STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC.,	)	Case Nos. 2011-MMC-001
Employer,	)	38 ALRB No. 7
	)	(38 ALRB No. 2)
and	)	(37 ALRB No. 5)
UNITED FARM WORKERS OF AMERICA,	)	August 3, 2012
Petitioner.	)	

DECISION AND ORDER

On November 17, 2011, the United Farm Workers of America (UFW) filed with the Agricultural Labor Relations Board (ALRB or Board) a declaration requesting mandatory mediation and conciliation (MMC) pursuant to Labor Code section 1164 and Title 8, California Code of Regulations section 20400. On December 23, 2011, the Board issued *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, in which it found that the request for MMC met all other statutory prerequisites but that there were material facts in dispute regarding whether the parties previously had a binding contract between them that precluded referral to MMC. Accordingly, a hearing was held on February 8, 2012 and the Administrative Law Judge (ALJ) issued his decision on March 6, 2012. In that decision, the ALJ concluded that there was no binding agreement because the intent and belief of both parties was that execution of the agreement was required to manifest final consent to its terms. San Joaquin Tomato Growers, Inc. (SJTG) filed exceptions to the ALJ's decision. On March 29, 2012, the Board issued *San Joaquin Tomato Growers,*

Inc. (2012) 38 ALRB No. 2, affirming the ALJ's decision and referring the parties to MMC.

The parties engaged in the MMC process but were unable to agree on all terms of a collective bargaining agreement, thereby necessitating a report be issued by the mediator fixing the disputed terms. On July 16, 2012, Mediator Matthew Goldberg issued his report. SJTG timely filed with the Board a petition for review of the report. SJTG takes issue with various findings of the mediator regarding the wage and duration provisions of the contract.

DISCUSSION

Pursuant to Labor Code section 1164.3, subdivision (a), the Board may accept for review those portions of the petition for which a prima facie case has been established that (1) a provision of the collective bargaining agreement set forth in the mediator's report is unrelated to wages, hours, or other conditions of employment within the meaning of Section 1155.2, (2) a provision of the collective bargaining agreement set forth in the mediator's report is based on clearly erroneous findings of material fact, or (3) a provision of the collective bargaining agreement set forth in the mediator's report is arbitrary or capricious in light of the mediator's findings of fact.

SJTG takes exception to six findings and conclusions of the mediator. SJTG's first two exceptions are to comments by the mediator that 1) SJTG has already demonstrated that it can pay the $0.61 harvest piece rate and 2) SJTG can adjust tomato prices to offset wage increases.

As to the first comment, SJTG argues it was forced by a labor shortage to pay the $0.61 rate and, due to sales and price uncertainties, cannot measure the economic feasibility of that rate until the season is over. Even if SJTG's assertion is accurate, it is paying that rate already and used that existing pay rate in its final wage proposals. Thus, it has agreed to that rate, making the mediator's comment of no import. SJTG's characterization of the second comment is exaggerated, as the mediator simply said that there was no evidence that "price adjustments could not be made to offset at least part of the increases." He did not suggest, as SJTG argues, that it can control the market price for round green tomatoes. We find that SJTG did not establish a prima facie case that the mediator's statements constitute clearly erroneous findings of material fact or were arbitrary or capricious, or that any provisions of the report were improperly based on those statements.

Next, SJTG contends that it was clear error to use the wage increases in the Pacific Triple E contract as a guide when the rates imposed on SJTG will never be reached under the three years of the Pacific Triple E contract. It is true that the picking piece rates in the Pacific Triple E contract are lower all three years than in the first year of the SJTG contract, though daily rates are higher. However, the mediator properly began with the existing SJTG piece rate of $0.61, which reflects present labor market conditions that SJTG's competitors also will face in order to secure sufficient labor. The mediator explained that, consistent with the approach reflected in the Pacific Triple E contract, increases in the second and third years were warranted to keep pace with the cost of living and to keep wages competitive. The mediator's explanation for the modest

increases, particularly with the correction or clarification of the apparent arithmetic error discussed below, is not based on clearly erroneous findings of fact or arbitrary or capricious.

However, in light of the mediator's stated intent to track the wage increases in the Pacific Triple E contract, there appears to be an arithmetic error. The Pacific Triple E contract shows a $0.02 increase in the second year and a $0.01 increase in the third year, increments that also are reflected in the mediator's report. However, the Pacific Triple E contract sets forth the rates for two buckets ($1.12, $1.14, $1.15), while the mediator's report sets forth the rate for one bucket ($0.61, $0.63, $0.64). Thus, the Pacific Triple E increase actually is $0.01 per bucket for the second year and $.005 per bucket for the third year. Therefore, if the mediator's intention was to track the Pacific Triple E contract's piece rate increases, the rates for SJTG should be $0.62 for the second year and $0.625 for the third year. Accordingly, we grant review as to the picking piece rate increases for the second and third years so that the mediator may clarify his intent as to the level of the increases.

