Ventura, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	Case No. 2003-MMC-02
PICTSWEET MUSHROOM FARMS,	)	
	)	29 ALRB No. 3
Employer,	)	
	)	(August 1, 2003)
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	
	)	

DECISION AND ORDER

On July 3, 2003,[1] the United Farm Workers of America, AFL-CIO (Union or UFW) filed a declaration with the Agricultural Labor Relations Board (Board) pursuant to Labor Code section 1164 et seq. indicating that the Union and Pictsweet Mushroom Farms (Employer or Pictsweet) have failed to reach a collective bargaining agreement and requesting that the Board issue an order directing the parties to mandatory mediation and conciliation of their issues.[2]

On July 8, the Employer timely filed an answer to the Union's declaration pursuant to section 20401 of the Board's regulations.

[1] All dates refer to calendar year 2003 unless otherwise indicated.

[2] Senate Bill 1156 and Assembly Bill 2596 amend the Agricultural Labor Relations Act (Act or ALRA) to provide for mandatory mediation in selected circumstances where the parties have been unable to reach a collective bargaining agreement. The amendments created Labor Code sections 1164-1164.14, which became effective January 1, 2003.

On July 11, the Board issued an order directing the parties to brief the issue of the effect of a predecessor employer's collective bargaining agreement with the certified union. On July 25, the parties filed timely briefs.

1. Applicable Statutory Provisions

Labor Code sections 1164(a) and 1164.11 provide that a labor organization or an employer who was a party to a certification issued before January 1, 2003[3] may file a request for mediation any time following 90 days after a renewed demand to bargain, and that the parties will be referred to mediation, where:

1. The *parties* have failed to reach an agreement one year after the initial request to bargain;
2. The employer has committed an unfair labor practice;
3. The *parties* have not previously had a binding contract; and
4. The employer employed at least 25 workers during any calendar week in the year preceding the filing of the declaration and request for mediation.

Therefore, as to a pre-January 1, 2003 certification, five conditions must exist for the Board to refer the parties to mandatory mediation: the 90 day period of renewed bargaining and the four elements enumerated above.

Under the Board's regulations, the parties will be referred to mediation unless the answer shows that the conditions are not met, in which case the declaration is dismissed.

[3] If the labor organization was certified after January 1, 2003, either party may file a request for mediation any time following 180 days after an initial demand to bargain.

2. The Union's Declaration and Request for Mediation

The UFW's declaration was signed by attorney Barbara Macri-Ortiz and states that the UFW was certified in 1976 in Case No. 75-RC-1-M, when the mushroom farm was owned by West Foods. The UFW reached collective-bargaining agreements with West Foods and its successor, Mushroom King. Pictsweet purchased the operation in a trustee's sale resulting from Mushroom King's Chapter 7 bankruptcy proceeding in 1987.

The declaration states that from 1987 to the present, the UFW has never reached a collective-bargaining agreement with Pictsweet. The only bargaining meetings between the UFW and Pictsweet began in December 1999 when the UFW requested negotiations. The first round of bargaining consisted of nine bargaining meetings in 2000 and one in January 2002.

The UFW requested further bargaining in a letter dated January 17. Three meetings were held in 2003 (January 30, March 27, and July 1), but no contract was reached.

The UFW requested bargaining in 1987 and 1994. The declaration does not address what occurred as a result of the 1987 and 1994 requests beyond asserting that they were substantive attempts at bargaining that did not result in a contract.

The declaration also refers to the Board's finding of a violation in *Pictsweet Mushroom Farms* (2002) 28 ALRB No. 4 issued March 18, 2002, which was not appealed and became final on April 18, 2002. The Employer reinstated Felipe Andrade and paid him $14,838 in backpay.

3. The Employer's Answer

A. Issues Not Contested by Employer's Answer

Section 20401(b) of the Board's regulations (Title 8, California Code of Regulations, section 20401(b)) provides that any allegation in a declaration seeking mandatory mediation not denied will be deemed admitted.

Pictsweet's July 8, answer does not dispute that there was a 90 day renewed period of bargaining, that Pictsweet and the UFW failed to reach a contract within one year after the UFW's initial request for bargaining,[4] and that Pictsweet has employed 25 employees during at least one week in the year preceding the filing of the declaration.

