Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROS. CO. OF CALIFORNIA,	)	
	)	Case No. 2007 MMC-01
Employer,	)	
	)	33 ALRB No. 1
and	)	
	)	(January 24, 2007)
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Petitioner.	)	

DECISION AND ORDER

On January 11, 2007, the United Farm Workers of America (UFW) filed a declaration with the Agricultural Labor Relations Board (Board) pursuant to Labor Code section 1164 et seq. and Board Regulation 20400[1] indicating that the UFW and D'Arrigo Bros. Co. of California (Employer or D'Arrigo) have failed to reach a collective bargaining agreement and requesting that the Board issue an order directing the parties to

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[1] The Board's regulations are codified at California Code of Regulations, title 8, section 20100, et seq.

mandatory mediation and conciliation. On January 17, 2007, the Employer timely filed an answer to the UFW's declaration pursuant to section 20401 of the Board's regulations.[2]

Labor Code section 1164(a)[3] provides that a certified labor organization or an employer may file a request to be directed to mediation and conciliation, in the case of a certification issued before January 1, 2003, if the request is made any time following 90 days after a renewed demand to bargain, the employer employed at least 25 workers during any calendar week in the year preceding the filing of the request for mediation, and the criteria listed in section 1164.11 are met. Those criteria are:

> (a) the parties have failed to reach an agreement for at least one year after the date on which the labor organization made its initial request to bargain,
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> (b) the employer has committed an unfair labor practice, and
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> (c) the parties have not previously had a binding contract between them.

In this case, D'Arrigo contests two of the prerequisites, that it has committed an unfair labor practice within the meaning of section 1164.11, subdivision (b), and that the parties have not previously had a binding contract.[4]

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[2] D'Arrigo's motion to strike the UFW's position statement in support of its declaration is denied, as the Board does not view Regulation 20400 as precluding the submission of argument in support of a party's declaration that the statutory prerequisites for invoking the mandatory mediation process have been met.

[3] All subsequent statutory references are to the California Labor Code, unless otherwise specified.

[4] D'Arrigo also argues that the mediation and conciliation statute is unconstitutional. However, the same arguments have been considered and rejected by the courts. (*Hess Collection Winery* v. *ALRB* (2006) 140 Cal.App.4th 1584.) In any event, the Board has no authority to declare a statute unconstitutional or refuse to enforce a

(Footnote continued . . .)

In its declaration, the UFW cited three cases as satisfying the unfair labor practice requirement: 4 ALRB No. 45, 6 ALRB No. 27, and 32 ALRB No. 1. In its answer, D'Arrigo asserts that these cases fail to meet the requirement because they represent either technical refusal to bargain cases where D'Arrigo was found to have engaged in a good faith effort to seek court review of the Board's underlying certification decision or, in the case of 32 ALRB No. 1, a case that is not yet final. With regard to the latter case, which is now pending review in the Court of Appeal, D'Arrigo is correct, as that case is not yet final (see Regulation 20400, subd. (a)(1).) It is not necessary to determine in this case if a technical refusal to bargain found to have been pursued in good faith meets the unfair labor practice prerequisite. We have taken official notice of four additional cases, now final, in which the Board found that D'Arrigo had committed various unfair labor practices, including discriminatory discharges and unlawful unilateral changes in terms and conditions of employment. (9 ALRB No. 30, 9 ALRB No. 3, 8 ALRB No. 66, and 8 ALRB No. 45.)

The issue of whether the parties previously had a binding contract within the meaning of section 1164.11, subdivision (c), presents a complex question of statutory construction. D'Arrigo and the UFW (then known as the United Farm Workers Organizing Committee, AFL-CIO) had a collective bargaining agreement that ran from November 18, 1970 to November 17, 1972. This was, of course, prior to the passage of

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(Footnote continued . . .)
statute on such grounds absent an appellate court opinion holding the statute unconstitutional. (See Cal. Const., art. III, § 3.5.)

the Agricultural Labor Relations Act (ALRA) (Lab. Code § 1140, et seq.) in 1975 and prior to the UFW's certification in 1977 as the exclusive bargaining representative of the relevant bargaining unit.

