

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RICHARD’S GROVE & SARALEE’S)	
VINEYARD, INC.,)	
)	Case No. 07-RD-2-SAL
Employer,)	
)	33 ALRB No. 7
and)	
)	(December 28, 2007)
VICTORINO VELASQUEZ,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA,)	
)	
<u> Certified Bargaining Representative.</u>)	

DECISION AND ORDER

A petition for decertification in the above-entitled case was filed on July 19, 2007, and the election was held on July 26, 2007. The tally of ballots showed 39 votes for No Union, 6 votes for the United Farm Workers of America (UFW), the incumbent collective bargaining representative, and 3 unresolved challenged ballots. On August 2, 2007, the UFW filed an objection to the election alleging that agents of the employer, Richard’s Grove & Saralee’s Vineyard, Inc. (hereafter Employer), engaged in misconduct prior to the election that interfered with the free choice of voters. The UFW also filed an unfair labor practice charge, Case No. 07-CE-27-SAL, alleging that the same conduct constituted a violation of the Agricultural Labor Relations Act (ALRA).

On October 4, 2007, the Regional Director dismissed the unfair labor practice charge, after concluding that his investigation did not provide evidence sufficient to support the allegations in the charge. The UFW did not appeal the dismissal to the General Counsel himself.¹ On October 23, 2007, the Executive Secretary issued the attached order dismissing the election objection. Relying on *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11, the Executive Secretary concluded that where, as here, the evaluation of the merit of election objections is dependent on the resolution of issues in a pending unfair labor practice charge, the Agricultural Labor Relations Board (Board or ALRB) must defer to the exclusive authority of the General Counsel regarding the investigation of charges and the issuance of complaints. In this case, the Executive Secretary determined that the General Counsel's dismissal of the unfair labor practice charge alleging the same conduct in turn required the dismissal of the related election objection. The UFW timely filed a request for review of the dismissal of the election objection. The UFW contends that the Board should reconsider the holding in *Mann Packing Co., Inc.* or, alternatively, construe it in a manner that would make it inapplicable to the present case.

¹ Hereafter, references to the "General Counsel" regarding the authority over unfair labor practice matters include both the General Counsel himself and the regional directors who have the delegated responsibility to determine in the first instance whether to issue a complaint. The decision not to issue a complaint is not subject to judicial review; however, a narrow exception has been recognized allowing challenge by extraordinary writ where the dismissal raises a colorable claim of deprivation of a constitutional right, the General Counsel exceeds a specific grant of authority, or the General Counsel relies on an erroneous construction of the statute. (*Belridge Farms v. ALRB* (1978) 21 Cal.3d 551.)

We find that the Executive Secretary properly applied the principles of *Mann Packing Co., Inc.* in determining in this instance that the dismissal of the related unfair labor practice charge was fatal to the election objection. The General Counsel's refusal to issue a complaint on the basis that there was insufficient evidence to prove the allegation in the unfair labor practice charge precludes relitigation of that issue in a representation proceeding.

DISCUSSION

The *Mann Packing Co., Inc.* Principle

In *Mann Packing Co., Inc.*, the Board followed the National Labor Relations Board's (NLRB) holding in *Times Square Stores Corporation* (1948) 79 NLRB 361 (hereafter "*Times Square Stores*") concerning the interplay of the Board's authority in representation proceedings and the General Counsel's authority regarding parallel unfair labor practice allegations. In *Times Square Stores*, the NLRB concluded that the General Counsel's exclusive authority to investigate unfair labor practices and determine if a complaint should issue precluded the adjudication of the same issue in a representation proceeding. Specifically, where the General Counsel had declined to issue a complaint alleging that a strike was precipitated by unfair labor practices, the NLRB found itself precluded from independently determining if the strike was an economic or unfair labor practice strike and, thus, whether the strikers were eligible to vote under eligibility rules prevailing at that time.

The NLRB's holding was based on section 3(d) of the National Labor Relations Act (NLRA; 29 U.S.C. § 151 et seq.). That section, which is essentially

identical to section 1149 of the ALRA, provides that the General Counsel "shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board." (Emphasis added.) To clarify that the General Counsel's authority regarding unfair labor practice charges was exclusive and outside Board control, the NLRB cited the Congressional Conference Report that explained section 3(d), added by amendment in 1947.² That report stated that the General Counsel is to have "the final authority to act in the name of, but independently of any direction, control, or review by the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board." (H.Con.Rep. No. 510, on H.R. No. 3020, 80 Cong., 1st Sess., p. 37.)

