Public Employment Relations Board

In re: A&J Kirby Farms, LLC, 56 PERB ¶ 4402 (2023); Porpiglia Farms, Inc, 56 PERB ¶ 4406 (2023); and Lynn-Ette & Sons, Inc, 56 PERB ¶ 4405 (2023)

BRIEF OF AMICUS CURIAE NEW YORK FARM BUREAU

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New York Farm Bureau, Inc. ("Farm Bureau") is a non-governmental, voluntary, general farm organization, which was organized in 1953, as a not-for-profit corporation, under the Membership Corporation Law. Farm Bureau's purpose is to promote, protect and represent the economic, social, and educational interests of New York's farmers, as well as to encourage the development and preservation of agricultural areas within the state. Farm Bureau currently has a statewide membership of more than 12,500 member families in 52 counties. Membership in the Farm Bureau nationally through the American Farm Bureau Federation is nearly six-million-member families. In addition, 52 County Farm Bureaus affiliated with Farm Bureau by written agreement and with parallel purposes and objectives serve New York agriculture. The present cases involve legal issues with the potential to impact agricultural activities and operations in most counties in New York State.

Since farmers make up less than 1 percent of New York State's population, Farm Bureau is actively involved in supporting, preserving, and strengthening legislation which recognizes the unique nature of the agricultural industry, and which protects the interests and rights of those engaged in agricultural pursuits. Farm Bureau advocates in favor of such laws and in support of regulations that accurately interpret and implement their intent. Consistent with its purposes, Farm Bureau has a vital interest in protecting and preserving the agricultural nature and usage of agricultural lands, and in ensuring the adherence to, and upholding of, laws that impact agriculture. The purpose of Farm Bureau's amicus curiae brief is to provide this Court with important information regarding the purpose and interpretation of the Farm Laborers' Fair Labor Practices Act (FLFLPA) and its application to workers under seasonal agricultural guest workers present in the United States on H-2A visas (H-2A workers) in the three cases [A&J Kirby Farms, LLC, 56

PERB ¶ 4402 (2023); Porpiglia Farms, Inc, 56 PERB ¶ 4406 (2023); and Lynn-Ette & Sons, Inc, 56 PERB ¶ 4405 (2023) before the Public Employment Relations Board (Board), as well as its broader impact on New York farms, which rely on H-2A workers.

Questions Presented

Farm Bureau has been invited by the Board to submit legal arguments on the following questions:

A. Should seasonal agricultural guest workers present in the United States on H-2A visas (H-2A workers) be included in a bargaining unit certified under the State Employment Relations Act, as amended by the Farm Laborers' Fair Labor Practices Act?

B. Should H-2A workers who worked for the Employer at the time the petition for certification was filed, but who have returned to their home countries at the time of the certification issues, be considered employees who are included in the proposed unit?

Argument

a. Seasonal agricultural guest workers present in the United States on H-2A visas (H-2A workers) are not to be included in a bargaining unit certified under the State Employment Relations Act, as amended by the Farm Laborers' Fair Labor Practices Act because of federal field and conflict preemption.

A determination as to whether H-2A guest workers are permitted to unionize pursuant to Section 705 of the State Employment Relations Act (SERA) as amended by the Farm Laborers' Fair Labor Practices Act (FLFLPA), is a novel issue and one of first impression for the Board. Farms in New York State, many of which are small family owned and operated businesses, are tracking this issue because the Board's determination will have widespread implications. Not only are there important policy reasons to find that H-2A workers should be excluded from the scope of a bargaining unit, but the Board should find that the law also requires such exclusion.

The federal government has "'broad, undoubted power over the subject of immigration and the status of aliens'…including the regulation of aliens within our boarders.'" *Maine Forest Products Council*, 586 F. Supp. 3d 22, 38 (U.S.D.C. Maine 2022) (citing, *Toll v. Moreno*, U.S. 1,

10, 102 S. 2977 (1982)). This power allows the federal government to make determinations about "what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Id*. The federal government passed the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA) as a "comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Id*.

