Reedley, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RAY M. GERAWAN and STAR R. GERAWAN, A Married Couple, dba GERAWAN RANCHES and GERAWAN ENTERPRISES; GERAWAN CO., INC., A California Corporation; GERAWAN FARMING, INC., A California Corporation, Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 92-CE-38-VI 21 ALRB No. 6 (September 1, 1995)

DECISION AND ORDER

This matter is before the Agricultural Labor Relations Board (ALRB or Board) on a stipulated record, having been bifurcated for the purpose of having the Board determine whether it has jurisdiction to proceed. As explained below, the Board concludes that the preemptive effect of action taken by the National Labor Relations Board (NLRB) prevents the Board from proceeding to adjudicate the merits of the unfair labor practice allegations at issue. For this reason, the case shall be dismissed.

Procedural History

General Counsel's initial consolidated complaint in this matter alleged that Gerawan Ranches, Gerawan Co., Inc., et al. (Gerawan or Employer) had engaged in various unfair labor practices during June and July 1992. On July 21, 1993, the ALRB,

having found that there was no longer a sufficient identity of issues between Case No. 92-CE-38-VI and the remaining cases, issued an order severing Case No. 92-CE-38-VI from the remainder of the complaint. Case No. 92-CE-38-VI concerns allegations that the Employer unilaterally changed rates of pay and working conditions of its packing shed employees and refused to reinstate economic strikers who had made unconditional offers to return to work.

In November 1992, Gerawan filed a representation petition with the NLRB asking the Regional Director to determine whether or not Gerawan's packing shed workers were subject to the NLRB's jurisdiction (Case No. 32-RM-700). On March 9, 1993, the NLRB Regional Director for the Oakland Region issued his decision in Case 32-RM-700. The Regional Director determined that the Employer's packing shed workers were commercial rather than agricultural. He dismissed the petition for an election in the packing shed unit because the United Farm Workers of America, AFL-CIO (UFW) was not seeking to represent employees under the National Labor Relations Act (NLRA). On August 6, 1993, the NLRB denied the UFW's Request for Review of the Regional Director's decision.

On January 7, 1994, the ALRB General Counsel filed a motion to amend the complaint on the basis of the NLRB decision. General Counsel believed that the Board was deprived of jurisdiction to remedy the alleged unfair labor practices beyond the date of the NLRB Regional Director's decision. He therefore

sought to limit the remedies requested in his complaint, such as reimbursement for monetary losses, and to eliminate completely other remedies such as reinstatement and language requiring the Employer to cease and desist and bargain with the UFW over the terms of employment of the packing shed workers. The motion to amend the complaint was granted by the Administrative Law Judge (ALJ) assigned to the case.

After the Employer filed an answer to the complaint and a prehearing conference was held, the Employer and General Counsel filed a joint motion to bifurcate the issues in this matter so that a hearing could first be held solely on the issue of jurisdiction. Over the UFW's objections, this motion was granted by ALJ Douglas Gallop on April 25, 1994. The parties further agreed to file a stipulated record on the jurisdictional issue. The stipulated record consists primarily of transcripts and exhibits from the NLRB hearing in Case 32-RM-700, the NLRB Decision and Order, and letters from the NLRB to the Employer regarding that case.

On June 7, 1994, the Employer filed a motion to transfer the jurisdictional issue directly to the Board as a novel legal question. The Executive Secretary granted the motion on June 9, 1994. The Employer, the Union and General Counsel all filed briefs to the Board on the question of jurisdiction.

Positions of the Parties

Before discussing the contentions of the parties, it is helpful to summarize the NLRB's decision finding that Gerawan's

packing shed employees are not engaged in agriculture. The NLRB Regional Director found that of the companies who used Gerawan's packing shed, Gerawan Ranches, Gerawan Enterprises, Gerawan Co., Inc., Gerawan Farming, Inc., Phil Braun and Caram/Gerawan were a single-integrated enterprise and a single employer within the meaning of the NLRA. He concluded that the inflow of fruit from the Gerawan entities could not be considered fruit from "outside" sources, and thus the functions performed on such fruit by packing shed employees constituted practices performed either by a farmer or on a farm, incidentally to or in conjunction with such farming operations, i.e., secondary agriculture.

