two before the new harvest. If they are, they lose their shelf space to competing fruit or fresh fruits, or other products, and it is difficult to get that shelf space back. This type of assistance builds trust that translates into a stronger industry able to pay better prices to growers.

The reason the processors agreed many years ago to pay a precedent-setting service fee to the cling peach association is because the processors wanted intelligent management at the association that could provide more stability in the industry and avoid the extremes of high and low prices. Bargaining associations will have to continue providing services the processors will pay for to generate sufficient revenue to serve their grower-members.

Joint efforts with other bargaining associations will also become more important. Pears, tomatoes, potatoes, and asparagus growers already are building support systems to share information across State and regional lines. While the next step would appear to be joint activity with growers of like crops in other countries, national interests seem to prevent much international cooperation at this time. For example, subsidies paid by EC nations to their growers seem to override what might otherwise be a common interest of farmers in the United States and those countries.

Negotiating in an Increasingly Hostile Market

Bargaining for agricultural products has never been easy. The future looks even more challenging. Several market trends indicate an increasing hostile environment for agricultural producers, especially those growing crops for fruit and vegetable processing.

Redirection of the Marketing Order Program

Both Federal and State governments will need constant education and support on the value of marketing orders that control quantity and/or quality of products sent to market, or directly provide a safety net under prices paid to producers. Existing orders of this nature may be under constant attack. Associations that depend on Government regulation to provide order to their markets will be under pressure to relinquish that assistance.

Increased opportunities may arise to use marketing orders to finance research and promotion activities. The important advantage of these programs to associations is that all growers, not just association members, finance the effort. Producers of commodities with growing demand may be hesitant to vote in any such Government program. But, growers of crops with mature or shrinking demand may well see the market order as a tool to fund the development of disease-resistant and higher quality varieties, use advertising to increase sales, and, as a result, attain higher prices paid to producers.

Adjusting to Changing Customer Preferences

The processed food industry has two sets of customers, stores that buy its products directly and consumers who ultimately purchase and use the products. Stores carry what the consumers will buy, not what farmers want to produce.

Computers and universal bar codes give stores the ability to precisely track consumer purchases, both by volume and profit. Stores are looking at data such as return-per-linear-foot of shelf space to determine what products they will buy. Results I have seen indicate, for example, that juices are showing favorable trends for growth, but the outlook for canned fruit is not positive. Tomato-based products, riding a wave of interest in Italian and Mexican foods, are doing well.

But consumer tastes are somewhat fickle. All of this could change quickly. What is important is that now the chains and other stores can detect these changes quickly. Elements of the food industry that can adjust their product mix with changes in consumer demand will likely prosper. Others will not.

This includes growers and grower associations. Unfortunately for tree fruit growers, raw product mix is fixed several years into the

future. Row crop farmers can alter their production more quickly, as soil and weather conditions permit. Thus, associations must be attuned to changes in consumer trends so they can help growers promptly react. Associations must also be ready to work with their processors to develop and bring to market products that best satisfy consumers. Some may survive on blind luck, but long-term planning and action will likely become more important.

Continued Concentration in Processing

After many years of lax antitrust enforcement, the food processing industry has few players remaining. Del Monte is the only major noncooperative processor in some commodities. The number is not likely to increase substantially. Girton suggested that the day may come when the only canners are cooperatives.

Zollinger's comments are particularly compelling. Although the growth in demand for tomato products has led to an increase in the number of tomato processors, Zollinger expressed great concern about inadequate antitrust enforcement and its adverse impact on independent farmers. He pointed out that at that time one company owned both the second and third largest ketchup processors in the world. These large firms are constantly shuffling managers and changing operations. Top management is a great physical distance from the actual processing and handling of the commodities, not to mention the farmgate. Managers of these companies are harder and harder to contact, deal with, and to get any final decisions from. And sometimes the decisions made simply make no sense.

But equally important, Zollinger recognized this situation as an opportunity for grower associations to prove their worth.

Bargaining associations must educate all growers to accept the fact that an individual grower, or even a relatively small group of growers, is of no consequence to an international conglomerate. Perhaps these companies will make decisions that will show unaffiliated growers that the services of a bargaining association are really needed.

Zollinger believes that experienced cannery managers realize these conglomerates are only sucking capital out of the canneries and releasing valuable employees whose expertise can never be recovered. The associations have allies in the industry that can work with

growers in attempting to minimize the damage done by the conglomerate ownership.

He concluded that bargaining associations have a real place in agriculture. If growers will commit their authority to bargain to the association and allow it to do its job, the money they devote to the association will yield the highest return of any of their invested dollars.

Internationalization of Markets

Most of the commodities represented by agricultural bargaining associations are sold into reasonably mature markets. With unit sales growth slow or stagnant, international competition posses important challenges to both producers and processors in this country.

Foreign producers often have significantly lower costs of production than domestic growers. Even with transportation costs factored in, buyers can often acquire foreign product at less cost than domestic product.

Lower costs are also attracting investment capital into processing facilities in the southern hemisphere. Further reductions in trade barriers will accelerate this trend. The international conglomerates, with their heavy bottom-line emphasis, will be only too willing to take advantage of this situation. It will be up to bargaining associations and domestic processors to develop programs that protect and expand domestic market shares of these markets.

Fair Practices Legislation

As earlier indicated, bargaining associations have found the need for legislation to require bargaining in good faith. Michigan has not openly enacted such legislation, but also taken the next step of providing that an impasse can be resolved through binding arbitration. Association representatives report that this has been effective. Efforts to secure amendments to the Federal Agricultural Fair Practices Act to incorporate such provisions have been unsuccessful to date.

Experience in California, where there is a requirement that the parties bargain in good faith, has shown that processors adamantly oppose any modification of the California Fair Practices Act to require mandatory and binding arbitration. The compromise which representatives of processors and associations worked out jointly to

require non-binding conciliation has been surprisingly effective. In fact, one of the requests made recently was by a processor. On another occasion, the processor suggested it.

I anticipate it will continue to be used as an inexpensive tool to resolve impasse without incurring ill feelings frequently generated by a formal complaint accusing a party of failing to bargain in good faith. Of course, there are still occasions when such action must be taken.

Growers in other states may find this to be a worthwhile mechanism to employ. Processors may be willing to join with association leadership in supporting the enactment of such legislation. Growers in other states should support enactment of legislation to provide for an advisory committee composed of representatives of bargaining associations and processors similar to that in effect in California and which has proven so effective.

Adopting more effective State legislation is not in lieu of seeking amendments to the Federal fair practices law discussed earlier. It is regrettable that the Federal act for which growers fought so strenuously is ignored. This frustrates what clearly was the intent of Congress.

At the very least, I believe bargaining associations should seek to amend this Federal Act to eliminate the inhibiting effect of the disclaimer clause on enforcement of the Act as interpreted by the Federal court in *Butz v. Lawson*.[107]

Organizing Bargaining Cooperatives in 0 ther Commodities

Growers of a number of commodities that do not have bargaining cooperatives could benefit from organizing. The broiler industry, for instance is only partially organized. Producers of other poultry, sheep, cattle, and other livestock would be likely prospects. Production of fish and other seafood products is increasing. The experience of the catfish producers in Mississippi has shown that aquaculture is another potential area of growth in producer bargaining activity.

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[107] 386 F.2d 227 (N.D. Ohio 1974). This case is discussed in chapter 3 in the section on the Federal Agricultural Fair Practices Act of 1967.

This is not only of importance to the producers of such commodities but also to the existing bargaining associations. Increasing the number of food producers are represented by bargaining cooperatives can provide a stronger base for effective political action and create a greater pool of administrative personnel committed to the concept of cooperative action by producers in bargaining for their product.

Conclusion

Each challenge is, in its own way, an opportunity. Cooperation among individual growers offers the best hope of overcoming these obstacles and succeeding in the marketplace of tomorrow. If bargaining associations are well funded, intelligently managed, and actively supported by growers, their members have a tool to gain the competitive advantage that can generate success in the future. These associations appear to be the growers' best hope for maintaining a strong, independent production sector in American agriculture.

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Appendix

California Canning Peach Association Master Contract of Sale to Canner

THIS MASTER CONTRACT OF SALE TO CANNER ("Master Contract"), made and entered this day of _____, 19__, between the CALIFORNIA CANNING PEACH ASSOCIATION, a non-profit, cooperative association, organized under the Agricultural Code of the State of California ("the Association"), and _____, ("the Canner").