The third paragraph of the answer denies the assertion in paragraph 5 of the declaration that Pictsweet committed an unfair labor practice. The answer does not dispute the declaration's assertion that the Board in its decision at 28 ALRB No. 4 found that its discharge of Felipe Andrade was an unfair labor practice and that the Board's order became final when Pictsweet did not seek judicial review. Labor Code section 1160.8 makes any Board decision final where no petition for review is filed within thirty days of the issuance of the Board's order. No petition for judicial review was filed in 28 ALRB No. 4. Employer presents no argument or evidence to dispute the legal conclusion that it committed the unfair labor practice found in 28 ALRB No. 4 and that the matter became final and non-reviewable.

[4] It is unnecessary to determine the legal significance of any requests to bargain in 1987 or 1994.

B. Certification

The only statutorily required allegation of the declaration that the answer directly denies is that Pictsweet is a "party" to a certification with the UFW because the original certification named West Foods, not Pictsweet, as the employer. Pictsweet asserts that on this ground, the declaration does not satisfy Labor Code section 1164.11 and must be dismissed.

The incumbent union's status as the legally authorized representative depends upon Board certification only. In this respect, the ALRA is sharply different from the National Labor Relations Act (NLRA, 29 US.C. sec. 141 et seq.). Under the NLRA, a certification creates an irrebuttable presumption of union majority status for a year following its issuance. After the certification year has expired, an employer, if it learns that employees are dissatisfied with an incumbent union, can unilaterally withdraw recognition, file a petition for an election or conduct a poll to determine whether employees in the bargaining unit continue to support the union. The Legislature in enacting the ALRA consciously rejected the NLRA model under which the union's status as recognized bargaining agent can be revoked by an employer based on employee expressions of dissatisfaction with the union.

The ALRA's statutory scheme clearly provides that the union's entitlement to bargain arises from the Board's election and certification and can only be removed by the Board's election and certification process. (*Nish Noroian Farms* (1982) 8 ALRB No. 25) It therefore begins when the union is certified and continues until the union is decertified. The Board has uniformly held that a Board certification remains effective

until the certified union is decertified by the election processes created by the Act. (*Lu-Ette, Inc.* (1982) 8 ALRB No. 91). Only two events aside from decertification in a Board election have been recognized as effective to terminate a certification: (1) a disclaimer by the certified union of its status as collective bargaining representative or (2) the certified union's "defunctness," i.e., its institutional death and inability to represent the employees. (*Bruce Church, Inc.* (1991) 17 ALRB No. 1.)

It is therefore clear and well-settled that the sale of the employing agricultural operation to a different business entity is not an event that would divest a union of its certification. (*San Clemente Ranch v. Agricultural Labor Rels. Bd.* (1981) 29 Cal.3d 874.) The Board and courts have consistently held that a successor is bound by the certification issued when a predecessor employer owned the agricultural operation described in the certification.

C. Affirmative Defenses

i. Effect of Predecessor Employer's Collective Bargaining Agreement

Paragraph five of the answer asserts that if Pictsweet stands in West Foods and Mushroom King's shoes as a successor to a certification, Pictsweet must also be allowed to stand in West Foods and Mushroom King's shoes for purposes of Labor Code section 1164 as having reached a collective bargaining agreement pursuant to the certification. In other words, Pictsweet contends that because its predecessor signed a contract, Pictsweet should be relieved of the obligations imposed by the mandatory mediation amendment, i.e., that it should be deemed to "stand in its predecessor's shoes"

for all purposes, including for the purpose of being excepted from application of the mandatory mediation law.

Pictsweet cites two cases in its July 25, 2003 brief, neither of which involves a contractual successorship issue. In the first, *Allentown Mack Truck Service v. Nat'l. Labor Rels. Bd.* (1997) 522 U.S. 357, the successor conducted a poll of employees to determine if a majority of them continued to support the incumbent union. It had hired all the employees from the predecessor's operation. NLRB precedent required that the employer have a reasonably based doubt that the majority of employees continued to support the union, and the successor employer relied on criticism and unhappiness with the union expressed by employees in the bargaining unit while they had been employed by the predecessor.

The NLRB precluded the successor from relying on expressions of employee opposition to the union by applying its presumption that the employees of a successor where the union had enjoyed majority status are presumed to support the union in the same proportion as they had under the predecessor, i.e., that since the union's status as majority representative had not been challenged by the predecessor employer, that the union had an unimpaired status as "majority representative," and therefore had the same status under the successor.

The Supreme Court rejected the NLRB's preclusion of the successor's invoking employee dissatisfaction with the union where the predecessor employer had never challenged the union's status as the recognized majority representative.