However, the NLRB Regional Director concluded that Gerdts, Boos and Western Ag constituted outside sources not part of the Gerawan single-integrated enterprise since these companies were separately managed, did not share employees, maintained themselves as separate entities with separate lines of credit, farmed property separate from that of Gerawan family members, and had the option of utilizing other packers and had done so. He found that during the four years prior to his decision, (1989 through 1992) the outside entities had furnished an annual average of over 3% of the peaches, plums and nectarines, and over 2% of the grapes and apricots, packed by the Employer. Under the precedent established in *Camsco Produce Co., Inc.* (1990) 297 NLRB 905 [133 LRRM 1225] (NLRB will assert jurisdiction over off the farm packing shed employees if any amount of farm commodities, other than those of the employer-farmer, are regularly handled by

the employees) and *Campbell's Fresh, Inc.* (1990) 298 NLRB No. 54 [134 LRRM 1165] (in which the NLRB found mushroom packers who handled less than .001% of outside product to be nonagricultural employees), the NLRB Regional Director concluded that Gerawan's packing shed employees were statutory employees under the NLRA.

General Counsel

General Counsel does not dispute that since March 9, 1993 (the date of the NLRB Regional Director's decision), the employees working in Gerawan's packing operation have been subject to NLRB jurisdiction. However, General Counsel asserts that up to that date, Gerawan's packing shed workers were agricultural employees who were part of a statewide bargaining unit certified by the ALRB in July 1992.

General Counsel argues that this Board rejected the *Camsco* rule in *Bud Antle, Inc.* (1992) 18 ALRB No. 6 and announced that it would continue to apply the standard it relied upon in *Sunny Cal Egg & Poultry, Inc.* (1988) 14 ALRB No. 14 (processing employees will be found to be non-agricultural only if a regular and substantial portion of their work consists of processing crops of an outside grower). General Counsel argues that the percentage of outside produce processed in the Employer's shed is not enough to make it a commercial enterprise under ALRB case law.

General Counsel further asserts that the NLRB Regional Director's decision does not preempt the ALRB's jurisdiction because the decision is prospective only, from March 9, 1993. Up

to that date, General Counsel argues, Gerawan was an agricultural employer subject to the jurisdiction of the ALRB. Although the NLRB Regional Director relied on data from 1989 through 1992, General Counsel argues that he did not apply his ruling retroactively so as to divest the ALRB of its jurisdiction prior to March 9, 1993.

UFW

The UFW argues that the NLRB's assertion of jurisdiction on March 9, 1993 does not preempt the ALRB from asserting jurisdiction for unfair labor practices that occurred in July 1992. The Union asserts that the ALRB's claim of jurisdiction does not intrude into an area reserved to the NLRB, since the federal agency has not claimed jurisdiction over the unfair labor practices involved herein.

The UFW asks the Board to reject the NLRB's *Camsco* rule and to follow our decision in *Sunny Cal Egg & Poultry, Inc.* (1988) 14 ALRB No. 14 (applying the former NLRB rule that outside mix must constitute a regular and substantial portion of the produce handled in order to invoke NLRB jurisdiction). The Union asserts that the small percentage of outside produce supplied by growers Boos, Gerdts and Western Ag is not sufficient to constitute a regular and substantial portion of the packing shed's work.

Employer

The Employer argues that since Gerawan's packing shed regularly handles *some* amount of outside produce, it must be

considered a commercial operation. (Citing *Camsco* and *Campbell's Fresh, Inc.*). The Employer also asserts that Gerdts, Boos and Western Ag cannot be considered joint employers with Gerawan under the criteria applied by the NLRB (i.e., there is no interrelation of operations, common management, centralized control of labor relations, or common ownership).

The Board's decision in *Bud Antle*, *supra*, 18 ALRB No. 6, is distinguishable, Gerawan argues, in that Antle's employees did not change the nature of the product they were handling in the cold storage operation, while Gerawan's employees actually sort, grade, size and pack a freshly harvested crop. *Bud Antle* is further distinguishable, Gerawan states, in that *Camsco* was decided well before the unfair labor practice charges were filed in this case; Gerawan has had a long term, stable relationship with its outside growers; and the outside product is not incidental to the Employer's operation, nor is it handled as a convenience for established customers.