WHEREAS, the Association has secured standard Membership Agreements and Member's Allocation Forms from numerous growers in the State of California in the form attached to, and made a part of this Master Contract,

WHEREAS, by virtue of these contracts, the Association will market and negotiate prices and terms of sale for a large proportion of the crop of canning cling peaches produced in California; and

WHEREAS, the Canner is in the business of canning and packing cling peaches and desires to secure an adequate and certain supply of peaches for processing and establish a reasonable price and terms of sale for such cling peaches; and

WHEREAS, the Association is empowered by its members to market members' fruit and to negotiate prices and terms of sale for its members and others;

NOW THEREFORE, in consideration of the premises and of the mutual obligations of the parties to this Master Contract, the parties agree:

1. **Effective Date.** This Master Contract shall become effective upon its execution by both parties and shall be for a term of one (1) year, except that with respect to those Association members whose Allocation Forms are attached to this agreement and incorporated by reference, and with respect to such additional Allocation Forms as may be signed by Canner while this agreement is in effect, this Master Contract shall be effective for the term of years specified in the respective Allocation Forms. Further, with

respect to those Association members who are parties to such Allocation Forms, and unless the Association's authority to sell is terminated in accordance with Paragraph 2 below, the Association agrees to sell and Canner agrees to purchase for the term specified in the Allocation Forms all of the cling peaches that have been allocated to Canner.

2. **Termination of Authority to Sell. Notwithstanding any other provision** of this Master Contract, if the authority of the Association, as specified in the Member's Allocation Form, to sell peaches to the Canner is terminated for any reason except acquisition by the Canner of the orchard or the peaches by purchase or other means, the Canner shall buy and Association shall make best efforts to sell a like estimated tonnage of peaches from the Association's unsold pool, if any, or from other specified orchards during the crop season then in progress or the next following crop season if such termination occurs after the end of a crop season. However, if prior to the expiration of the seasons covered by the Allocation Form, the member sells or otherwise transfers the orchard described in the Allocation Form, Canner shall be obligated to purchase and Association shall be obligated to sell the peaches produced from such orchard only during the crop year in which such transfer is made, but not thereafter unless agreed upon by all parties to the Allocation Form. A "crop year" as used herein shall begin on November 1 and shall close on the following October 3 1.

3. **Ability to Perform.**

(a) The ability of the Association to deliver the peaches hereby sold to Canner is based and depends on the Membership Agreement between the Association and its members and the Allocation Forms subject to this Master Contract. Accordingly, if the Association is unable to perform this Master Contract as to any member's orchard allocated to the Canner because of causes beyond the Association's direct control, then the mutual obligations and terms of this Master Contract shall not be affected, changed or released as to any peaches from any other orchard which is allocated to Canner hereunder; and, the Association shall be relieved from all obligations under this Master Contract by reason of and as to any non-fulfillment

of its terms which shall arise from causes beyond the Association's direct control. It is the intent of this paragraph of this Master Contract, among other things, that each orchard allocated to Canner shall be deemed allocated to Canner under the terms of this agreement separately from other orchard allocated to Canner under the terms of this agreement, as though each orchard were covered by a separate contract with Canner.

(b) In case of fire, boiler explosion, interruption of power, strikes or other labor disturbances, lack of transportation facilities, shortages of labor or supplies, perils of the sea, floods, earthquakes, action of the elements, invasion, war, riot, insurrection, rebellion, interference of civil or military authorities, enactment of legislation or any unavoidable casualty or cause affecting the conduct of Canner's business to the extent of preventing or substantially restricting canning operations, including any obligation on Canner's part to transport the fruit covered hereby, or to furnish containers therefor, Canner, after making every reasonable effort to accept delivery of all peaches subject to this Master Contract, will be excused from performance hereunder during the period that Canner's business or canning operations are so affected, and Canner may, during such period, accept such portion of such fruit as Canner has informed the Association in its reasonable judgment it can economically handle.

The Canner understands and agrees that the Association, in the event of the occurrence of any of the foregoing enumerated emergencies, in order to prevent economic waste to the growers and consumers, retains the right, without liability of any kind or character to the Canner:

(1) To divert the peaches to another canner who is able to accept the same, at such price and terms as the Association and such other canner may agree;

(2) To divert the peaches to another canner who can and does furnish containers and transportation or either of them, at such price and terms as the Association and such other canner may agree.

(c) If, for like causes, the farming operations of any member whose fruit is covered hereby are so affected that such

member, or members, are unable to make complete delivery of the fruit, then, and, in that event, the Association shall make every reasonable effort to complete deliveries hereunder, and the Association shall be excused from performance of that part of this Master Contract which it is unable to perform because of these causes during the period of the member's farming operations are so affected. The Association shall not be liable for the failure to deliver fruit destroyed by frost, flood or other similar casualties.

4. Grade Standards.

(a) Member shall deliver at the designated point of delivery indicated on the Member's Allocation Form, promptly after harvesting, all fruit covered hereby in good condition and in conformity with the grade, quality and delivery standards agreed to each year by the Association and Canner as outlined in "Appendix A." If the parties fail to agree on the applicable standards prior to commencement of deliveries in any year, the matter will be settled by arbitration in accordance with the procedures set forth in Paragraph 13, as modified by subparagraph (b) below. During the arbitration process, the standards of the previous year will remain in effect until the matter is resolved.

(b) In the arbitration of any controversy or claim arising from or related to any grade or grading procedure applicable to any delivery of cling peaches to Canner under this Master Contract, all three (3) arbitrators shall be familiar with the growing and canning of fruit.

5. Allocation Form. The Association will provide each of its members with a "Member's Allocation Form," which shall describe: (1) the Association member whose orchard has been allocated to Canner; (2) the orchard number and number of acres and tonnage estimates that are the subject of this agreement; (3) the member's point of delivery; (4) the seasons covered by this agreement; (5) any special services that are to be performed by the member for the account of the Canner; and (6) a description of any mortgages, liens or encumbrances covering the crop. The Allocation

Form when executed by the member, the Canner and the Association shall become a part of this Master Contract.

6. **Hauling.** **The** members shall deliver peaches to the Canner's designated delivery point as set forth in each member's Allocation Form. Canner agrees to pay the member for hauling from the orchard to the delivery point, either at the prevailing rate paid by the Canner in the district under comparable conditions of tonnage and distance, or as set forth in the member's Allocation Form.

7. Weighing. All weighing, receiving, accepting and inspecting shall be done at the Canner's designated delivery point as shown in the Allocation Form. As its option, Canner may grade any delivery, or shall have the right to rely upon any grade and weight certificate issued in accordance with the provisions of any applicable marketing order.

8. Records. **The** Association shall have the right at any time, by its authorized agents, to examine and inspect the scales, weights and pertinent delivery point records of the Canner covering operations under this Master Contract.

9. Delivery Receipts. The Canner agrees to furnish to each member at time of each delivery, a receipt showing name of member, member's contract number, number and tare of containers, variety and grade of peaches delivered, together with gross, tare and net weight, and to issue a separate weight certificate for each delivery received. At the close of each day, the Canner shall provide duplicates of all receipts issued on the previous day, direct to the head office of the Association, or Canner will otherwise make available computer diskettes to the Association containing all information regarding daily receipts. If Canner shall fail or neglect to provide to the Association at the close of each day duplicate receipts showing deliveries of all peaches on the previous day, then the Association may, after written notice, or demand upon Canner, at its option, and at the Canner's expense, secure copies of weight certificates through an agent of the Association stationed at the point of delivery.

10. **Containers.** **The** Canner agrees to furnish to the members of the Association free of cost sufficient and suitably clean containers for the purpose of handling the peaches to be delivered to Canner. The Canner shall pay all freight and delivery charges on empty containers to roadside of member's orchard; or to point agreed to by grower and canner at time of signing allocation form. It is further agreed that any seasonal hauling rate afforded by Canner includes member's responsibility to haul any excess containers back to point of fruit delivery at the end of the harvesting season.

(a) In the event that containers are not returned by the member within fifteen (15) days following final delivery by the member, the member will be liable to the Canner for the actual cost of the same. The Association shall not be liable to the Canner for damage to containers, but this shall not relieve the member from liability for damages to containers due to his fault or neglect. In any event, title to containers shall always remain and be in the Canner.

(b) If the Canner shall fail to supply containers as required by this Master Contract, Canner shall pay to the Association all documented damages sustained by losses through overripe fruit on account thereof, except the Canner shall not be liable for such damages when Canner cannot provide containers because of strikes, fires, acts of God or failures of transportation or other causes beyond Canner's direct control.