As a preliminary matter, we reject the UFW's contention that the 1970-1972 contract was not a "binding contract" within the meaning of section 1164.11, subdivision (c), because it is inconsistent with the provisions of section 1159 of the ALRA, which provides that only labor organizations certified by the Board as the exclusive bargaining representative may be parties to a legally valid collective bargaining agreement. Section 1159 prohibits contracts with uncertified labor organizations, but only contracts entered into after the effective date of the ALRA. This is made clear in section 1.5 of the preamble to the ALRA, which states that it is the intent of the Legislature that contracts entered into prior to the effective date of the legislation were not to be automatically voided. Rather, such contracts, if they extended into the period after the ALRA became effective, would be voided only upon a certification by the Board in a bargaining unit that included the employees covered by the contract. In sum, the 1970-1972 contract was legally valid during its existence and the passage of the ALRA had no retroactive effect upon that status.

Therefore, there is no question that there was a "binding contract." But that does not resolve the issue at hand. The central question is whether the binding contract referred to in section 1164.11, subdivision (c), means only one entered into after the certification of the union. If section 1164.11, subdivision (c), is read to mean simply that the same two entities that are parties to a request for mandatory mediation had a binding

contract between them at any time, then the 1970-1972 contract is disqualifying. However, we find that when this provision is viewed in the context of the statute as a whole, the meaning is not so clear.

The mandatory mediation and conciliation statute, by its terms, applies only to an employer and a certified labor organization. Indeed, this is made clear in the first sentence of section 1164, which provides that an "employer or a labor organization certified as the exclusive bargaining agent" may file a declaration requesting the invocation of the process. Thereafter, the term "parties" is used throughout the law, in clear reference back to the employer and certified labor organization and the period after certification.

Indeed, section 1164.11, subdivision (a), which requires that the "parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain," necessarily relates to the post-certification period. A comparison with the provisions governing the application of the process to certifications issued after January 1, 2003 makes this clear. Section 1164 states, in pertinent part, that the process may be invoked "180 days after an initial request to bargain where the labor organization was certified after January 1, 2003." The clear import of this provision is to require that the parties attempt to negotiate a contract on their own for a minimum of 180 days after certification, the period to run from the "initial request to bargain." It would make no sense if the "initial request to bargain" could refer to a request prior to the certification, for such a request has been unlawful since the passage of the ALRA under section 1153, subdivision (f), section 1154, subdivision (a)

(1), and section 1159. The reference to "initial request to bargain" in section 1164.11, subdivision (a), must similarly be construed as referring to the post-certification period, for that provision, in contrast to the 180-day period for certifications issued after January 1, 2003, merely requires that the invocation of the mandatory mediation process may not take place unless the parties have attempted to negotiate on their own for one year. As subdivision (a) of section 1164.11 clearly references the post-certification period, we find no reason why our interpretation of subdivision (c) of that same section should differ.

Therefore, while it is possible that the Legislature intended that the term "parties" in section 1164.11, subdivision (c), in contrast to its use in other provisions of the statute, connotes the two entities without reference to the labor organization being certified, that is neither the only reasonable interpretation nor, more importantly, the most reasonable one when the provision is viewed in the context of the statute as a whole.

Legislative intent also supports the conclusion that section 1164.11, subdivision (c) refers to the period after certification.[5] In the preamble to the mediation and conciliation statute (2002, ch. 1145, § 1), the Legislature stated the following:

> The Legislature finds and declares that a need exists for a mediation procedure in order to ensure a more effective collective bargaining process

[5] D'Arrigo suggests that it is indicative of legislative intent that an early version of SB 1736, a bill covering similar subject matter but vetoed by the Governor, contained a provision, later deleted, defining "first collective bargaining agreement" as one executed following certification. As the mediation and conciliation statute was the result of the later passage of two other bills, SB 1156 and AB 2596, that were amended to include the mandatory mediation subject matter while SB 1736 was pending on the Governor's desk, we find the proffered connection too attenuated to be instructive.

> between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the Agricultural Labor Relations Act, ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry.

This expression of legislative intent reflects a perception that the pre-existing bargaining provisions of the ALRA have failed in fully realizing the main purpose of the ALRA, namely, to "ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry." It seeks to accomplish this purpose by creating a mechanism to jump start negotiations that have not been productive for specified periods after certification of the union.