Finally, the Employer argues that no matter what position it might previously have taken on the jurisdictional question, the NLRB has exclusive jurisdiction to determine whether employees are agricultural or commercial. (Citing *H-M Flowers, Inc.* (1977) 227 NLRB 1183 [94 LRRM 1649] and *San Diego Building & Construction Trades Council* v. *Garmon* (1957) 359 U.S. 236 [43 LRRM 2838] (hereafter *Garmon*).)

Analysis

First, it must be made clear that this Board has never rejected *Camsco* as applicable NLRB precedent. In *Bud Antle, Inc.*, the Board simply determined that it would not be appropriate to apply *Camsco* retroactively and that, in any event, the small amounts of pre-packed produce purchased and resold as a convenience to customers did not constitute "outside mix" falling under the *Camsco* rule. While this Board continues to question the wisdom of *Camsco* and has urged the NLRB to adopt a more workable standard,[1] there has never been any question that it is a rule that must be followed, where applicable, until changed by the NLRB or the reviewing courts.

In the present case, there is no issue of retroactive application because the alleged unfair labor practices occurred two years after *Camsco* issued. Nor is the procurement and handling of the produce found by the NLRB here to constitute "outside mix" of the character discussed in *Bud Antle, Inc.* The Regional Director found that all of the fruit from outside sources is commingled with the fruit grown by Gerawan and processed, packed, and labeled in identical fashion.

Second, this Board recognizes that the scope of NLRB preemption is presently governed by the dictates of *Garmon* and

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[1]*Camsco's* "any amount with regularity" standard has grave practical implications, in that employers, by simply including minute amounts of "outside mix," can easily weave in and out of ALRB and NLRB jurisdiction, thereby frustrating the enforcement of both state and federal law and undermining the fundamental policy goal of bringing stability to labor relations.

its progeny. Thus, while this Board has jurisdiction to determine its jurisdiction, where a claim of preemption is raised, it must be addressed. If preemption is found, then this Board may not proceed any further and the matter must be raised with the NLRB. (*International Longshoremen's Association, AFL-CIO* v. *Davis* (1986) 476 U.S. 380 [106 S.Ct. 1904].)

In the instant case, the NLRB Regional Director ruled that Gerawan was a commercial employer based on the percentage of outside produce packed in Gerawan's shed, and the years for which the alleged unfair labor practices herein were committed (1992). There is no suggestion in the NLRB Regional Director's decision that the outside growers whom he found to be independent of Gerawan (Gerdts, Boos and Western Ag) were ever part of Gerawan's enterprise. The Regional Director discussed the separate ownership history of the three companies, found that they have been separately managed and have not shared employees, maintained themselves as separate entities with separate lines of credit, have farmed property separate from that of Gerawan family members and have had the option of utilizing other packers and have done so.

Thus, it is clear from these findings that, in the NLRB's view, Gerawan packs a regular amount of fruit from independent growers not part of any Gerawan integrated enterprise. Under *Camsco*, this establishes that the packing shed is a commercial operation and, therefore, the shed employees are under the jurisdiction of the NLRB. Due to the nature of the

proceeding before the NLRB, the finding that the packing shed is a commercial operation is prospective in nature, i.e., it is operative only as of the date of the hearing. Nevertheless, given that fact that the Regional Director's findings covered a period including 1992, it is certain that the NLRB would reach the same conclusion if the status of the packing shed in 1992 were squarely placed in issue before it. Under existing constructions of *Garmon*, such circumstances result in this Board being preempted.

Until such time that Congress amends the NLRA or the NLRB reverses its current direction, disputes such as the one in the instant case will be left to the NLRB to resolve.

ORDER

As explained above, the findings contained in the decision of the NLRB in *Gerawan Farming, Inc.* Case No. 32-RM-700 require the conclusion that the Board is preempted from proceeding to adjudicate the merits of the unfair labor practice allegations in the instant case. On this basis, Case No. 92-CE-38-VI is hereby DISMISSED.

DATED: September 1, 1995

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

MEMBER FRICK, Concurring: While I concur with my colleagues that this Board is preempted from proceeding to adjudicate the merits of this case, I believe that the circumstances in this case raise issues that warrant comment.