In the other case cited by Pictsweet, *MV Transportation* (2002) 337 NLRB No. 129, the NLRB rejected the creation of a similar rule where a successor employer had recognized a union that had been recognized by the predecessor employer. The NLRB in *St. Elizabeth's Manor* 329 NLRB 341 (1999) had established a rule that the successor employer, once having recognized the union that had represented the employees with the predecessor employer, could not withdraw that recognition even if it had acquired a reasonable good faith doubt of the union's continuing majority support. The NLRB in *MV Transportation* disavowed this rule because it gave the union a higher status with the successor employer than it had enjoyed with the predecessor employer, but only as to the obligation to recognize and bargain.

Pictsweet's argument, stated most directly, is that if it is required to be subject to mandatory mediation because it has never reached a contract, while its predecessors under the same certification would not have been, it, like MV Transportation, is being put in a worse situation than its predecessor was.

The cases cited by Pictsweet apply to the obligation to recognize and bargain with the union that represented the employees under the predecessor employer's ownership, not to its obligations under a predecessor's contract.

The Union's brief points out that as far as being bound by a predecessor's collective bargaining agreement, as distinguished from the predecessor's recognition of the union, a successor employer, under both the NLRA and ALRA, is not required to stand in the shoes of its predecessor unless the successor at some point voluntarily accepts being bound by the predecessor's contract. Therefore, the underlying premise of

the Employer's argument, that the successor under established labor law always stands in shoes of its predecessor, does not apply to prior collective bargaining agreements.

Further, the conditions for the application of section 1164 and 1164.11 by their terms focus on the existing collective bargaining relationship. Specifically, they ensure that the present employer, whether or not a successor to the bargaining obligation, goes into mandatory mediation *only* as the result of its own conduct: it must have committed an unfair labor practice, must have been through a period of bargaining for a year without having reached a contract, and must have been through a period of renewed bargaining for three months without having reached a contract.

While we believe it is clear from the nature of the prerequisites listed in section 1164.11 that the mandatory mediation law is aimed at existing parties to a collective bargaining relationship, the overall purpose of the statute removes any doubt. Section 1 of SB 1156, one of the component bills of the mandatory mediation law, states, in pertinent part, "[t]he Legislature finds and declares that a need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the Agricultural Labor Relations Act."

This expression of legislative intent, along with the language of the statute itself, demonstrates that the statute was designed to as a mechanism to jump start collective bargaining relationships, where, in specified circumstances, the parties have been unable to reach agreement on their own. The character of a collective bargaining relationship is the result of the history of negotiations between the existing parties. The

fact that a union was successful in reaching agreement with a predecessor employer has little or no bearing on the character of its relationship with a successor employer. Rather, where the successor has not assumed an existing contract, the relationship between the union and the successor is one that "starts from scratch," i.e., it is analogous to an initial collective bargaining relationship following certification of the union. Therefore, we see no logic in construing section 1164.11 so that a contract between the certified union and a predecessor employer (not voluntarily assumed by the successor) would be disqualifying.

ii. Abandonment

Paragraph 7 of the answer asserts that as a matter of policy the Union should be found to have abandoned the unit.

The most comprehensive discussion of the concept of abandonment appears in *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4. In *Dole Fresh Fruit*, the Board recognized that abandonment has a very limited role even under the NLRA. The NLRB considers abandonment only as some evidence to establish union loss of majority when no election has been conducted. Consistent with underlying policy decision by the Legislature that loss of majority not established through a Board election is not a basis for withdrawing recognition, the Board in *Dole Fresh Fruit* treated union abandonment as having no significance independent of union disclaimer of interest or union defunctness. *Dole Fresh Fruit* specifically held that a period of dormancy in bargaining, even a prolonged period, did not establish union "abandonment" of a certification.

Finally, *Dole Fresh Fruit* pointed out that the presentation of an abandonment defense has no relevance where bargaining has resumed after a period of

dormancy. In this case, bargaining has been resumed and regularly pursued since the Union's 1999 request for bargaining, and was most recently renewed by three sessions following the reviewed of the request in January 2003.

Pictsweet's argument that the UFW's alleged abandonment of the bargaining unit is therefore without merit.

iii. Constitutional and Other Statutory Contentions

Paragraph 6 of the answer asserts as an affirmative defense that the mandatory mediation law violates various rights and protections guaranteed under the California and United States Constitutions and refers to the litigation now pending in superior court. (*Western Growers Association, et al. v. California Agricultural Labor Relations Board, et al*., Case No. 03AS00987.)

