Salinas, California

STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

MANN PACKING COMPANY, INC., Employer, and ERNESTO GARCIA, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	)	Case No. 88-RD-3-SAL 15 ALRB No. 11

DECISION ON CHALLENGED BALLOTS

On June 23, 1988, pursuant to a Petition for Decertification filed by agricultural employee Ernesto Garcia, an election was held among all the agricultural employees of Mann Packing Co., Inc. (Employer) in the State of California, excluding employees in the Employer's off-the-farm packing shed.[1/]

The initial official Tally of Ballots served upon the parties revealed the following results:

[1/]The United Farm Workers of America was certified as the exclusive bargaining representative of all of the Employer's agricultural employees, excluding packing shed employees, on January 23, 1976, and recertified on January 30, 1986, following a decertification election in which the UFW demonstrated a continuing majority status. Decertification elections must be held in units which are co-extensive with the unit as originally certified.

UFW	11
No Union	29
Challenged Ballots	30
Void Ballots	_0
TOTAL	70

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director (RD) conducted an investigation, and, on September 13, 1988, issued his Report on Challenged Ballots in which he recommended that 26 of the challenges be sustained, that 2 additional challenges be overruled, and that the remaining 2 challenges be held in abeyance until such time as they may prove to be outcome determinative. Thereafter, the incumbent exclusive representative, the United Farm Workers of America, AFL-CIO (UFW or Union), timely filed with the Board exceptions to the RD's Report with a brief in support of exceptions.

The Union excepted only to the RD's findings concerning the group of 20 individuals who had been laid off or terminated due to the Employer's allegedly unlawful contracting out of unit work to non-union crews. On January 16, 1989, the Employer filed a Motion to Dismiss the Union's exceptions. The Union did not accept the invitation of the Board's Executive Secretary to respond to the Motion.

The Agricultural Labor Relations Board (ALRB or Board) has considered the RD's Report on Challenged Ballots in light of the Union's exceptions thereto and the Employer's Motion to Dismiss the Union's exceptions. For the reasons discussed below,

the Board has decided to affirm the RD's recommendation that the challenges to the 20 ballots which are in issue herein be sustained.[2/]

Background

Twenty individuals who sought to vote in the decertification election were challenged by Board agents because their names did not appear on the applicable pre-petition eligibility list. It is undisputed that none of them performed any work for the Employer during the pertinent payroll period as they had been previously laid off or terminated. In conducting his investigation into the merits of the challenges, the RD solicited the positions of the parties. The Employer relied on the statutory requirement that eligibility to vote requires the employee to have worked during the pre-petition payroll period. It was, and is, the Union's position that those 20 individuals would have worked during the pertinent time period, and thus would have been eligible to vote, but for the Employer's elimination of bargaining unit work in retaliation for their support of the Union in a previous decertification election. That same conduct served as the basis for unfair labor practice charges filed by the Union on behalf of those 20 individuals. The Union alleged that they were discriminatorily discharged for engaging in union activity and, further, that the Employer's unlawful contracting out of unit work constituted unilateral changes in violation of the duty to

[2/] In the absence of any exceptions thereto, the Board adopts pro forma the RD's recommendations regarding the remaining 10 challenged ballots.

bargain.[3/] The first of the charges alleged unilateral changes beginning in July, 1986, and was filed on December 12 of that year, 18 months prior to the election. On September 30, 1986, the subcontracting issue was embodied in a grievance filed by the UFW. Thereafter, the parties agreed to submit the matter to arbitration. On April 13, 1988, the arbitrator issued his decision.

In his Report, the RD relied on the arbitrator's decision which examined the same contracting issue as alleged in the unfair labor practice charges, and which held that the contracting out of harvesting work did not abrogate the collective bargaining agreement between the Union and the Employer herein. In his Report, the RD pointed out that his investigation of the pending unfair labor practice charges also revealed a deficiency in the declarations submitted in support of the allegations. In particular, he found that the arbitration decision was based on fully litigated facts, in which all parties participated, and that the resulting decision was relevant to the eligibility question at issue herein.