11. **Base Price Determination.**

(a) Both parties recognize the advantages of entering into binding contracts for the purchase and sale of peaches in advance of the commencement of the harvest season, although, because of the unavailability of reliable marketing information, it may not always be possible to agree upon a specified price at the time of contracting. Accordingly, the. Association and the Canner agree that the base price(s) for the purchase of all peaches sold under this Master Contract shall be a "reasonable price," as that term is used in Section 2305(1)(b) of-the California Commercial Code.

(b) In order to· arrive at a reasonable price, the Association shall meet with the Canner at convenient times prior to

harvest to examine the economic data available concerning the marketing of fresh and processed cling peaches and other relevant factors concerning the cling peach industry. Based on such facts, parties shall negotiate the base price(s) to be paid by the Canner to the Association. The base price(s) shall in all cases be a "reasonable price. "

(c) "Base price(s)" means the price(s) to be paid by the Canner to the Association as adjusted by the seasonal provisions applicable to each crop year under Paragraph 14 of this Master Contract.

12. **Failure to Agree.** If the parties fail to establish, prior to commencement of deliveries in any season, a "reasonable price" under the provisions of Paragraph 11, then either party shall have the right to invoke the conciliation procedure set forth in Sections 54451-58 of the California Food and Agricultural Code. If the parties cannot reach agreement through the conciliation procedure, then the matter shall be settled by arbitration in accordance with the procedures set forth in Paragraph 13. The arbitrators shall determine the base price(s) to be paid under this Master Contract, and their decision shall be final and conclusive as to the "reasonable price" for the then current crop year.

13. **Arbitration.** Any controversy or claim arising from or relating to this Master Contract, or the breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction of the matter. Arbitration shall be by three (3) arbitrators, the decision of a majority of whom shall be binding upon the parties. The arbitrators shall be selected in the following manner: Upon written demand of either party for arbitration, both parties shall select an arbitrator within ten (10) days of receipt of the written demand by either party; within two (2) days thereafter, the two arbitrators so selected shall select a third; or, in the event of failure of the two arbitrators to select a third arbitrator within such two-day period for any reason whatsoever, the third arbitrator shall be selected in accordance with the Commercial Arbitration Rules of the American Arbitration

Association. Within three (3) days following the appointment of the third. arbitrator, the three arbitrators shall meet to conduct the hearing; within fifteen (15) days of the close of the hearing, the arbitrators shall report their decision, which, when signed by a majority of them, shall be final. Except as provided herein, the provisions of Chapters 1, 2, 3, 4 and 5 of Title 9, Part 3 of the Code of Civil Procedure (Sections 1280-1294.2, inclusive) of the State of California shall govern the conduct of the arbitration proceeding. The costs and expenses of such arbitration, excluding attorneys' fees but including the compensation of the arbitrators, shall be shared equally by the parties.

14. **Seasonal Provisions. The** schedule of incentives and penalties, the delivery tolerances and the inspection arrangements upon which the base price(s) determined hereunder shall be paid, shall be established annually by agreement between the Association and Canner. If the parties fail to agree on the applicable seasonal provisions prior to commencement of deliveries in any year, the matter shall be resolved by arbitration in accordance with the procedures set forth in Paragraph 13. During the arbitration process, the seasonal provisions of the previous year will remain in effect until the matter is resolved.

15. **Weekly Payments.** All payments due to the Association shall be made as soon as practicable following each week's deliveries. Up to five percent (5%) of the purchase price for such peaches shall be paid to the Association, and the remaining amount, less deductions, shall be paid directly to the member delivering the same. One percent (1%) of the purchase price and the service charge shall be deducted and paid to the Association in accordance with assignments made by the agency grower and contained in the Association membership agreement for any peaches delivered by growers holding agency agreements of the Association per list of growers and orchard numbers attached. Association agrees to hold Canner harmless from and defend Canner against any and all claims, liability, cost or expense (including attorneys' fees) arising out of any dispute with an agency grower over the payments which the Canner deducts pursuant to this paragraph from the amounts due such grower.

16. **Advance Payments.** In the event a price is not agreed to by the parties or determined by arbitration prior to the date on which deliveries are made hereunder, then the Canner shall make interim payments to the Association and its members, in accordance with the provisions of this paragraph in an amount not less than seventy-five percent (75) of the average price per ton paid for cling peaches for the preceding three (3) years. For years in which a schedule of values is utilized the price shall be deemed to be the "Base Price" set forth in such schedule. Unless otherwise agreed in writing between the Association and Canner, the remaining balance of the proceeds due hereunder shall be paid by Canner within fifteen (15) days after the price has been agreed to or, if determined by arbitration, within fifteen (15) days after the arbitrators serve their decision. The pendency of an application to the arbitrators to correct the award, or a petition to the court to confirm, correct, or vacate it, shall not extend or otherwise affect Canner's obligation to pay the balance due within fifteen (15) days after the arbitrators serve their decision. If any such application to the arbitrators to correct the award, or petition to the court to confirm, correct or vacate it, results ultimately in a final determination by the arbitrators or the court that a lower (or higher) price than that rendered in the original arbitrators' decision is payable or should have been payable for the crop year in issue, any excess amount over such lower price paid by Canner shall be refunded to Canner by the Association (or any additional amount owed by Canner shall be paid by Canner to the Association) within fifteen (15) days of such final decision; provided, however, that if Association has paid out to its members the amount originally awarded by the arbitrators prior to a final decision by them or the court that a lower price is payable, then in that event the Association shall have the option of refunding the difference to Canner by way of an offset against monies to be due from Canner from the purchase and sale of peaches in the next- succeeding crop year. (If the Association exercises this option, the amount to be refunded shall bear interest at the maximum rate allowed by law from the date of the final decision fixing the lower price to the date of the offsetting refund .)

17. **Service Charge.** Canner hereby recognizes that the organization and continued existence of the Association relieves the

Canner of trouble, labor and uncertainty of soliciting and obtaining separate contracts with individual growers. In consideration thereof, the Canner agrees to pay to the Association, over and above the base price(s) agreed to, a service charge of 1.25% 'of the base price(s). The service charge is in addition to, and shall not be construed to be a part of, the purchase price.

18. **Non-Discrimination.** Canner recognizes the right of the farmer to join voluntarily and belong to cooperative bargaining associations and agrees that it will not interfere with or restrain any farmer in the exercise of that right or discriminate against any producer of cling peaches with respect to price or other terms of sale by reason of such producers' membership in, or contract with, the Association.

19. **Legislation or Marketing Order.** This contract shall be deemed modified to the extent necessary to comply with State and Federal laws and any order, regulation or license pursuant thereto, and any marketing agreement or order under the authority of law.

20. **Pesticides. The** Association agrees that its members have not used and will not use any pesticide (as defined in the Federal Insecticide, Fungicide and Rodenticide Act) on the peaches subject to this agreement other than those shown in any schedule furnished to the Association and its members by the Canner or as otherwise agreed upon in writing by the Canner. Prior to the delivery of the peaches subject to this agreement, at the request of the Canner, each member delivering the same shall furnish to the Canner an accurate statement of the pesticide treatment of his peaches' on such form as shall be furnished by the Canner. If a member shall breach any of these provisions, in addition to other remedies, Canner may, at its option, refuse to accept delivery of the crop. If Canner does refuse to accept delivery, it shall have no obligation to pay for said crop, and Association may dispose of the crop free of this agreement.

2 1. **Orchard Entry.** Member shall till, cultivate, fertilize, irrigate and endeavor to eliminate and control worm and insect infestation, all in the manner customary of consistent with the production of processor grade fruit. Canner's agents are expressly

authorized and permitted to enter into and upon members' orchards and land during the term hereof for the purpose of examining and inspecting the growing crop and the harvesting of same if such be deemed advisable to Canner to protect its interests. Canner is not required to give grower advice relating to the performance of this contract. Such advice as Canner may give grower shall be deemed gratuitous and Canner shall not be liable to grower therefor.

22. **Fair Labor Standards Act. The** Association agrees that, unless otherwise exempt under Section 13 of the Fair Labor Standards Act of 1938, it and its members will comply with all applicable requirements of Sections 6, 7 and 12 of said Act, and with all regulations and orders of the United States Department of Labor issued under Section 14 thereof.

23. **Adulteration.** Association and members guarantee that no article sold hereunder is or will be adulterated or misbranded within the meaning of any law, in particular, the Federal Food, Drug and Cosmetic Act of June 25, 1938, as amended, and that no such article will be produced or shipped in violation of sections 404 or 302(d) of said Act.

24. **Notice of Assignments.** Canner and Association agree to give prompt written notice to the other party of any assignment of proceeds (or notice thereof) received by them covering any cling peaches sold under this Master Contract.