Here, the Board should find that the FLFLPA should "give way" to the INA, amended by the IRCA, pursuant to both field preemption and conflict preemption. Not only has the INA specifically and comprehensively regulated the area of H-2A guest workers (field preemption), if the Board permits H-2A guest workers to unionize and participate in collective bargaining, it will make complying with federal law virtually impossible for farm employers (impossibility preemption) and will stand as an obstacle to the accomplishment and execution of Congress's objectives (obstacle preemption).

State laws that regulate migrant/guest workers are particularly susceptible to preemption as immigration is "an area traditionally of federal concern." *Maine Forest Products Council v. Cormier*, 51 F.4th 1, 11 (1st Cir. 2022). "The crucial inquiry is whether a state law impedes the federal effort." *Maine Forest Products Council*, 586 F. Supp. 3d at 45.

First, to ensure both domestic agricultural and H-2A guest workers' rights are protected, the federal government has implemented comprehensive regulations. These rights are balanced against the farm employers need for temporary and seasonal help on farms to ensure continued food production. These detailed requirements must be followed in order to ensure that the goals outlined by the INA, as amended by the IRCA, and the DOL are maintained, without being

subrogated by any subsequent private collective bargaining. Specific terms and conditions of employment for H-2A guest workers that employers are required to provide are specifically set forth in the law. Such requirements include but are not limited to: minimum wage requirements (20 C.F.R. § 655.120(a)); living accommodations (20 C.F.R. § 655.122(d)); three meals a day or provide free and convenient cooking facilities (20 C.F.R. § 655.122(g)); transportation to and from work (20 C.F.R. § 655.122(h)(3)); provide tools and other equipment (20 C.F.R. § 655.122(f); requirement to cover transportation costs to and from the H-2A guest workers home country (20 C.F.R. § 655.122(h)(1-2)); guarantee that H-2A guest workers will receive employment (or the equivalent in pay) for at least a total number of hours equal to at least 75% of the workdays in the contract period (20 C.F.R. § 655.122(i)); workers compensation insurance (20 C.F.R. § 655.122(e)); requirement to obtain DOL approval should the Employer need to reduce the number of H-2A guest workers it utilized during a contract period (20 C.F.R. § 655.122(o)); requirement that any and all deductions will be disclosed in the work contract (20 C.F.R. § 655.122(p)).

In addition to the above, the employer is also required to file a petition to be reviewed and approved indicating the type of work the employee is going to perform in order to show that the proposed employment qualifies as a basis for H-2A status. In the petition, employers must set forth all of the terms and conditions set forth above, in addition to the following:[1]

- The beginning and ending dates of the contract period
- The location(s) of work
- The hours per day and days per week each worker is expected to work
- The crop(s) to be worked and/or each job to be performed

[1] https://www.dol.gov/agencies/whd/fact-sheets/26-H2A (last visited June 16, 2023).

- Any deductions not otherwise required by law (any deductions must be reasonable, and any deduction not specified is not permissible).

Farm Bureau agrees with the US Court of Appeals, First Circuit that "an employer seeking to hire an H-2A worker must jump through hoops." *Maine Forest Products Council v. Cormier*, 51 F.4th 1, 9 (1st Cir. 2022). "The foundation of our laws on immigration and naturalization is the [INA], which sets out the 'terms and conditions of admissions to the country and the subsequent treatment of aliens lawfully in the country." *Kansas v. Garcia*, 140 S.Ct. 791, 797 (2020).

Farm employers who wish to hire H-2A guest workers must receive certification from the DOL that (1) there are not sufficient domestic workers who are ready, willing, qualified and able to perform the job duties; and (2) that the use of H-2A workers will not adversely affect the wages and working conditions of similarly situated domestic workers. 8 U.S.C. § 1188(a)(1)(A-b). For the DOL to provide this certification, farm employers must demonstrate the need for the specific number of H-2A guest workers requested and are required to attempt recruit U.S. workers. 20 CFR 655.135(c)(3).

Under the requirements of the H-2A program, farm employers are required to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 50% of the period of the work contract has elapsed. 20 C.F.R. § 655.135(d). Since farm employers utilizing the H-2A program must recruit local workers, the positions held by H-2A workers are not guaranteed and the farm cannot guarantee employment or that it will bring back particular H-2A workers the following growing season. *See Garcia v. Stewart*, 531 F. Supp. 3d 194, 199 (D.D.C 2021).