The Board has no authority to rule on these particular affirmative defenses in its evaluation of the declaration and answer filed by the parties in this matter. Under Article 3, Section 3.5 of the California Constitution, an administrative agency has no power to: (a) declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) declare a statute unconstitutional; or (c) declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

The answer's eighth paragraph asserts as an affirmative defense that the Employer's "right to freely bargain for terms of a collective bargaining agreement is irreparably harmed by the mandatory mediation law." The Employer does not identify where this right originates from, but to the extent that this defense is based on the un-amended version of the ALRA, or upon alleged constitutional violations, it fails for the reasons discussed above.

Paragraph 9 of the answer also asserts as an affirmative defense assert that the new mandatory mediation law violates California Labor Code section 1155.2 (a). This section of the Act mandates that the parties must bargain in good faith, but indicates that this obligation does not "compel either party to agree to a proposal or require the making of a concession."

The Board finds that this affirmative defense is without merit. As stated above, the ALRA was amended by the addition of Labor Code sections 1164-1164.14 to provide for mandatory mediation in selected circumstances where the parties have been unable to reach a collective bargaining agreement. These amendments went into effect on January 1, 2003. The Employer cannot now rely on the un-amended version of the Act to support its claim that the mandatory mediation process violates the ALRA.

CONCLUSION

The Board has evaluated the declaration, the answer, and the briefs submitted in this matter in accordance with section 20402 of the Board's regulations, and finds that the prerequisites for referral to mediation set forth in Labor Code sections 1164 (a) and 1164.11 and Board regulation section 20400 (a) have been met. In addition, the

Board has evaluated the affirmative defenses offered by the Employer and finds that they do not provide any basis for the Board not to proceed with referring this matter to mediation.

ORDER

PLEASE TAKE NOTICE that pursuant to Labor Code section 1164 (b) and section 20402 (b) of the Board's regulations, the parties in the above matter are directed to mandatory mediation and conciliation of their issues. The mandatory mediation process is governed by Labor Code sections 1164-1164.14 and sections 20400-20408 of the Board's regulations. The Board requests that upon the issuance of this order a list of nine mediators compiled by the California Mediation and Conciliation Service be provided to the parties; and thereafter, the parties shall select a mediator in accordance with Labor Code section 1164 (b) and section 20403 of the Board's regulations.

By Direction of the Board

Dated: August 1, 2003

GENEVIEVE A. SHIROMA, Chair

GLORIA A. BARRIOS, Member

CATHRYN RIVERA, Member

CASE SUMMARY

Pictsweet Mushroom Farms (United Farm Workers of America, AFL-CIO)

29 ALRB No. 3
No. 03-MMC-02

Background

The Union filed a declaration seeking mandatory mediation. The Employer purchased the farm involved in 1987 from Mushroom King, a predecessor employer who had entered into collective bargaining agreements with the certified union, as had West Foods, an earlier owner who was named in the certification. In 1999, the Union requested that the Employer bargain for a contract. Ten bargaining sessions were held in 2000 and 2001, but no contract was reached. The Union requested renewed negotiations in 2003. Three meetings were held but no contract was agreed to.

Declaration and Answer

The answer did not dispute that Pictsweet was a successor employer but denied declaration's assertion that the Employer had committed the unfair labor practice found by the Board in its decision at 28 ALRB No. 4. The Employer denied that the Employer was party to a certification because the certification issued had named West Foods, not Pictsweet as the employer. The answer further asserted that the contracts entered into between West Foods and Mushroom King and the Union precluded a finding that there had been no contract for purposes of the mandatory mediation law. The Employer also asserted that the Union had abandoned the certification by not engaging in collective bargaining from 1987 through 1999 and that the mandatory mediation law was unconstitutional and contrary to section 1155.2(a) of the Agricultural Labor Relations Act.

Board Decision

The Board rejected Pictsweet's argument that the predecessor employers' contracts with the Union precluded application of the mandatory mediation law to it. The statute was intended to apply to those who were parties to certifications after the statute became effective and, as to the successor employer, the Union was in a position analogous to that of a newly certified union that had never had a collective bargaining agreement. The Board held that it was without jurisdiction to consider Pictsweet's arguments that the mandatory mediation law was unconstitutional. The Board deemed its unfair labor practice finding to be established because no petition for review had been filed.

* * *