The jurisdiction of this Board was originally invoked with the filing of a representation petition on May 2, 1990. The petition did not seek to include Gerawan's packing shed employees. In its May 4, 1990 response to the petition, Gerawan insisted that the bargaining unit should contain its packing shed employees in addition to the field employees sought by the petitioning union.[1] The initial election was held on May 5, 1990 and a runoff election, which resulted in a majority of ballots cast for the UFW, was held on May 15, 1990. After a consolidated election objections and unfair labor practice

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[1]It is worth noting that the facts necessary to determine the applicability of *Camsco Produce Co., Inc.* (1990) 297 NLRB 905 [133 LRRM 1225] were known solely to Gerawan.

hearing and subsequent appeal to the Board, the UFW was certified as the exclusive bargaining representative on July 8, 1992.

The charge in the present case was filed on July 28, 1992 and a complaint including the charge was issued on September 16, 1992. On or about November 16, 1992, Gerawan filed the petition with the NLRB in Case No. 32-RM-700, which resulted in the decision that the packing shed employees are under the jurisdiction of the NLRB.[2] Thus, after insisting that the packing shed employees be included in the ALRB unit, after taking advantage of every procedural mechanism involved in the election review process, and, most importantly, after being charged with committing unfair labor practices against packing shed employees, Gerawan took the position that the packing shed employees had always been under the jurisdiction of the NLRB.

As the UFW argues, equitable principles would normally dictate that Gerawan should be estopped from pursuing such a belated claim. However, established principles of law provide that subject matter jurisdiction may not be conferred by estoppel. This reality, coupled with recent decisions of the NLRB, makes possible the growing trend of employers who have been subject to ALRB certifications of previously undisputed validity to suddenly assert that they are in fact under the jurisdiction of the NLRB, and thereby avoid obligations accruing under the

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[2]An "RM" normally results in an election if an appropriate unit under the NLRA is sought by the petition. However, in this case, Gerawan was well aware that no election would result because the UFW will not represent employees under the NLRA.

Agricultural Labor Relations Act (ALRA). Often such claims are not raised until after unfair labor practice charges are filed with the ALRB against such employers and/or after the statute of limitations under the NLRA has run.

There are several ways in which the NLRB might ameliorate the procedural problems that exist because of the expansion of the gray areas in the definition of secondary agriculture, with the concomitant increase in the frequency with which the ALRB is preempted under *San Diego Building & Construction Trades Council* v. *Garmon* (1957) 359 U.S. 236 [43 LRRM 2838] (i.e., where the conduct at issue is arguably protected or prohibited under the NLRA), and the increased ease with which a business operation may slip in and out of the mutually exclusive jurisdictions of the NLRB and ALRB. My concern originates not with the change in the ALRB's jurisdiction, but with the reality that there now exists increased confusion surrounding the boundaries of the two boards' jurisdictions which results in unfair labor practice charges "falling through the cracks" and not being investigated or adjudicated in any forum. In addition, such confusion results in uncertainty among employees, employers, and unions as to the proper forum for their claims, in turn causing the duplicative expenditure of scarce federal and state resources.

Most fundamentally, the NLRB could retreat from its recent trend of narrowing the definition of secondary agriculture to bring under its jurisdiction employees who have historically

fallen within the agricultural exemption. (See *Camsco, supra; Produce Magic, Inc.* (1993) 311 NLRB 1277.) Furthermore, equity would be well served by the NLRB tolling its statute of limitations during the period that a charge is pending before the ALRB, particularly in cases such as the present one where the filing party had every reason to believe that jurisdiction vested in the ALRB.[3] In addition, the NLRB could adopt the ALRB's prior certifications so as to minimize the disruptions in bargaining relationships from shifts in jurisdiction.[4]

Moreover, since the original certification was by the ALRB, the more appropriate avenue for raising issues of jurisdiction in the context of this case would have been for Gerawan to file a unit clarification petition with the ALRB before invoking any federal remedy. The ALRB and the state reviewing courts have jurisdiction to determine their jurisdiction and can competently examine all claims of federal preemption. Particularly where a union has been certified by the ALRB without dispute over the agricultural status of the affected employees, the NLRB should allow the state process to be exhausted before considering intervention. Otherwise, the immediate invocation of NLRB procedures to examine jurisdiction

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[3]In addition, in such situations charging parties should be informed of their right to file charges with NLRB. In the present case, the charging parties included named individuals, as well as the UFW.