25. **Assignment of Contract.** Neither party to this Master Contract shall assign or transfer this contract or any interest in it without the written assent of the other party first obtained.

Executed at Lafayette, California, the day and year first above mentioned.

CANNER	CALIFORNIA CANNING PEACH ASSOCIATION
By: _____	By: _____

California Canning Pear Association Pooling Policy, Adopted 1957

WHEREAS, the Membership Agreement of the California Canning Pear Association duly executed by each member of the Association expressly authorizes the Board of Directors of the Association to adopt the principle of pooling with respect to canning pears contracted by each member to be sold through the Association as its exclusive sales agent; and

WHEREAS, as a matter of policy the Board of Directors of the Association considers it desirable to apply the principle of pooling with respect to first grade canning pears for the best interests of the members of the Association.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. **Adoption of pooling principle.** The Board of Directors of the California Canning Pear Association does hereby adopt the principle of pooling in determining the net proceeds which shall be due each member with respect to No. One or Prorate Grade Hardy and Bartlett pears which the member has contracted to market through the facilities of the Association.

2. Authority of Membership Agreement. The pooling of such pears hereunder shall be consistent with and pursuant to the authority set forth in the Membership Agreement of the California Canning Pear Association.

3. Effective Date of Pooling Policy. The policy hereby adopted by the Board shall apply to such pears for the 1957 harvest season and for each successive season hereafter, unless otherwise changed by a resolution of the Board.

4. **First or Opening Pool.** The first or opening pool shall include all tonnage which is signed tonnage within the meaning of the Membership Agreement and which is specified in the final tonnage estimates submitted by the member on or before July 8, 1957.

5. Pooling Committee. There shall be a Pooling Committee composed of not less than five nor more than seven members of the Board who shall be appointed by the President. The Pooling Committee shall administer the pooling of pears in accordance with the principles herein and hereinafter adopted by the Board, including such rules and regulations as the Board may adopt. The Committee shall keep minutes of all of its meetings and a record of all action taken by it which shall be submitted to the Board for review as promptly as is practicable. Without being limited thereto, the Pooling Committee shall:

(a) Recommend rules and regulations with respect to pooling for adoption by the Board

(b) Recommend what pears, if any, should be excluded from any pool because of difference in quality, damage by the elements or for other sufficient reason.

(c) Recommend a closing date for second or subsequent pools, if any.

California Canning Pear Association Pooling Policy, Adopted 1976

1. **Adoption of Pooling Principle. The** Board of Directors of the California Canning Pear Association do hereby adopt the principle of pooling in determining net proceeds which shall be due each member with respect to No. 1 or Hail or Frost Grade Bartlett pears which the member has contracted to market through the facilities of the Association and which are economically feasible to harvest and, further, which have not been sold and delivered at the established Association Canner price for such pears.

2. **Authority of Membership Agreement. The** pooling of such pears hereunder shall be consistent with and pursuant to the authority set forth in the Membership Agreement of the California Canning Pear Association.

3. **Effective Date of Pooling Policy. The** policy hereby adopted by the Board shall apply to such pears for the 1976 harvest season.

4. Tonnage Covered. The pool shall include all signed tonnage of No. 1 Bartlett pears specified in the final tonnage estimates submitted by the members; provided that there shall be excluded such tonnage as in the judgment of the Board shall be substantially in excess of the normal processing tonnage for the member. In determining whether the processing tonnage of a member for the current season is abnormal, consideration shall be given to the following factors, among others:

A. Whether the average processing tonnage of the member for the three years immediately preceding the current harvest season in which his or its processing tonnage was highest is substantially less than the final tonnage estimate for the current season.

B. Whether on the basis of the final tonnage estimate for the current season there is a substantial change from

the past experience of the member with respect to the proportion of his total tonnage of pears which would qualify for processing which he sold for processing.

C. Whether such variation of change is attributable to such causes as acquisition of new orchards or increased yield from trees or other such causes as may be considered to justify the increased processing tonnage as normal.

5. Pooling Committee. There shall be a Pooling Committee composed of five members of the Board who shall be appointed by the President. The Pooling Committee shall administer the pooling of pears in accordance with the principles herein and hereinafter adopted by the Board 'including such rules and regulations as the Board may adopt. The Committee shall keep minutes of all of its meetings and a record of all actions taken by it which shall be submitted to the Board for review as promptly as shall be practicable. Without being limited thereto, the Pooling Committee shall:

A. Recommend rules and regulations with respect to pooling for adoption by the Board.

B. Recommend what pears, if any, should be excluded from the pool because of difference in quality, damage by the elements or for other sufficient reason. In this respect it is contemplated that canning pears, otherwise qualified, may be excluded because the orchard would not be considered commercially acceptable to be harvested for the No. 1 and Hail and Frost grade pears. The Pooling Committee shall establish a procedure for processing complaints by members with respect to the administration of the pool and shall provide a fair opportunity for each such member to be heard by the Committee. The determination of the Pooling Committee will be communicated to such members as soon as shall be reasonably practicable. The member shall thereupon

have a right to appeal to the Board of Directors from the decision of the Committee.

California Canning Pear Association Revised Canner Contract Provision for Arbitration of Reasonable Price, Adopted 1985

...

(b) Said "reasonable price" shall be determined by the canner and the Association by agreement. In the event that the "reasonable price" is not so determined by agreement by the parties, it shall be determined by arbitration, pursuant to the provisions hereinafter set forth in this paragraph. In the event of arbitration, "reasonable price" shall, to the extent applicable, be determined in accordance with the provisions of Uniform Commercial Code Section 2305(1)(b).

(c) In the event that a reasonable price cannot be reached by agreement by the parties, the reasonable price to be paid under this contract shall be determined by three arbitrators, the decision of a majority of whom shall be binding upon the parties hereto and shall be final and conclusive as to a "reasonable price" for the then current crop year. The arbitrators shall be selected in the following manner: Upon written demand of either party hereto for an arbitration to determine said reasonable price, both parties shall select an arbitrator within ten (10) days of receipt of said written demand by either party; within two (2) days thereafter the two parties so selected shall select a third; or, in the event of failure of the two arbitrators to select a third arbitrator within such two day period for any reason whatsoever, the third arbitrator shall be appointed by the presiding judge of the Superior Court of the City and County of San Francisco forthwith upon the application of either party after three (3) days notice in writing to the other party; within three (3) days following the appointment of the third arbitrator, the three arbitrators shall meet to conduct a hearing and to determine what a "reasonable price" shall be for the current crop year.

(d) Each party shall, prior to the hearing, submit to the other party and to the arbitrators in writing its final offer with respect to the pears, the reasonable price for which is to be determined hereunder. Within fifteen (15) days of the close of said hearing the arbitrators

shall report their decision which, when signed by a majority, shall be final and not subject to review. The reasonable price determined by a majority of the arbitrators shall be confined to the selection of either one of their final offers as submitted by the parties. Except as provided herein, the provisions of Chapters 1, 2 and 3 of Title 9, Part III of the Code of Civil Procedure (Sections 1280 - 1284.2, inclusive) of the State of California shall govern the conduct of the arbitration proceeding. The costs and expenses of such arbitration excluding attorneys fees but including the compensation of the arbitrations, shall be shared equally by the parties.

(e) Pending determination of a "reasonable price" by arbitration, the canners shall otherwise make payments to the member/growers as and when otherwise due on the basis that the reasonable price as provided herein is equal to the canner's last bona fide offer during the harvesting season to Association, with subsequent adjustment, if necessary, to be made upon conclusion of the determination by arbitration.

California Canning Peach Association Membership Agreement Provision For Agency Membership

6. Any Member of the Association who, at the time of execution of this Membership Agreement, is obligated by contract to deliver the peaches described herein to a commercial cannery shall deliver his peaches directly to such commercial cannery and shall be exempt from the provisions of paragraphs 4 and 11 hereof until the expiration of the current term of said contract, but thereafter the Member shall become subject to the provisions of said paragraphs 4 and 11 and this paragraph shall no longer apply. The Member hereby appoints the Association to act as his agent during the current term of his contract with such commercial canner to perform such services and to conduct such activities (including price negotiations) as the Association deems necessary or advisable to assure that the Member will receive a price for his peaches which is equal to the price received by other members of the Association. The member agrees to pay a service charge per ton on the peaches described herein equal to the service charge paid by the commercial canners to the Association on peaches sold by the Association and that the Association may collect such service charge directly from said commercial canners. In this regard, the Member agrees that he will give notice to such commercial cannery pursuant to Section 58451 of the Agricultural Code of the State of California that he hereby assigns such sum to the Association and directs that such sum be deducted from the price to be paid for the peaches sold by him and to pay the same directly to the Association.