The United States Supreme Court in *National Labor Relations Board v. Sears, Roebuck* (1975) 421 U.S. 132 provided perhaps the best description of the difference between the roles of the national board and NLRB General Counsel. These same roles are mirrored in the ALRA:

Although Congress has designated the Board as the principal body which adjudicates the unfair labor practice case based on a charge, 29 U.S.C. § 160, the Board may adjudicate only upon the filing of a "complaint"; and Congress has delegated to the Office of General Counsel "on behalf of the Board" the

² When the NLRA was originally enacted, it granted the Board plenary authority over all aspects of unfair labor practice disputes such that the Board controlled not only the filing of complaints, but also their prosecution and adjudication. (See *National Labor Relations Board v. United Food and Commercial Workers* (1987) 484 U.S. 112, 117-118). This structure was altered by the Labor Management Relations Act, 1947 (LMRA), also known as the Taft-Hartley Act, resulting in the present language of section 3(d).

unreviewable authority to determine whether a complaint should be filed. [citations omitted] In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of the General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

(National Labor Relations Board v. Sears, Roebuck (1975) 421 U.S. 132, 138-139).

The import of the *Times Square Stores* and *Mann Packing Co., Inc.* cases is that in representation proceedings the Board will defer to the General Counsel's resolution of the investigation of an unfair labor practice charge where the merits of the issues necessarily decided by the investigation also are determinative of the merits of related issues in the representation case.³ In other words, it is a form of issue preclusion. For example, where voter eligibility depends on whether the voter was discharged in retaliation for engaging in protected activity and the General Counsel declines to issue a complaint on that issue, the Board would be precluded from litigating that issue in a challenged ballot proceeding. Similarly, in those instances where alleged misconduct prior to an election by its nature also would constitute an unfair labor practice if it in fact occurred, the General Counsel's refusal to issue a complaint based on insufficient evidence to substantiate the alleged conduct would preclude litigation of that issue in an election objection proceeding.

³ See generally *Oceanview Produce Co.* (1998) 24 ALRB No. 6 at p. 3, citing *Mann Packing Co., Inc.* for the proposition that it is standard practice for the Board to defer to the exclusive authority of the General Counsel in such circumstances.

But it is more than the mere existence of identical issues that triggers this rule. As the Board explained in *Mann Packing Co., Inc.*, it is well established that conduct sufficient to warrant the setting aside of an election does not necessarily constitute an unfair labor practice, and not all unfair labor practices necessarily constitute conduct sufficient to set aside an election. (See, e.g., *ADIA Personnel Services* (1997) 322 NLRB 994, fn. 2.) Thus, it is only where the issues in the two proceedings are coextensive in terms of their legal merit that the Board is bound by the General Counsel's determination. And, for example, it is only where the preclusion of relitigation of the issue is fatal to the election objection that the Board must in turn dismiss the objection. This detailed analysis must be applied whenever the application of *Mann Packing Co., Inc.* is considered.

In *Mann Packing Co., Inc.*, the Board also was careful to point out that in the absence of potential to interfere with the General Counsel's authority, such as where no related unfair labor practice charges have been filed, the Board retains its full authority to adjudicate all issues involving election objections and challenged ballots. Recently, in *Bayou Vista Dairy* (2006) 32 ALRB No. 6, the Board further explained that where a complaint was withdrawn and the underlying unfair labor practice charge dismissed pursuant to a settlement agreement without any admission of liability, it was the legal equivalent of no charge having been filed and the issue could be litigated in election objection proceedings. By extension, the withdrawal of a charge also would not preclude the Board from litigating a parallel issue in an election proceeding.

The UFW's Request to Overrule or Restrict *Mann Packing Co., Inc.*

The UFW first argues that the holding in *Mann Packing Co., Inc.* conflicts with the statutory and regulatory framework for the evaluation of election objections. Specifically, the UFW cites the statutory right to file election objections (see ALRA § 1156.3, subd. (c)) and notes that the regulatory framework requires that the Board evaluate the objections. Further, the UFW asserts that deferring to the jurisdiction of the General Counsel does not fall within the enumerated grounds for dismissal of election objections listed in Regulation 20365, subdivisions (c) and (d).⁴ As a result, the UFW claims, the application of the *Mann Packing Co., Inc.* rule constitutes improper rulemaking in violation of the Administrative Procedures Act.