The Union contests the propriety of the RD's deferral to the arbitral process in order to resolve the issues surrounding

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[3/] A total of four unfair labor practice charges were filed between December 12, 1986, and June 16, 1988, and all but one have relevance to the challenged ballot issues. One of the charges alleges that the Employer partially closed one ranch in order to eliminate work for two crews in retaliation for their support of the UFW. The two remaining charges allege that the Employer implemented unlawful unilateral changes by subcontracting out bargaining unit work and thereby laying off at least five broccoli harvesting crews.

the challenged ballots in this case. It is the Union's view that the conduct which it alleged in the unfair labor practice charges extends beyond that conduct which was examined by the arbitrator and, furthermore, that the arbitrator himself, while finding evidence of an Employer anti-union bias, cautioned in his decision that he was not reaching the statutory considerations which govern the unfair labor practice matters. Therefore, the Union asserts, the Board should reject the RD's determinations, insofar as they are premised on the findings of the arbitrator, and direct that matters alleged in the unfair labor practice charges be set for a full evidentiary hearing in order to take evidence concerning the lay-off of the workers in question. Only then, the Union argues, can the Board make a proper determination as to whether the challenges to the ballots of the disputed employees should be overruled.[4/]

On November 22, 1988, the RD dismissed the first of the unfair labor practice charges, in part, on the basis of the arbitrator's decision. But the RD also found, independent of the arbitrator's ruling, an absence of evidence "that the Employer has made any unilateral decisions to utilize non-union crews in harvesting its broccoli or other crops." On December 30, 1988, the General Counsel affirmed the RD's dismissal of the charge.

Thereafter, on January 16, 1989, the Employer filed with the Board its Motion to Dismiss the Union's exceptions on the ground that the decision of the National Labor Relations Board

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[4/] For the reasons discussed below the Board need not reach the question of deferral to arbitration posed by the Union.

(NLRB) in Times Square Stores Corp. (1948) 79 NLRB 361 [22 LRRM 1373] (Times Square) is controlling precedent, which mandates that the dismissal of the relevant unfair labor practice charge prohibits the Board from considering the pivotal issue in the Union's exceptions.

Discussion

The central question before the NLRB in Times Square was whether certain striking workers were entitled to vote in a representation election. The strikers had been challenged by the employer on the ground, inter alia, that they were economic strikers who had been permanently replaced and thus were not entitled to vote.[5/] The union had recently filed unfair labor practice charges in which it alleged that the employer had committed violations of the National Labor Relations Act (NLRA), including sections 8(a)(l) (interference with employees' statutory rights) and 8(a)(3) (discrimination in employment). Therefore, the union contended, since the employees were striking in protest of the employer's unlawful conduct, they were unfair labor practice strikers eligible to vote in the election. The charges were dismissed because the employer had voluntarily posted notices similar to those required in cases involving 8(a)(l) violations and because the section 8(a)(3) charge lacked merit. Further, the

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[5/] The law governing the eligibility of economic strikers to vote was changed following the election in Times Square. Now, pursuant to section 9(c)(3) of the NLRA, correspondingly section 1157 of the Agricultural Labor Relations Act (ALRA or Act), economic strikers may be eligible to vote in any election provided that the striker who has been permanently replaced shall not be eligible to vote in any election conducted more than 12 months after the commencement of the strike.

NLRB had previously announced a presumption that strikers are economic strikers unless an unfair labor practice proceeding establishes otherwise.

Thus, even though the question of eligibility to participate in representation matters turned on the status of the strikers, the NLRB, in Times Square, refused to permit the union to litigate an unfair labor practice in the representation proceeding. The NLRB reasoned that since the NLRA grants the General Counsel "final authority" to investigate charges and issue complaints, it would be "undesirable" for the NLRB to decide unfair labor practice charges that the General Counsel had already determined should be dismissed. Therefore, according to the NLRB, "an initial finding" that a strike was caused by unfair labor practices may be made only in unfair labor practice proceedings. Since the dismissal of the charges precluded the filing of an unfair labor practice complaint against the employer, the NLRB's presumption governed the case and the strikers were held ineligible to vote.

It is well established that this Board has exclusive jurisdiction to administer representation matters under Chapter 5 of the Act. Similarly, it is the General Counsel who, pursuant to section 1149, [6/] "shall have final authority, on behalf of the board, with respect to the investigation of charges and issuance of complaints under Chapter 6 ... and with respect to the prosecution of such complaints before the board."

[6/] All section reference are to the California Labor Code unless otherwise specified.