Indeed, it would be contrary to this expressed purpose to allow a pre-ALRA contract to be disqualifying. Prior to the enactment of the ALRA, there was no duty to bargain. Rather, an employer could voluntarily agree to bargain, usually in the face of economic pressure applied by the union. Even if a contract resulted, there was no continuing duty to bargain upon its expiration. Therefore, any bargaining relationship that existed prior to the enactment of the ALRA was fundamentally different from one imposed by a certification under the ALRA based on a secret ballot election. Such a bargaining relationship was tenuous at best and, absent an existing contract, could lapse at any time, as did the relationship between D'Arrigo and the UFW after the expiration of its contract in 1972. This fundamental difference in pre-ALRA bargaining relationships

further supports the conclusion that the Legislature intended to focus only on bargaining relationships established via a Board certification.

Additional legislative history further supports the view that the focus of the new law was on the operation of the ALRA, not upon any period prior to its enactment. As the Third District Court of Appeal pointed out in its discussion of the purposes of the statute in its decision rejecting a constitutional challenge to the mediation and conciliation statute:

> Proponents of the legislation asserted it was necessary because, after unions were certified to represent agricultural workers, the employers refused to agree to the terms of collective bargaining agreements. (Off. of Assem. Floor Analyses, 3d reading analysis of Sen. Bill No. 1156 (2001-2002 Reg. Sess.) Aug. 30, 2002, p. 7; Off. of Assem. Floor Analyses, conc. in Sen. amendments of Assem. Bill No. 2596 (2001-2002 Reg. Sess.) Aug. 31, 2002, p. 7.)
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> (*Hess Collection Winery* v. ALRB, *supra*, 140 Cal.App.4th at p. 1593. Emphasis added.)

For the reasons set forth above, we find that all of the statutory prerequisites for referring parties to mediation and conciliation have been met.

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ORDER

Pursuant to Labor Code section 1164, subdivision (b), and section 20402 (b) of the Board's regulations, D'Arrigo Bros. Co. of California and the United Farm Workers of America are hereby directed to mandatory mediation and conciliation of their issues.[6] 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.

Dated: January 24, 2007

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

[6] Under the procedures set forth in the mediation and conciliation statute, this decision does not constitute a final order of the Board. Therefore, a party dissatisfied with any of the holdings herein may challenge them in a petition for review of the mediator's report, should it be necessary that a report issue, and in the appellate courts on review of the Board's decision on the report. (See Lab. Code §§ 1164.3 and 1164.5.)

CASE SUMMARY

D'ARRIGO BROS. CO.
(UFW)

33 ALRB No. 1
Case No. 2007-MMC-01

Background

On January 11, 2007, the United Farm Workers of America (UFW) filed a declaration with the Agricultural Labor Relations Board (Board) pursuant to Labor Code section 1164 et seq. and Board Regulation 20400 indicating that the UFW and D'Arrigo Bros. Co. of California (Employer or D'Arrigo) have failed to reach a collective bargaining agreement and requesting that the Board issue an order directing the parties to mandatory mediation and conciliation. On January 17, 2007, the Employer timely filed an answer to the UFW's declaration pursuant to section 20401 of the Board's regulations. D'Arrigo contested two of the statutory prerequisites, denying the assertions that it had committed an unfair labor practice within the meaning of section 1164.11, subdivision (b), and that the parties have not previously had a binding contract within the meaning of section 1164.11, subdivision (c). D'Arrigo also argued that the mediation and conciliation statute is unconstitutional.

Board Decision

The Board first noted that D'Arrigo's constitutional arguments have been considered and rejected by the courts (*Hess Collection Winery* v. *ALRB* (2006) 140 Cal.App.4th 1584.) and that, in any event, the Board has no authority to declare a statute unconstitutional (Cal. Const., art. 3, sec. 3.5.) The Board took official notice of four cases, now final, in which the Board found that D'Arrigo had committed various unfair labor practices. As a result, it was not necessary to rely on the three cases cited by the UFW, one of which was not yet final. While the Board found that the parties did have a "binding contract" prior to the passage of the Agricultural Labor Relations Act (ALRA), the Board also concluded that the Legislature intended the no binding contract prerequisite to refer only to a contract entered into after certification of the labor organization under the provisions of the ALRA. The Board reached this conclusion after examining the pertinent provision in the context of the statute as a whole and considering legislative history. The Board, therefore, directed the parties to proceed to mandatory mediation and conciliation.

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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.

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