We do not agree. Section 1156.3, subdivision (c) provides a right to file election objections, inter alia, alleging misconduct affecting the results of the election, and requires that they be evaluated by the Board. Regulation 20365 sets forth the procedure for evaluating objections. Neither presents any conflict with the principles of *Mann Packing Co., Inc.*

Regulation 20365, subdivision (c)(2) requires a party objecting to the conduct of the election or to misconduct allegedly affecting the results of the election to provide declarations setting “forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election.” (Emphasis added.) Subdivision (d) provides that the Executive Secretary shall dismiss any

⁴ The Board's regulations are codified at Title 8, California Code of Regulations, section 20100, et. seq.

objections that fail to meet the requirements of subdivisions (a), (b), or (c).⁵ A dismissal due to the application of *Mann Packing Co., Inc.*, i.e., by precluding relitigation of issues decided by the General Counsel pursuant to his exclusive authority, is one way in which the allegations are evaluated and found to have been controverted. Moreover, the Board's regulations largely are procedural in nature and do not comprehensively incorporate governing legal principles. The Board has the discretion to create rules either through formal rulemaking or through case adjudication. (*Agricultural Labor Relations Board v. Superior Court* (1977) 16 Cal.3d 392, 413; *California Coastal Farms, Inc. v. Agricultural Labor Relations Board* (1984) 111 Cal.App.3d 734, 739.)

Next, the UFW argues that textual differences between the ALRA and NLRA render *Times Square Stores* inapplicable precedent.⁶ As noted above, the pertinent language in the two acts regarding the General Counsel's authority is essentially identical. The UFW asserts, however, that other differences in the two statutes require different readings of that language. The UFW first cites the fact that while the filing of election objections is specifically mentioned in the ALRA, the NLRB's process is a

⁵ As the UFW points out in its request for review, section 1156.3, subdivision (c) has been construed by the courts to allow the Board to dismiss objections without a hearing where it is determined that the objecting party has failed to present a prima facie case for setting aside the election. Pursuant to Regulation 20365, the Executive Secretary is delegated the authority in the first instance, subject to Board review, to determine if election objections should be dismissed without a hearing.

⁶ Pursuant to ALRA section 1148, the ALRB must follow applicable precedents under the NLRA. Strictly speaking, the Board in *Mann Packing Co., Inc.* found it unnecessary to conclude whether *Times Square Stores* was applicable precedent within the meaning of section 1148. Rather, the Board merely construed the pertinent language as mandating the same result. (*Mann Packing Co., Inc.*, 15 ALRB No. 11, at p. 8, fn. 8.)

creature of regulation. From this, the UFW argues that, unlike the NLRB, the ALRB cannot apply “discretionary considerations” such as those in *Times Square Stores*.

The principle enunciated in *Times Square Stores* and followed in *Mann Packing Co., Inc.* is not a “discretionary consideration.” Rather, it constitutes fundamental statutory construction reconciling the authorities of the General Counsel and the Board. Moreover, as discussed above, there is no conflict between *Mann Packing Co., Inc.* and the language of section 1156.3, subdivision (c) providing for the filing and evaluation of election objections. The inclusion of that language in the ALRA is one of several examples of principles or procedures created by NLRB case law or regulations that were codified in whole or in part in the ALRA.⁷ Their inclusion in the ALRA reflects the California Legislature’s general acceptance of related NLRB precedent, not its rejection. The Board may exercise reasonable discretion in establishing the process and standards utilized in evaluating election objections as long as there is no conflict with the statute, and there is none in this instance.

The UFW also cites as a pertinent difference the fact the NLRB has delegated to its regional directors the role of evaluating election objections in the first instance, while that task is delegated to the Executive Secretary pursuant to ALRB regulations. How this latter difference bears on the proper interpretation of section 1149 is unclear, and the UFW has provided no explanation.