Once the employer has successfully achieved the necessary certification and approval, it is then required to provide the H-2A guest worker with a "copy of the work contract between the

employer and the worker" as part of the visa application process. 20 C.F.R. § 655.103(b). If the employer does not provide a separate contract, the applicable work contract "will be the terms of the job order". *Id*.

As is clearly set forth above, Congress has specifically and comprehensively regulated the area of H-2A guest workers, their terms and conditions of employment and the manner in which H-2A guest workers can be admitted into the United States pursuant to an H-2A visa. Accordingly, the Board should find that FLFLPA, as narrowly and specifically related to H-2A guest workers, has been preempted.

Even if the Board finds that the FLFLPA is not preempted pursuant to field preemption, it should find that permitting H-2A guest workers to be included within the scope of a collective bargaining unit and to engage in collective bargaining, would require farm employers to violate federal law and frustrates and/or stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. Accordingly, the Board should find that due to the parameters of conflict preemption (both impossibility and obstacle), that the FLFLPA is preempted by the INA and H-2A guest workers cannot be included within the scope of a collective bargaining unit or engage in contract negotiations over their terms and conditions of employment.

First, as set forth above, field preemption is appropriate not just because H-2A guest workers are implicated by the FLFLPA, but because Congress has already enacted detailed and comprehensive regulations related to the admission of H-2A guest workers, including terms and conditions of employment. Moreover, permitting H-2A guest workers to engage in collective bargaining will require both the farm employers and the H-2A employees to violate federal law.

Once an employer is certified by the Secretary of State as being eligible to receive H-2A guest workers, the employer is required to provide H-2A guest workers with "…a copy of the work

contract between the employer and the worker" as part of the visa application process and "no later than on the day work commences." 20 C.F.R. § 655.122(q). The work contract is required to contain "all material terms and conditions of employment relating to wages, hours, working conditions, and other benefits." 20 C.F.R. § 655.103(b).

The consequence of an employer changing any term in the H-2A work contract is significant. If any material term including, but not limited to, wages, hours, and working conditions, are altered, the employer is subjecting himself to liability in the form of civil monetary penalties, and/or being prevented from receiving future labor certifications. Subpart B of 29 C.F.R. §§ 655, 502.10, 502.19(c); See also 20 C.F.R. § 655.182(a), (d)(1)(iii). If the terms of the work contract are changed, it may also pose significant consequences for the employee. The employee's H-2A visa "may be revoked upon finding that the 'beneficiary is *no longer employed by the petitioner in the capacity specified in the petition*….'" *Maine Forest Products Council*, 586 F. Supp.3d at 41 (emphasis added). As a result, implementing any deviations from the work contract during its term would violate federal law. *See* 20 C.F.R. § 655.122(p); *see also Ruiz v. Fernandez*, 949 F. Supp.2d 1055, 1075 (E.D. Wash. 2013). Before an individual can even apply for an H-2A visa, they must be hired by an employer who already has an approved temporary labor certification – meaning that the work contract (which contains the terms and conditions of employment) has to have already been approved by the DOL.[2] As part of the H-2A visa processes, as a requirement to be issued an H-2A visa, the workers have to agree to the terms of the work contract that they are applying for. Should the employees thereafter agree in collective bargaining to alter the terms of the work contract, they too could be found to be in violation of federal law due to the fact that they are no longer employed in the capacity specified in the petition.

[2] H-2A Visa Application Process for Workers, https://www.calt.iastate.edu/article/h-2a-visa-application-process-workers#_ednref1 (last visited June 16, 2023).

The federal regulations at issue not only require farm employers to submit job orders that contain all the material terms and conditions of employment to the DOL for prior approval, it also requires the employer to submit a sworn statement that the order "contains all the material terms and conditions of the job." 20 C.F.R. § 653.501. Farm employers will be unable to submit such statement and comply with such requirement if it is in collective bargaining negotiations with a union over terms and conditions of employment for H-2A employees. This will impact the number of H-2A workers that a farm employer will be able to utilize and the timeframe for which they will be permitted to arrive. Any deviation in timing as to when H-2A workers may arrive could detrimentally affect the agricultural industry as a whole and the crops that are produced.