[4]The policies underlying the ALRA and the NLRA are essentially identical and their corresponding provisions, interpretations, and procedures are substantially the same.

often results not simply in the shift of a bargaining relationship or adjudication of unfair practice allegations from the auspices of state to federal law, but in the evasion of both laws. At the very least, it results in unnecessary duplication in the use of scarce federal and state resources. This serves neither state nor federal interests.

This Board has expressed previously that it stands ready to work cooperatively with the NLRB to establish procedures to provide a viable transition between jurisdictions and to ensure that the purposes of both state and federal collective bargaining laws are fulfilled. Cases such as the instant one compellingly illustrate the need for such cooperation.

DATED: September 1, 1995

LINDA A. FRICK, Member

CASE SUMMARY

RAY M. GERAWAN and STAR R. GERAWAN, dba GERAWAN RANCHES and GERAWAN ENTERPRISES; GERAWAN CO., INC.; GERAWAN FARMING, INC. (UFW)

21 ALRB No. 6
Case No. 92-CE-38-VI

Background

This matter was brought before the Board on a stipulated record, having been bifurcated for the purpose of having the Board determine whether it has jurisdiction to proceed. General Counsel's initial consolidated complaint in this matter alleged that Gerawan Farming, Inc., et al. (Gerawan) had engaged in various unfair labor practices during June and July 1992. In November 1992, Gerawan filed a representation petition with the NLRB asking the Regional Director to determine whether or not Gerawan's packing shed workers were subject to the NLRB's jurisdiction (Case No. 32-RM-700). On March 9, 1993, the NLRB Regional Director issued his decision, in which he determined that the Gerawan's packing shed workers were commercial rather than agricultural. This result was based on his findings that Gerawan packed produce other than its own and, thus, under *Camsco Produce Co., Inc.* (1990) 297 NLRB 905, the work in the packing shed did not fall within the definition of secondary agriculture. Nevertheless, he dismissed the petition for an election in the packing shed unit because the UFW disclaimed interest in representing employees under the NLRA. On August 6, 1993, the NLRB denied the UFW's Request for Review of the Regional Director's decision. On January 7, 1994, the ALRB General Counsel filed a motion to amend the complaint on the basis of the NLRB decision, which was granted by the ALJ then assigned to the case.

After the Employer filed an answer to the complaint and a prehearing conference was held, the Employer and General Counsel filed a joint motion to bifurcate the issues in this matter so that a hearing could first be held solely on the issue of jurisdiction. This motion was granted by ALJ Douglas Gallop on April 25, 1994. The parties further agreed to file a stipulated record on the jurisdictional issue. On June 7, 1994, the Employer filed a motion to transfer the jurisdictional issue directly to the Board as a novel legal question. The Executive Secretary granted the motion on June 9, 1994.

Board Decision

First, the Board made it clear that it has never rejected *Camsco* as applicable NLRB precedent. The Board explained that, while it continues to believe that *Camsco* has grave practical implications because it allows employers to easily weave in and out of ALRB jurisdiction, it represents a rule that must be followed, where

applicable, until changed by the NLRB or the reviewing courts. Since the NLRB decision included factual findings showing that Gerawan packed outside produce during the period up to and including the time of the alleged unfair labor practices, the Board concluded that, under existing precedent, it was preempted from proceeding to adjudicate the merits of the unfair labor practice allegations. On that basis, the Board dismissed the case.

Concurring Opinion by Member Frick

Member Frick concurred that the Board was preempted from adjudicating the merits of the case, but wrote separately to suggest several ways in which the NLRB could ameliorate the problems caused by growing confusion over the boundaries between NLRB and ALRB jurisdiction. Member Frick suggested that the NLRB could retreat from its recent trend of narrowing the definition of its agricultural exemption, toll its statute of limitations during the period that a charge is pending before the ALRB, inform parties of their right to instead file charges before the NLRB, adopt the ALRB's certifications where jurisdiction shifts to the NLRB, and defer intervention until state processes have been exhausted. Member Frick also noted that the Board has previously expressed its willingness to work with the NLRB to establish procedures to provide a viable transition between jurisdictions, in order to ensure that the purposes of both state and federal collective bargaining laws are fulfilled.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.