The UFW also argues that the *Mann Packing Co., Inc.* rule improperly gives the General Counsel the authority to control the outcome of representation

⁷ Contract bar rules are another prime example. (See Lab. Code § 1156.7).

proceedings, thus interfering with the Board's exclusive authority over representation matters. However, this issue was central to the analysis in *Times Square Stores* (79 NLRB at pp. 364-365) and *Mann Packing Co., Inc.* (15 ALRB at pp. 7-8). In both cases, it was determined that the General Counsel's final authority over the investigation of unfair labor practice charges and the issuance of complaints acts as a narrow limitation on the Board's exclusive authority over representation matters. We do not find a sufficient basis for revisiting that holding. *Mann Packing Co., Inc.* is settled law that is neither manifestly incorrect, nor has it proven unworkable in practice.⁸

Lastly, the UFW argues that the principles of *Mann Packing Co., Inc.* should be construed narrowly so as to apply solely in circumstances extant in that case, namely, that the disputed issue must pertain to voter eligibility and be tied to an unfair labor practice proceeding where the issue has been fully litigated. *Mann Packing Co., Inc.* indeed was a challenged ballot case and did involve an issue that had been litigated, though in an arbitration proceeding, not an ALRB proceeding. The General Counsel dismissed the charge because he found that the same issue, an alleged unilateral change in subcontracting that affected the voting eligibility of laid off employees, had been fully litigated in the arbitration proceeding in which it was found that the subcontracting was not in violation of the parties' collective bargaining agreement.

⁸ In those instances where a complaint issues and, accordingly, the matter is set for hearing, it might be argued that the time taken for investigation of the unfair labor practice charge adds delay to the process. However, where the charge is dismissed and the dismissal requires in turn the dismissal of the related election objection, that process is often more speedy than litigation of an election objection. In any event, a party could avoid any potential delay by opting to file the allegation solely as an election objection.

While both the *Times Square Stores* and *Mann Packing Co., Inc.* involved voter eligibility, neither case provides any indication that the principles would not apply equally in election objections cases. In the analysis in both cases the two boards refer to “representation” issues or proceedings. And, in fact, both boards have consistently applied these principles in election objections cases. (See, e.g., *ADIA Personnel Services* (1997) 322 NLRB 994; *Bayou Vista Dairy* (2006) 32 ALRB No. 6.) Further, there is no legal basis for applying these principles in challenged ballot cases but not in election objection cases.

Nor has having the unfair labor practice issue fully litigated ever been a requirement under either Board’s jurisprudence. In *Times Square Stores* there had been no adjudication, but merely a decision by the General Counsel to dismiss the parallel charge. As noted above, *Mann Packing Co., Inc.* involved the rare circumstance where the issue had been litigated in arbitration. In a passage from *Mann Packing* relied on by the UFW, the Board cited as an example of the same principles being applied a case where there had been an adjudication, *Agri-Sun Nursery* (1987) 13 ALRB No. 19. Nowhere else in the Board’s decision in *Mann Packing Co., Inc.* is there any indication that the principles of *Times Square Stores* apply only where the issue had been fully litigated. Further, the citation to *Agri-Sun Nursery* is incorrect. In its final disposition of two challenged ballots in that case the Board relied on a prior Board decision, not on a determination by the General Counsel. However, in the earlier procedural stages of that case, the resolution of the two challenges was held in abeyance pending the General Counsel’s determination whether to issue a complaint. (*Agri-Sun Nursery* 13 ALRB at

pp. 1-2.) Thus, in actuality *Agri-Sun Nursery* provides no support for the notion that *Mann Packing* principles apply only where there has been an adjudication.

Finally, adoption of a fully litigated requirement as urged by the UFW would render the rule so narrow as to be meaningless. The deferral to arbitration scenario that existed in *Mann Packing Co., Inc.* is a rare one. It is difficult to conceive of any other scenarios involving prior adjudications to which the principles of *Mann Packing Co., Inc.* might apply. Any other prior adjudications would be by the Board or by another administrative or judicial forum. In such circumstances, principles of collateral estoppel would preclude relitigation of the same issues, and would in no way implicate the authority of the General Counsel. Therefore, the restrictions urged by the UFW would render the doctrine a virtual nullity.

We find that the Executive Secretary properly applied the principles of *Mann Packing Co., Inc.* in determining in this instance that the dismissal of the related unfair labor practice charge was fatal to the election objection. The misconduct alleged in the election objection, threats of discipline for wearing or displaying union buttons or other insignia, if found to have occurred, by its nature also would have constituted an unfair labor practice. Therefore, the General Counsel's refusal to issue a complaint on the basis that there was insufficient evidence to prove the allegation precludes relitigation of that issue in an election objection proceeding.