Moreover, it will be almost impossible for the employer to bargain with the Union "before" it submits the work contract for approval to the DOL. First, PERB's comments to the new rules specifically state that "employees who are no longer employed by the employer will not be included in the unit." PERB Assessment of Public Comment on Proposed Rules, January 2023, pg. 14. Thus, once they return to their home countries, H-2A guest workers will no longer be employed and shall no longer be members of the bargaining unit. Consequently, H-2A guest workers who have returned to their home country will not have the ability to participate in negotiations or vote on any new contract terms and conditions of employment.

Secondly, individuals have to reapply for an H-2A visa each year and there is no guarantee that the same employees will return year-after-year. However, as part of the visa process, before an individual will be offered an H-2A visa they must already have been hired by an employer who has received the appropriate certification from the DOL.[3] It is therefore impossible to negotiate over terms and conditions of employment with H-2A guest workers who are no longer employees,

[3] H-2A Visa Application Process for Workers, https://www.calt.iastate.edu/article/h-2a-visa-application-process-workers#_ednref1 (last visited June 16, 2023).

and who cannot be, under the law, issued a H-2A visa prior to the submission of the work contract for approval to the DOL. Farmers cannot even extend offers of employment, and H-2A visas cannot be granted until after the work contract, which is required to contain all the material terms and conditions of employment, has been approved by the DOL.

Should an employer bring over H-2A workers prior to the completion of negotiations, and negotiations conclude within the H-2A workers contract period, farm employers will be in violation of federal law if it alters any of the terms and conditions of employment that have already been approved by the federal government, including making any deductions for union dues. Accordingly, the FLFLPA as it relates to the inclusion of H-2A guest workers in collective bargaining is preempted because it would require farm employers to violate federal law in order to comply.

In addition to the fact that there is a direct conflict, permitting H-2A guest workers to engage in collective bargaining would frustrate and/or stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

The H-2A regulations are extensive and address every aspect of an H-2A guestworker's employment. The federal government enacts this comprehensive system of oversight for the purpose of protecting both domestic farmworkers and those workers participating in the H-2A program. To allow employers under FLFLPA to alter the agreed upon terms and conditions that have already been reviewed and approved by the federal government, and accepted by the H-2A guest workers, would undercut the federal government's ability to ensure that the purpose and goals of the INA and DOL regulations are being met. Thus, such interpretation of the state law would prevent the federal government's ability to issue H-2A visas to employees who meet the regulation's requirements. In sum, requiring farmers who employ H-2A workers with federally

approved work agreements to SERA's collective bargaining obligations, "…attempts to override the specific H-2A work authorizations provided by federal law." *Maine Forest Products Council v. Cormier*, 51 F.4th 1, 11 (1st Cir. 2022).

To fully appreciate the scale in what H-2A workers do for our agricultural economy in New York, 9,192 H-2A guest worker positions were certified in New York in 2021, accounting for 2.9% of total certified positions when compared across the country[4]. These workers are vital to not only New York's economy, but more importantly, our consumers due to the healthy food they help produce. New York is a leader in many agricultural commodities. It is estimated there are 33,400 farms in New York State, covering 6.9 million acres from Long Island to Chautauqua Counties[5]. H-2A workers are vital in the production of seasonal fruits and vegetables, and increasingly important in the production of other agricultural commodities.

In commodities that are produced with the assistance of H-2A workers, New York ranks second nationwide in apple production in cash receipts, second in snap bean processing, fourth in snap bean cash receipts, fifth in fresh snap beans receipts, fifth in fresh cabbage cash receipts, fifth in tart cherry cash receipts, sixth in fruits and nuts cash receipts, seventh in cherry cash receipts, and ninth in floriculture cash receipts, among others[6].