Additionally, the Member agrees to direct the commercial canner to which he delivers his peaches to pay to the Association an amount equal to 1% of the proceeds arising from the sale of such peaches, which sum shall be held by the Association and disbursed in accordance with paragraph 10 hereof.

Excerpt, Unpublished Interview with Cameron Girton, December 9, 1988

MR. MARCUS: Would you try your hand at a brief explanation of the Hoos formula?

MR. GIRTON: The Hoos formula was as the name implies--a formula developed by Dr. Sidney Hoos and Dr. George Kuznitz that would, if supplied the proper information, forecast the F.O.B. price for a case of 24 2-1/2 canned pears for the next marketing season.

To begin, the formula would record the average F.O.B. prices of all canned pear sizes and convert them to a 2-1/2 basis.

Let's assume then that the average price of a 24 2-1/2 can size for the past season was $10 per case. To determine next year's F.O.B. price the following information was required:

1. Estimate the size of the pear crop for the current season in California, Washington and Oregon.

2. Subtract the amount of fruit to be shipped fresh.

3. Subtract the amount to be used for other uses, such as Gallo, dried, frozen, etc.

4. Subtract the amount to be used for fruit cocktail.

This then leaves the net amount of pears on the Pacific coast to be used for pear halves.

The average case yield per ton for pear halves is approximately 45 cases per ton - so you multiply the pear tonnage times the case per ton - this will give you total amount of cases of pears.

You then subtract the estimated amount to be exported and the estimated amount to be purchased by the government. To this you add the carry-over from the previous year and subtract the desired amount of carry-over for the next year. This gives you the net amount for domestic consumption.

If this figure is higher than last years it had a minus effect on the F.O.B. price of $10 per case. If it is less than last year's figure it has a plus effect on the $10 per case F.O.B. price.

Other facts effect the pear price, competing fruits--if there are more peaches, apricots, fruit cocktail, pineapple and at lessor F.O.B. prices a minus effect--if less a plus effect.

G.N.P.--the overall economy will have a plus or minus effect.

Now we have the estimated F.O.B. price for the coming year--it may be the same $10 per case or $10.50, or $9.50 or some other depending on the economic data furnished the formula. To determine the grower price per ton we take the historical percentage that growers have received for the past 10-20 years. This is done by taking the price per ton times the canning pear half tonnage and the number of cases packed times the F.O.B. price per case. Then you divide the dollar amount of the cases by the dollar amount of the canning tonnage and determine the percent of the average grower share.

The average percentage or grower share may range from 25 to 30 percent. This percentage applied to the total value of the pack is the grower share. Divided by the current tonnage--you determine the grower price per ton.

Organization for Self Preservation

JACK Z. ANDERSON, President
California Canning Pear Association

Editor's Note: Soon after the cannery pear prices were established on the Pacific coast last fall Jack Anderson was invited by the Washington State Horticultural Association of Wenatchee to speak before their group of pear growers at Yakima and Medford and at a meeting of the Oregon State Horticultural Society. His message of "Organization for Self Preservation" was well received by the Pear Growers in both Oregon and Washington.[108]

Although the title of my talk to you here today may sound slightly poetic. I can assure you that it was not chosen for its rhythm nor its iambic pentameter. It was chosen rather because I believe it suggests the solution to many of the complex problems that confront the farmers of the Pacific coast in this modern and high speed age.

It was chosen also because of my personal knowledge of the various degrees of successful recognition gained by organized commodity groups as opposed to the lack of recognition accorded to unorganized farm producers. When 1 speak of "recognition" I mean the business of having our problems adequately recognized by the people with whom we do business: The transportation industry, the handlers and packers, the processors and canners, as well as the duly elected legislative bodies to whom we find it necessary at times to appeal for assistance.

As some of you know, I served for fourteen years as a Member of the United States House of Representatives from the Eighth District of California, from 1938 to 1952. During the last six

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[108] Reprinted from the 1954 Annual of the Pear Growers and Central Coast Pear Association, pp. 3-7. The editor's note is from the original report.

years of my term in office I was chairman of the California Congressional Delegation's sub-committee on "Agriculture and Farm Problems. " In this latter capacity I had ample opportunity to observe at first hand the success so often obtained by organized farm groups and the indifferences and lack of attention paid to the unorganized farmers.

For instance, if I were to go to Washington D.C. to discuss with our representatives in Congress some specific bills affecting the Pacific coast pear industry, and if I went only as an individual, my voice would be like a voice in the wilderness--
unheard and unheeded. On the other hand, if I were to go to the nation's capital as the representative of a California pear association, or better still, representing a Pacific coast pear association, I would be respectfully listened to and my advice and counsel would be solicited.

I am a farmer. My family has been engaged in the business of producing and selling fruit since 1865. With those years of experience we feel that we know something about fruit production. We try to grow a quality product and to market it under a brand that is respected and sought after. However, we fully realize that when it comes down to the last step, the sale of our commodity, we are almost completely helpless as individuals. We must belong to an organization that .can assist us in bargaining for a fair and adequate price for the product we grow.

A portion.of our crop flows to the eastern markets where it is sold at public auction and we are content to compete there for what the market will bring. However, a part of our crop also goes to the cannery and there, for at least eleven of the last twelve years, we have been compelled to accept whatever price our purchaser decided to offer. On only one occasion--this year--have we been in a position to sit down and bargain for a reasonable price for our commodity.

Now this didn't just happen. It took a lot of doing by a lot of people. But the fact of the matter is that the producers of canning pears in California finally decided that their future, their "self preservation" if you will, depended upon organization --and organize they did. More than fifty per cent of all the canning pears produced in California in the 1953 crop year were sold to the processors by the California Canning Pear Association. I am proud and honored to have been selected as the first President of this new Association. I

think we did a good job for our growers and I have every reason to believe that most of our grower-members are pleased with the results we obtained for them.

I am sure you would like to know how we did it. The fact that you have invited me here indicates your interest. Therefore I shall try to outline for your information exactly what transpired, a "blow by blow" description, in other words. Now I know that you are not all pear growers, that some of you produce other crops and that you may or may not belong to an association of one kind or another. However, I should like to impress upon you the fact that what I have to relate about the formation of our canning pear association in California can be applied with the same effect to any other farm commodity produced in this or any other state.

First of all, of course, any commodity group having a desire to form an organization must be guided by a will to win. The basic philosophy must be "it can be done." You will encounter, just as we did, the defeatists, the prophets of failure, the rugged individualists, if you please, who would apparently prefer to sell their crops at a loss rather than to sacrifice one iota of their independence. Disregard them and their philosophy. Select your ultimate objective, set your sights on that goal, and then go to work.

Here is how we did it. A year ago last September, following a season of disastrous prices to the growers of canning pears in California, two forward looking individuals decided to do something about it. Joe Green, a progressive and successful pear grower in Courtland, and H. V. Beckman, Manager of the Pear Growers League in San Jose, invited about sixty representative pear growers from every pear producing district in California to attend a meeting in Sacramento. The turnout exceeded even their fondest hopes and I was told during the course of the meeting that those in attendance were in fact the most representative group of pear growers ever gathered together in one room in our state.

The primary topics of discussion were: Organization and surplus control. It was generally agreed that only through some type of a statewide canning pear association could we expect to be in a position to bargain with the processors on a price for our product. It was further agreed that such an organization could go a long way toward eliminating the wide range in prices paid for pears and assist tremendously in stabilizing the entire industry. That stabilization was

badly needed is best emphasized by looking back to 1948 when the California Bartlett growers received an average of $120.00 per ton for their pears and looking quickly, but reluctantly, at 1949 when these same growers sold for an average of $3 1 .OO per ton a crop of almost the same tonnage as was produced the previous year. It is obvious that no industry can expect to survive and prosper under conditions that permit a variation in price of almost five hundred per cent from one year to the next.

This was so obvious to the grower group that met in Sacramento that a committee of nine was selected from the various pear districts in California and this committee was given the task of developing the type of organization that would best meet the needs of the pear industry in our state. I was selected as chairman of this committee and we immediately went to work on what was to be a monumental undertaking, but one well worth all the time and effort that went into it.

I would be remiss indeed if I did not pause here to pay tribute to the men who were elected to my committee and who gave unstintingly of their time, money, and brains to find the solution to a problem that so many said could not be solved. They and they alone are responsible for the fact that a successful pear association was finally founded in time to bargain with the canners for the sale of our 1953 crop.