ORDER

For the reasons stated above, the UFW's request for review of the Executive Secretary's dismissal of the UFW's election objection is DENIED. The Executive Secretary shall issue a Certification of Results of Election.

DATED: December 28, 2007

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	Case No. 07-RD-2-SAL
RICHARD'S GROVE & SARALEE'S)	
VINEYARD, INC.,)	
)	ORDER DISMISSING
Employer,)	ELECTION OBJECTION;
)	NOTICE OF OPPORTUNITY
and)	TO FILE REQUEST
)	FOR REVIEW
VICTORINO VELASQUEZ,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA,)	
)	
<u>Certified Bargaining Representative.</u>)	

PLEASE TAKE NOTICE that the election objection filed by the United Farm Workers of America, AFL-CIO (UFW), dated August 2, 2007, in the above-captioned matter is hereby DISMISSED. Where, as here, evaluation of election objections is dependent on the resolution of issues related to pending unfair labor practice charges, the Board must defer to the exclusive authority of the General Counsel regarding the investigation of charges and issuance of complaints. (See *Mann Packing Company, Inc.* (1989) 15 ALRB No. 11.) In this case, the election objection filed by the UFW mirrors the allegations in unfair labor practice charge 07-CE-27-SAL that was filed by the UFW. This charge was dismissed by the Regional Director on October 4, 2007 for

lack of evidence and the union did not seek review of this decision. Accordingly, the unfair labor practice charge having being found to lack merit, the overlapping election objection raising the same issue is hereby also dismissed in accordance with *Mann Packing Company, Inc., supra*.

PLEASE TAKE FURTHER NOTICE that, pursuant to Regulation 20393(a),¹ the Certified Bargaining Representative may file with the Board a request for review of the dismissal of its election objection within five (5) days of the issuance of this Order. The five-day filing period is calculated in accordance with Regulation 20170. Accordingly, the request for review is due on November 1, 2007.

Dated: October 23, 2007

J. ANTONIO BARBOSA
Executive Secretary, ALRB

¹ The ALRB's regulations are codified at Title 8, Cal. Code Regs., sec. 20100, et seq.

CASE SUMMARY

RICHARD'S GROVE & SARALEE'S VINEYARD, INC.
(United Farm Workers of America)

33 ALRB No. 7
Case No. 07-RD-2-SAL

Background

A petition for decertification was filed on July 19, 2007, and the election was held on July 26, 2007. The tally of ballots showed 39 votes for No Union, 6 votes for the United Farm Workers of America (UFW), and 3 unresolved challenged ballots. The UFW filed an objection to the election alleging that agents of the employer, Richard's Grove & Saralee's Vineyard, Inc. (hereafter Employer), engaged in misconduct prior to the election that interfered with the free choice of voters. The UFW also filed an unfair labor practice charge alleging that the same conduct constituted a violation of the Agricultural Labor Relations Act (ALRA). On October 4, 2007, the Regional Director dismissed the unfair labor practice charge, due to insufficient evidence. The UFW did not exercise its right to appeal the dismissal to the General Counsel himself. On October 23, 2007, the Executive Secretary issued an order dismissing the election objection. Relying on *Mann Packing Co., Inc.* (1989) 15 ALRB No. 11, the Executive Secretary concluded that where, as here, the evaluation of the merit of election objections is dependent on the resolution of issues in a pending unfair labor practice charge, the Board must defer to the exclusive authority of the General Counsel regarding the investigation of charges and the issuance of complaints. The UFW timely filed a request for review of the dismissal of the election objection. The UFW contends that the Board should reconsider the holding in *Mann Packing Co., Inc.* or, alternatively, construe it in a manner that would make it inapplicable to the present case.

Board Decision

The Board declined to overrule *Mann Packing Co., Inc.*, finding that it is settled law that is neither manifestly incorrect, nor has it proven unworkable in practice. The Board observed that rule reflects a reconciliation of the authority of the General Counsel and the Board that is consistent with both the ALRA and its implementing regulations. The Board also rejected the UFW's suggestion that *Mann Packing* be restricted to situations involving voter eligibility and prior adjudications. The Board found that the principles of that case have equal bearing in election objections cases and that a prior adjudication requirement has never existed and would render the rule meaningless.

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