Farms must demonstrate the inability to hire domestic workers before they can utilize the H-2A program, as described earlier. Farms that rely on H-2A guest workers do so because they are not able to secure local workers. Including H-2A workers in a bargaining unit certified under SERA, as amended by FLFLPA, puts farms in legal jeopardy, as discussed above. Farms that are

[4] *Office of Foreign Labor Certification*; H-2A Temporary Agricultural Program-Selected Statistics, Fiscal Year 2021 EOY; United States Department of Labor, Employment and Training Administration.
[5] National Agricultural Statistic Service, United States Department of Agriculture, 2022 Agricultural Overview, New York State, page 5, https://www.nass.usda.gov/Statistics_by_State/New_York/Publications/Annual_Statistical_Bulletin/2022/2021-2022_NY_Annual_Bulletin.pdf
[6] Cash Receipts by Commodity State Ranking, United States Department of Agriculture, Economic Research Service; 2021; https://data.ers.usda.gov/reports.aspx?ID=17844

faced with the quandary of whether to abide by state law or follow federal law cannot succeed. If, as demonstrated in previous paragraphs, SERA, as amended by FLFLPA, makes relying on the federal program illegal, farms will have no one to harvest the fresh fruits, vegetables, and other agricultural products, creating a food security challenge to consumers in New York State. At a time when food insecurity is at crises levels in New York State and across the county, the Board is in a position to help protect the production of needed food in New York State. Given the significant protections afforded to workers under the H-2A program, which comprehensively addresses all aspects of the farm workers' employment, forcing a farm to violate federal law accomplishes more harm to hungry New Yorkers than providing meaningful benefits to the H-2A workers.

Therefore, NYFB respectfully requests the reversal of the Acting Director's decision to hold that H-2A workers may not to be included in a collective bargaining agreement under SERA, as amended by FLFLPA.

b. H-2A workers who worked for the Employer at the time the petition for certification was filed, but who have since returned to their home countries at the time the certification issues, are not to be considered employees who are included in the proposed unit as they are no longer employed by the farm.

An H-2A visa is intended to be temporary/seasonal in nature. Upon expiration of the contract term of the job order and in accordance with the H-2A visa rules and regulations, H-2A guest workers must return to their origin countries. Once the contract term expires, and the individual leaves the farm to return to their home country, they are no longer considered to be working for the farm employer and no longer satisfy the definition of an "employee" pursuant to Section 701 of SERA. Even if the H-2A guest workers were to have the ability to unionize as "farm laborers" as defined under FLFLPA, once all the H-2A guest workers leave, they are definitively no longer "farm laborers" that can be unionized as contemplated by FLFLPA. Any

other determination would directly contradict the comments that PERB provided in response to the proposed SERA rules. PERB's comments to the new rules specifically state that "employees who are no longer employed by the employer will not be included in the unit." PERB Assessment of Public Comment on Proposed Rules, January 2023, pg. 14.

PERB's comment is consistent with the practice of the National Labor Relations Board in determining who is eligible to vote in an election. It is well-established that to qualify as a voter in an NLRB representation election, an employee must be: (1) employed in the appropriate unit during the established eligibility period; and (2) in employee status on the date of the election. *In Re Dakota Fire Prot., Inc.*, 337 NLRB 92 (2001) ("An employee's actual status as of the eligibility date and the date of the election governs the employee's eligibility to vote."); *Orange Blossom Manor, Inc*., 324 NLRB 846 (1997); *Emsco Derrick & Equip. Co.*, 53 NLRB 210 (1943). In fact, the State Labor Relations Board, explained in *Wyckoff Heights Hospital*, that while temporary workers can be included in a unit, "whether an individual employee had a continuing interest in terms and conditions of employment, was a separate matter to be determined when addressing employee's eligibility to vote." 35 SLRB 313, 316-317 (1972). Here, the Board has already opined that employees no longer employed by the employer will not be included in the unit, and therefore, they no longer have a continuing interest in terms and conditions of employment. As a result, the Board should not permit employees who have returned to their home countries be included within the scope of the unit and the Board should disregard any dues authorization cards submitted by employees who are no longer employed, at the time the Board attempts to certify the union.

Conclusion

In conclusion, for the forgoing reasons, the Board should exclude H-2A workers from collective bargaining under the SERA as amended by the FLFLPA, and also exclude individuals

who have returned to their home county as “employees” in a proposed bargaining unit, since they are no longer employed by the farm.

Respectfully submitted,

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