As you can well imagine we were at once confronted with a multitude of complexities and problems, both small and large. Some districts wanted to form local associations while others felt that only through a statewide organization could we achieve the degree of unity and strength that is essential to success. Our organizing committee met frequently through the months of October, November and December.. We adopted the policy of meeting in a different district each time and we solicited the suggestions and advice of the growers and handlers in these various districts. By using this method we were able to learn the many and varied problems each district faced and we became thoroughly familiar with the entire pear producing industry.

By the last of the year we had progressed to the point where it was necessary to obtain an expression of opinion from the growers themselves. We knew that without the support of the producers any effort on our part to form an association was foredoomed to failure.

Consequently it was decided to address a letter to every producer of canning pears in California.

Our letter outlined in detail the problems confronting the industry, the work that our committee had done, and it wound up with two questions: (One) Do you believe that a statewide pear association is necessary- in order to insure the more orderly marketing of our annual crop? and (two) would you be willing to sign a pre-organization agreement if not less than one hundred thousand tons of pears were signed in the organization?

The favorable response to our questions was so overwhelming that the parent body again convened in Sacramento in January of this year and our organizing committee was reconstituted and given the very definite assignment of developing and incorporating a pear association. We were requested to develop the necessary articles of incorporation, by-laws, and a form of grower-association contract. Our committee went to work at once and on April ninth we signed the Articles of Incorporation, adopted the By-Laws, and approved the preliminary draft of a membership agreement. We had decided earlier to discard the idea of a pre-organization agreement and to present to the growers a "one package" deal containing all of the essentials needed by a going organization. We further decided to set as our minimum fifty thousand free tons of canning pears. That is fifty thousand tons that were not obligated under long term contracts or bound by contracts with cooperative canneries.

Our next step was to present our proposal to the growers and start our sign-up. A series of meetings was scheduled and eight such meetings were held in the eight principal pear producing districts in the state. The attendance was generally very good and the time, travel and work put in by my Board of Directors was inspiring. It was evident that our efforts were producing results as signed Membership Agreements started flowing into our office in ever increasing numbers. By June fifth we had passed our minimum requirements and knew that we were in business to stay. By this time, of course, the clock and the approach of the harvesting season were working against us and we were still confronted with the task of drafting and having accepted a form of canner-association contract for the sale of our members fruit. This proved to be a most difficult and complex job. In the first place the canners insisted that district price differentials be recognized.

Perhaps you here in the State of Washington are not familiar with this particular "gimmick" but I can assure you that we in California are. I am convinced that the canners were of the opinion that our new association would quickly founder on the rocks of "district price differentials." However, we were determined that no such problem, difficult as it was, would prevent us from attaining our ultimate objective.

A subcommittee of our Board was appointed to study this particular, and perhaps peculiar question, and this committee, after much research and study, reported its findings and recommendations to the Board. Their thorough investigation showed that over a long period of time different prices had indeed been paid by the processors for canning pears. We simply applied the formula of a ten year average taken from the various districts and agreed that this average would be our yardstick as far as our price demands were concerned. This formula was accepted by our grower-members with a minimum amount of argument and a maximum amount of cooperation. It was this attitude and spirit that made it possible for us to meet and conquer the extremely difficult problems that then lay ahead.

Various drafts of our canner-association contract were approved, revised, amended, approved, and revised and amended again. The suggestions and advice of the canners were earnestly requested. From some we received the utmost in cooperation and help--from others practically nothing. By the time the Sacramento River district was ready to pick and deliver pears, we felt that we were ready to announce our price and ask the canners to sign our contract.

Unfortunately, we failed to reckon with the "annual emergency. " I call it that advisedly as we may just as well make up our minds that it is with us to stay. One year it's a shortage of pineapple for fruit cocktail, the next year it's a shortage of tin, and this year it turned out to be a labor dispute. What it will be next year no one knows--but it's interesting to speculate about.

Shortly before the strike, our Board of Directors, sitting as a sales committee in San Francisco, invited the canners to whom we sell our pears to meet with us on the question, the all important question, of the price to be paid for our crop this year. Because of the anti-trust laws and various other statutes we could only talk to one cannery representative at a time. These meetings consumed three

days. Our Board then met in continuous session to decide on the price, or prices (based on district differentials) we would request.

There was nothing haphazard about our approach. We studied the Giannini Foundation's report, the Nielsen Service report, in fact all of the economic data we could find. We took into consideration the size of the 1953 crop, both in California and the Northwest, the carry-over of both pear halves and cocktail, and then we wired our proposed prices to the processors. We received one acceptance, and then came the strike.

From then on--for eight days--we really "sweated it out." Pears were ripening fast. Canners were taking non-association pears into storage, but Association members had no home for their fruit. Our Board of Directors met in emergency sessions. We lined up boxes, transportation, and cold storage space, and then we could only sit and sweat--and we did! After eight agonizing days the strike was settled. We immediately reoffered our Association tonnage to the canners at our previous price.

Again only one taker. More emergency sessions of the Board. Growers becoming desperate--but no break in the ranks. The Board, after conferences with two or three major canners, agreed to re-offer our tonnage at seven dollars per ton less than the original price. Within twenty-four hours this price was accepted, our pears were sold, and our Association was made.

I have gone into our "birth pains" in some detail because I understood that you wanted to know how we pear growers in California formed an association that so many people told us could not be formed. However, I have purposely left out one very important detail because this is where you come in. During our price negotiations with the canners there was one question which we were invariably asked: "What are you going to do about the tonnage in the Northwest?" Our reply had to be that there was nothing we could do about the canning pears in Oregon and Washington because these states did not belong to our Association.

Now do you see the pattern? Do you get the idea? Since the processors can no longer play one district in California against another, as they have done so successfully for so many years, they now want to play one state against the other. There is nothing new or startling about this: it's simply the old idea of "divide and conquer" coming to the economic front.

Are you going to permit this to happen or are you going to do what we in California have done? Or better still, are you going to join with us in a three state cooperative effort where every farmer who grows pears is going to have something to say about what his product is worth?

The answer lies in your hands. I have always maintained that the ultimate solution to our present difficulties is one that must be solved by the growers themselves. No one is going to do it for them. I am convinced that many of the people with whom you do business would prefer to see us disorganized and, of course, completely at their mercy.

To further emphasize what I say about self-help let me quote briefly from an article written by S. R. Smith of the Production and Marketing Administration of the U.S. Department of Agriculture in 1950. In pointing out that the assistance of the Federal government might be withdrawn from Pacific coast pear growers if they refused to take some steps to help themselves, Mr. Smith said: "Before an aggressive and well coordinated self-help program can be launched, members of the pear industry must pull themselves into a tighter knit group. They cannot forge ahead by pulling and hauling against each other. They have to come to a realization that, since all have a common objective, they must all work together."

When I speak of government assistance I do not want to give the impression that I am referring to direct price supports for perishable commodities or to government handouts. I know that Federal control follows the Federal dollar and I don't think the pear growers on the Pacific coast want Washington D.C. to be telling us what we can or cannot do. I do refer to the assistance we can obtain through Federal marketing orders and programs, the sale of surplus fruit to the school lunch program under Section 32 funds, and tbe use of these same funds for export subsidies.

Just think, for instance, what the return of our pre-war export markets would mean to the Pacific coast pear industry today. If these historic outlets could be re-opened, our so-called surpluses would disappear like magic. Industry committees from California, Oregon and Washington are now endeavoring to re-open these markets but, unfortunately, we cannot figure on any appreciable volume of fresh or canned pears moving into export in the immediate future. The point is, however, that we are in a much better position to make our

problems known and have them properly recognized if we pool our brains and our resources and approach our problems with combined and cooperative intelligence.

Now just a few statistics. The Bartlett pear production trend and percentage canned is of importance in any pear problem under consideration for the Pacific coast. For example, the five year period 1949-1953 shows an increase in production of 1.5% over the previous five year period. For the same comparable periods, there was an increase of 15.5% in the amount canned. In other words, the increased canned output has more than kept pace with the production increase by some 14%. The increase in both of the foregoing figures was in California and Oregon, whereas there was a decrease of 30% in production and a decrease of 19% in the amount canned in Washington for the respective five year periods.

The population of the United States has increased seventeen million since World War II, by almost six million since the start of the Korean conflict, and we are now a country of almost one hundred sixty million people. It is expected that we will reach one hundred seventy-five million by 1960. If we can maintain near the present rate of consumption per capita of canned pears and canned pear products, we should not face overproduction. However, the competition for the consumer's dollar necessitates our constantly reminding the retailers and consumers of the virtues of our product. This is being done by the industry on fresh Bartletts and winter pears, canned pears and fruit cocktail. Promotion of these commodities is also being carried on by cooperatives and private companies with respect to their own brands in both fresh and canned channels of trade.