The respective duties and spheres of original jurisdiction of the Board and the General Counsel under the ALRA are virtually identical to corresponding provisions in the NLRA. Times Square merely gives expression to those statutory principles. Accordingly, Times Square has meaning where, as in that case, the right of certain individuals to participate in an election turns on a finding which is uniquely within the province of the General Counsel and thus can only be determined in an unfair labor practice proceeding.[7/] The Times Square principle has been followed by this Board, particularly where voter eligibility under Chapter 5 of the Act depends on fully litigated facts and decision pursuant to Chapter 6 standards. (See, e.g., Agri-Sun Nursery (1987) 13 ALRB No. 19, wherein the Board was required to await the conclusion of an unfair labor practice case before it could determine whether two employees would have worked during the eligibility period but for their alleged discriminatory discharges.)[8/]

Times Square, however, does not require automatic application, even where the same facts and circumstances constitute the basis for an unfair labor practice as well as a representation issue. It is well established that conduct

[7/] The Board does not read Times Square so broadly as to require that it defer to such an exercise of the General Counsel's discretion when no unfair labor practice charges have been filed.

[8/] In so doing, however, the Board was not required to determine whether Times Square was applicable precedent within the meaning of section 1148, as the Employer here urges we do. The Board merely construed section 1149 to mandate the same result, as we do here.

sufficient to warrant the setting aside of an election need not rise to the level of an unfair labor practice, and not all unfair labor practices necessarily constitute conduct which, by an objective standard, would reasonably tend to interfere with employee free choice.

In the instant case, as in Times Square and Agri-Sun, supra, 13 ALRB No. 19, eligibility to vote depends on the issuance of a complaint, the prosecution of charges, and a final decision and order of the Board concerning whether the Employer discriminatorily discharged employees in violation of the Act and/or engaged in violations of the duty to bargain. But where, as here, the General Counsel has exercised his section 1149 authority to dismiss the charges rather than issue a complaint and prosecute the allegations, the Board is precluded from litigating those charges by the Act itself. To do so clearly would usurp the authority of the General Counsel in derogation of the statute and, arguably, would be tantamount to the Board initiating an unfair labor practice proceeding.

For the reasons discussed above, the Board is statutorily compelled to reject the Union's request for a hearing for the purpose of litigating the status of employees who were challenged because they had been laid off and therefore did not work during the qualifying period for voter eligibility. Accordingly, the findings and recommendations of the Regional Director with regard to the 20 challenged ballots in that category should be, and they

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hereby are, affirmed.

Dated: August 10, 1989

BEN DAVIDIAN, Chairman[9/]

GREGORY GONOT

IVONNE RAMOS RICHARDSON

JIM ELLIS

[9/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, (if participating), followed by the signatures of the participating Board Members in order of their seniority.

CASE SUMMARY

Mann Packing Co., Inc.
(UFW)

Case No. 88-RD-3-SAL
15 ALRB No. 11

Background

The results of a decertification election among Mann Packing Company's (Employer) agricultural employees revealed the following results: the United Farm Workers of America, AFL-CIO (UFW or Union), the incumbent representative, 11 votes; No Union, 29 votes; and, 30 challenged ballots. As the latter were sufficient in number to determine the outcome of the election, the Regional Director (RD) conducted an investigation and issued a Report in which he recommended that 26 of the challenges be sustained, that two additional challenges be overruled, and that the remaining two challenges be held in abeyence. Thereafter, the UFW filed exceptions to the RD's determination as to 20 of the ballots, all of which were cast by employees who were challenged by Board agents because they had not worked during the qualifying pre-petition eligibility period. The Union had filed unfair labor practice charges on behalf of those same challenged voters, alleging therein that they would have worked but for the employer's unlawful contracting out of bargaining unit work to non-union labor contractor crews. Following an investigation of the unfair labor practice allegation, the RD dismissed the charge. The Union now asks that the Board consider, in the context of a representation hearing, the issue alleged in the unfair labor practice charge in order to determine the eligibility question.

Board Decision

The Board affirmed the RD's recommendation that the challenges to the 20 ballots be sustained, but on the basis of a somewhat different theory and therefore was not required to reach the arbitration question. The Board held that where, as here, eligibility to vote turns on a matter which is uniquely within the province of the General Counsel (e.g., whether employees have been laid off in violation of the Act) and thus can only be determined in the context of an unfair labor practice proceeding, the Board must look to the result of that proceeding in order to resolve the representation question. Thus, where such unfair labor practice charges have been dismissed, the Board is powerless to resolve the same issue in a representation proceeding. In so ruling, the Board looked to the express statutory authority which sets forth the respective duties and spheres of original jurisdiction of the General Counsel in unfair labor practice matters and the Board in representation matters. On that basis, the Board concluded that were it to grant the Union's request to litigate in the representation context the same allegations which served as the basis for the dismissed charges, the Board would invade the statutory authority of the General Counsel.