The foregoing is encouraging and it looks good if everything works out just right. But let's not be too Pollyanna about it. Some year the bloom and the set may be perfect in all three of our Pacific coast states. The sun may shine brightly all through the growing season from Wenatchee to Tehachapi. We may not be beset with blight, scab, frost, hail and the numerous other diseases and pests which we combat to a greater or lesser degree every year. Then what could happen? We could produce a three state crop of fantastic proportions. The canners and fresh fruit buyers would lick their chops and rub their hands, and what could we do? Under present

conditions and circumstances--nothing. We would fall from the tree like an over-ripe plum and many of us would be out of business.

In order to forestall such a disaster it becomes apparent that we must set up the necessary machinery to take care of a price depressing surplus. We can't do it on a one or a two state basis: it must be a Pacific coast program. In a year such as the one I have mentioned it might be necessary to remove from the normal channels of trade some ten, twelve or fifteen percent of our production. As you well know, it only takes a small percentage of over supply to absolutely ruin our markets and crush our producers. However, if a comparatively small percentage of an extremely heavy crop could be properly diverted, it would stabilize our prices and our industry in all three Pacific coast states.

Solving the so-called surplus problem then becomes very obviously a mutual problem and one in which every affected segment of our industry has a very vital part. Can you imagine California pear growers agreeing to divert a substantial percentage of their crop in order to stabilize pear prices if Oregon and Washington declined to do likewise? Can you visualize the producers here in Washington agreeing to such a program if California and Oregon would not agree to follow suit? The *answers* to those two questions are self-evident and they only serve to again re-emphasize the absolute need for intelligent cooperation between our three states.

Such cooperation is not unattainable. Again I say--it can be done. We organized the pear growers in California. You can do it here in Washington and the Oregon growers can do likewise. Then, of course, it becomes necessary to select the right kind of brains and leadership in each of the three states and put them to work and insist that they solve their differences, bury their prejudices and jealousies and come up with a program that is acceptable to the producers, the packers and handlers, the canners, and the consumers. When that occurs we will be *on* our way to stability for the pear industry and security for our pear producers.

In conclusion may I ask you to look into the crystal ball with me and try to see what I consider to be the modern Utopia for the farmers on the Pacific slope. What I have had to say here today has dealt primarily with the pear industry although, as I indicated at the outset, what the pear growers can do any other commodity group can do. We have learned, I think, through years of trial and error that

cooperative effort yields more satisfactory returns to a greater number of people than rugged individualism and short-sighted selfishness brings to the smaller number.

I have been on the legislative firing line and have watched with concern the effective efforts of the representatives of the so-called basic commodities when the welfare of the cotton, corn, wheat, tobacco, rice and peanut growers was concerned. I have seen agricultural laws passed and amended to suit the absolute demand of this farm bloc in Congress. I have had to sit and suffer as this legislative steamroller swept by the representatives of our so-called specialty crops here on the Pacific coast, gathering the cream and the gravy while we picked up the crumbs.

I don't have the gift of prophecy and the crystal ball to which I referred is no more accurate than my vision, but here is what I see. First of all, an organization of the producers of every one of the commodities which we grow in such abundance in our three Pacific states. Then, through an interlocking directorate or an association of directors of each of these commodity groups, a top board of directors who can represent effectively the wishes and desires of the growers who selected them. Then, and then only, we will have an effective voice speaking for California, Oregon and Washington agriculture. Then we will have found the way to insure the fact that our I pleas will be heard, our problems properly and adequately recognized, and our advice and counsel solicited and heeded. Then, in my humble judgment, we will have found the way to the economic security to which every farmer and family aspires.

California Food and Agricultural Code

Chapter 2. Cooperative Bargaining Associations

Article 2. Unfair Trade Practices

$54431. Acts constituting

It is an unfair trade practice, and unlawful, for any processor, handler, distributor, or agent of any such person, or, with regard to subdivisions (d), (e), and (f), for any cooperative bargaining association or any agent of an association, or for any other person to do any of the following:

(a) Interfere with, restrain, coerce, or boycott producers in the exercise of the rights which are guaranteed pursuant to Section 54402.

(b) Discriminate against any producer with respect to price or other terms of purchase of any raw agricultural commodity, by reason of the producer's membership in, or contract with, any cooperative bargaining association.

(c) Pay or loan money, or give any other thing of value, to a producer as an inducement or reward for refusing or ceasing to belong to, or for breaching one's membership agreement in, a cooperative bargaining association.

(d) Maliciously or knowingly give false reports about the finances, management, or activities of any person subject to this chapter.

(e) Refuse to negotiate or bargain, including refusing to comply with the procedure prescribed in Article 3.5 (commencing with Section 54451), at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious

attempt to resolve differences with a cooperative bargaining association 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, or refuse to negotiate or bargain, including refusing to comply with the procedure prescribed in Article 3.5 (commencing with Section 54451), at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious attempt to resolve differences with a processor for price, terms of sale, compensation for commodities produced under contract, and other contract provisions relative to any commodity which the cooperative bargaining association represents. This subdivision does not apply to fresh grapes purchased for wine. Also, this subdivision is limited to processors, handlers, or agents of any of those persons who deal in fruits, nuts, or vegetables for processing and a cooperative bargaining association which meets all of the following:

(1) That, under the articles of incorporation or bylaws of the cooperative bargaining association, the association is producer owned and controlled exclusively by producers.

(2) The cooperative bargaining association has enforceable contracts with its members.

(3) The cooperative bargaining association has financial resources and management reasonably sufficient to accomplish the purpose for which it was organized.

(4) The cooperative bargaining association represents, through its own members, a suffkient number of producers or a sufficient quantity of any particular commodity, or both, to make it an effective agent for producers in bargaining with handlers.

(5) One of the functions of the cooperative bargaining association is acting as principal or agent for its producer members to negotiate or bargain with handlers for prices, terms of sale, compensation for commodities produced under contract and other terms of contracts with respect to the production, sale, compensation for commodities produced under contract and other terms of contracts

with respect to the production, sale, and marketing of their commodities.

(f) Refuse 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. This subdivision only applies to a cooperative association whose members produce either fresh grapes purchased for wine or whose members produce any other commodity not specified in subdivision (e) and which meets all of the following:

(1) Under the articles of incorporation or bylaws of the cooperative bargaining association, the association is producer owned and controlled exclusively by producers.

(2) The cooperative bargaining association has enforceable contracts with its members.

(3) The cooperative bargaining association has financial resources and management reasonably sufficient to accomplish the purpose for which it was organized.

(4) The cooperative bargaining association represents, through its own members, a sufficient number of producers or a sufficient quantity of any particular commodity, or both, to make it an effective agent for producers in bargaining with handlers.

(5) One of the functions of the cooperative bargaining association is acting as principal or agent for its producer members to negotiate or bargain with handlers for prices, terms of sale, compensation for commodities produced under contract, and other terms of contracts with respect to the production, sale, and marketing of their commodity.

654432. Processors, handlers, etc.; refusal to negotiate or bargain; prior course of dealing

The provisions of subdivision (e) of Section 5443 1 only apply to any processor, handler, distributor, or agent of any such person, who refuses to negotiate or bargain, as specified by such provisions, with a cooperative bargaining association which represents producers with whom such a processor, handler, distributor, or agent of any such person, has had a prior course of dealing.

For purposes of this section, "prior course of dealing" means that the processor, handler, distributor, or agent of any such person has purchased in any two of the immediate preceding five years a commodity from a producer which a cooperative bargaining association represents. However, a processor, handler, distributor, or agent of any such person is subject to subdivision (e) of Section 54431 if that person has newly gone into business in California by locating in this state from another state or country, by being created from other business entities which had a prior course of dealing with a bargaining association, or by being newly created and utilizing substantially the same processing facilities as a prior processor which itself was subject to subdivision (e) of Section 5443 1.

§54433. Repealed.

054434. Business **done among members of association; inapplicability of subd. (e) of 954431**

The provisions of subdivision (e) of Section 54431 shall not apply to cooperative associations in respect to business done with its own membership.

§54435. Negotiation requirements

Nothing in subdivision (e) or (f) of Section 54431 requires any processor, handler, distributor, or agent of any such person, to negotiate over any specific period of time, or to agree upon price,

terms of sale, compensation for commodities produced under contract, and other contract provisions relative to any commodity which any cooperative bargaining association represents. However, nothing in this section relieves the parties from the requirement to negotiate and bargain pursuant to subdivision (e) or (f) of Section 54431 or to comply with the procedures prescribed in Article 3.5 (commencing with Section 54451) if applicable.

Article 3. Annual Report

§54441. Repealed.

[This provision read: ***The director shall prepare and submit an annual report to the Legislature on or before January I of each year regarding the operation of this chapter.*** It was repealed in 1992 as part of an act to reduce the number of reports to the California legislature. The advisory committee on agricultural bargaining continues to prepare an annual report which it submits to the Director of Food and Agriculture.]

$54442. **Advisory committee; establishment; membership**

(a) To aid in preparation of the report required under this chapter, the director shall establish an advisory committee consisting of the following persons:

(1) Six representatives of cooperative bargaining associations from names submitted by cooperative bargaining associations, two of whom shall be appointed by the Governor, two of whom shall be appointed by the Speaker of the Assembly, and two of whom shall be appointed by the Senate Committee. on Rules.

(2) Six representatives of processors from names submitted by processors, two of whom shall be appointed by the Governor, two of whom shall be appointed by the Speaker of the Assembly, and two of whom shall be appointed by the Senate Committee on Rules.

§54443. Study and report on issues

The advisory committee shall study and report on all of the following issues:

(a) Unfair trade practices.

(b) Licensing.

(c) Funding.

(d) Investigation and hearing procedures.

(e) The need for a mechanism to resolve bargaining disputes.

(f) Any other issues relating to this chapter.

(g) Any recommended changes to this chapter.

§54444. Meetings

The advisory committee shall meet not less than twice annually.

§54445. Preparation and transmission of report to director at time fixed by director

The advisory committee shall prepare and transmit a report to the director at a time fixed by the director so as to meet his or her obligations under this article.

§54446. Report on unfair trade practices; hearings, contents of report; annual progress report

(a) The advisory committee shall, on or before January 1, 1987, prepare and submit a report to the director who, in turn, shall report to the Legislature on the effectiveness of subdivisions (a) and (e) of Section 54431 in successfully aiding the bargaining process between processors and cooperative bargaining associations. The director shah include any recommended changes to subdivisions (a) and (e) of Section 54431 as part of the report.

(b) After receiving the report, the Assembly Committee on Agriculture and the Senate Committee on Agriculture and Water may hold hearings on the report.

(c) The report shall, among other things, focus on any specific abuses of subdivisions (a) and (e) of Section 5443 1.

(d) Annual progress reports on the report shall be submitted by the advisory committee to the director.

Article 3.5 Conciliation

954451. Order for conciliation; request

The department shall order conciliation between any cooperative bargaining association and any processor subject to this chapter if it determines, after receiving a request under the procedure specified in Section 54452, that conciliation will materially assist the parties in negotiating an agreement. Either party may request at any time that conciliation be ordered.

§54452. Request for conciliation; procedure

The following procedure shall be used upon receipt by the department of a request for conciliation:

(a) The request from one of the parties to the negotiation, referred to as the requesting party, shall be presented on a form prescribed by the department.

(b) The requesting party shall submit, along with the request, the last offer made to the other party, referred to as the responding party, reasons for rejection of the responding party's last offer, and an indication as to what the requesting party believes would be required to reach an agreement. A copy of the request, as well as any information required pursuant to this subdivision, shall be express mailed to the responding party on the same day that the request is submitted to the department.

(c) On the next business day after receiving the request for conciliation, the department shall notify the responding party that a request for conciliation has been received. The responding party shall be required to respond to the department within three business days after receipt of notification that conciliation has been requested. The response from the responding party shall include the last offer made to the requesting party, reasons for rejection of the requesting party's last offer, and an indication as to what the responding party believes would be required to reach an agreement. The responding party's response shall be made on a form prescribed by the department. A copy of the response, as well as any information required pursuant to this subdivision, shall be express mailed to the requesting party on the same day that the response is submitted to the department.

(d) On the same day that the responding party is notified by the department that a request for conciliation has been made, the department shall notify the conciliation service of the American Arbitration Association that conciliation may be ordered.

(e) On the date that the department notifies the responding party that a conciliation has been requested, the department may also request additional information from either party.

(f) Both parties have three business days after the date of the request made pursuant to subdivision (e) in which to respond to the request for additional information.

(g) Within three business days after final receipt from the parties of all information requested by the department, the department shall determine whether conciliation shall be conducted.

§54453. Conciliation process; rules; confidentiality

(a) If conciliation is ordered, the department shall, on the day the department determines that conciliation shall be conducted, notify both parties that the conciliation will take place and direct the American Arbitration Association to commence the conciliation process in accordance with its Commercial Mediation Rules for use in California, as amended and in effect December 1, 1988. However, this article prevails if there is any conflict between those rules and this article.

(b) Confidential information disclosed to a conciliator by the parties or by any other person in the course of the conciliation shall not be divulged by the conciliator. All statements, oral or written, records, reports, or other documents received or made by a conciliator while serving in that capacity, or by any other person, shall be confidential. The conciliator shall not be compelled to divulge the information or to testify in regard to the conciliation in any proceeding or judicial forum. The parties shall maintain the confidentiality of the conciliation, and shall not rely on, or introduce as evidence in any proceeding or forum, any of the following:

(1) Views expressed or suggestions made by any party in the course of conciliation proceedings with respect to a possible settlement of the dispute.

(2) Admissions by any party in the course of conciliation proceedings.

(3) Proposals made or views expressed by the conciliator.

(4) The fact that any party in the course of conciliation proceedings had or had not indicated willingness to accept a proposal for settlement made by the conciliator or other party.

§54454. Duties of conciliator; time; recommendation; response

The conciliator shall perform the following duties:

(a) Meet with the parties involved in the bargaining process in an attempt to resolve the dispute.

(b) Participate in negotiations and have authority to offer suggestions and recommendations to resolve the dispute.

(c) The total time allotted for conciliation shall not exceed 10 calendar days unless the conciliator feels that an additional period of five calendar days is likely to resolve the dispute. The determination of the conciliator on whether to extend the period of conciliation shall be based on the progress of negotiations during the conciliation process, the impact of a time delay on the parties, and other relevant factors.

(d) If a settlement has not been arrived at through the conciliation process, upon the conclusion of the process and within the time requirements of subdivision (c), the conciliator shall make a final recommendation to the parties as to what he or she believes will equitably resolve the dispute and result in a negotiated settlement. Each party shall be required to respond to the other party, and to the conciliator with their position and response to the conciliator's final recommendations.

§54455. Unresolved dispute; report

If the dispute has not been resolved by the completion of the conciliation process, the conciliator shall file a final report with the department within three business days after the close of conciliation. The report shall include only the following:

(a) A factual summary of the events that occurred during conciliation, including all of the following:

(1) The dates on which conciliation occurred.

(2) The amount of time expended in conciliation on each of those dates.

(3) The location of the conciliation on each of those dates.

(4) The names of the individuals present during conciliation on each of those dates.

(b) The final proposals of each of the parties.

(c) The response, as expressed by each party, to the other party's **final** proposal.

(d) A description of the remaining unresolved issues, as expressed by each party.

(e) A copy of the original request and response specified in Section 54.452.

§54456. Costs

All reasonable costs incurred in carrying out the conciliation prescribed in this article shall be shared equally by each party to the negotiations.

954457. **Annual report**

(a) In the report submitted to the Legislature pursuant to Section 54441, the department shall include a section on this article, which shall consist of the following items:

(1) The number of requests for conciliation.

(2) The number of conciliation cases handled.

(3) The number of conciliation cases reaching settlement through the process prescribed by this article.

(4) The parties involved in conciliation.

(5) Recommended changes to this article that would improve its effectiveness.

(b) The report shall not include any information otherwise confidential pursuant to subdivision (b) of Section 54453.

854458. Violations; penalty

Any person who violates any provision of this article is liable civilly for a penalty in an amount not to exceed the sum of ten thousand dollars ($10,000) for each and every violation.

Article 4. Penalties

§54461. Offense; punishment

The willful violation of any provision of this chapter is a misdemeanor punishable by a fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5,000) for each and every violation. This section does not apply to Article 3.5 (commencing with Section 54451).

§54462. Civil penalty

In addition to the penalty which is provided by Section 54461, any person who violates any provision of this chapter is liable civilly

for a penalty in an amount not to exceed the sum of five thousand dollars ($5,000) for each and every violation. This section does not apply to Article 3.5 (commencing with Section 54451).

§54463. Injunction

In addition to any other remedies provided under this article, the director may seek to obtain injunctive relief in the proper court to require any person subject to this chapter to comply with any applicable requirement in this chapter.

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