SJTG excepts to two aspects of the "after 6th trailer" bonus provision for dumpers, punchers, and tractor drivers, 1) the inclusion of the tractor drivers and 2) the amount provided for the punchers. SJTG asserts that tractor drivers have never been included in the bonus program because they are not part of the crews for which the incentives are designed. As explained by SJTG, the tractor drivers pull the loaded trailers of tomatoes from the field to the roadside for transport by truck to the packing shed and move empty trailers into position in the fields. The tractor drivers are not tied to any one

crew, but perform their work for all crews working in a field. SJTG also included a table, not included in the official record submitted to the Board purporting to show the bonus rates for 2010 and 2011. The table has the rates for dumpers ($10 each year) and punchers ($0 in 2010 and $5 in 2011) and says "not applicable" under "Tractor Drivers." The bonus provision in the mediator's report has $11.00 for each of the three classifications, with increases in the second and third years.

The mediator explained in his report that the bonus program should be continued to avoid inappropriate wage concessions. He did not address the propriety of the inclusion of the classifications listed and the record before the Board does not include evidence of a bonus having been paid previously to the tractor drivers. Rather, it appears that the mediator mirrored the UFW's bonus proposal, which included tractor drivers, albeit at lower rates. Because the inclusion of the tractor drivers in the bonus program provision appears to be clearly erroneous, the Board shall grant review on this issue so that the mediator may consider whether to modify the provision as to the tractor drivers.

We shall not grant review on the amount provided for the punchers because SJTG has failed to explain why the punchers should receive a lower amount, nor has it cited any relevant evidence in the record. As noted above, Labor Code section 1164.3, subdivision (a), requires a party seeking to review to establish a prima facie case that review is warranted under the narrow standard of review set forth in that section.

Lastly, SJTG excepts to two aspects of the mediator's report regarding the duration provision of the contract. First, relative to the three-year duration of the contract, SJTG objects to the mediator's comments regarding the parties' bargaining

history, the failure to reach a contract, and SJTG's unilateral implementation of changes in wage rates. In light of this history, the mediator found it appropriate to have a three-year contract with set wage rates. The history cited by the mediator is well-known to the Board and the Board finds it to be accurate. Nor does the Board find any fault with the mediator's conclusion that the parties' bargaining relationship would benefit greatly by having the stability afforded by a three-year contract with set wage rates. Therefore, review on this issue is not warranted.

Second, SJTG objects to the mediator making the contract retroactive to the start of the tomato picking season, June 12, 2012. As the mediator pointed out, SJTG already has made the wage rates effective unilaterally, as the first year rates are those now being paid. SJTG asserts that the MMC provisions do not authorize or provide for retroactivity. While pursuant to Labor Code section 1164.3 an imposed contract becomes effective upon an order by the Board confirming a mediator's report or upon a report becoming final without review being sought, this does not prevent the imposed contract from having retroactive provisions. Indeed, it is not uncommon for parties to negotiate provisions, particularly regarding wages, that are retroactive to a date prior to the execution of the contract. Nor is there anything inappropriate in a party proposing a retroactive provision and the mediator determining that such a provision is superior to the opposing view of the other party. In other words, we find no basis in law for concluding that retroactive provisions that normally may be part of collective bargaining agreements are precluded from inclusion in contracts imposed in the MMC process.

SJTG also points out that some provisions, such as the Union Security provision, cannot be applied retroactively. The mediator himself recognized this problem, naming the Seniority and Grievance and Arbitration articles as non-exclusive examples of provisions that could not as a practical matter be applied retroactively. The mediator nonetheless concluded that the agreement should otherwise be applied retroactively, with the implication that the parties should be able to readily identify and agree upon which articles can or cannot be applied retroactively. We do not find that conclusion to be clearly erroneous or arbitrary or capricious.

ORDER

In accordance with the discussion above and pursuant to Labor Code section 1164.3, subdivisions (b) and (c), the Board grants review so that the mediator may clarify his intent as to 1) the amount of the picking piece rate increases in the second and third year of the contract and 2) the inclusion of the tractor drivers in the bonus program. After meeting with or seeking further evidence from the parties as he deems necessary, the mediator shall issue a second report clarifying or modifying the two provisions or explaining why they have not been modified. Pursuant to Labor Code

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section 1164.3, subdivision (b), the provisions of the mediator's first report that are not the subject of SJTG's petition for review shall go into effect as a final order of the Board.

DATED: August 3, 2012

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

SAN JOAQUIN TOMATO GROWERS, INC. (United Farm Workers of America)

38 ALRB No. 7
Case No. 2011-MMC-001

Background

On November 17, 2011, the United Farm Workers of America (UFW) filed with the Agricultural Labor Relations Board (ALRB or Board) a declaration requesting mandatory mediation and conciliation (MMC) pursuant to Labor Code section 1164. On December 23, 2011, the Board issued San Joaquin Tomato Growers, Inc. (2011) 37 ALRB No. 5, in which it found that the request for MMC met all other statutory prerequisites but that there were material facts in dispute regarding whether the parties previously had a binding contract between them that precluded referral to MMC. Accordingly, a hearing was held on February 8, 2012 and the Administrative Law Judge (ALJ) issued his decision on March 6, 2012. In that decision, the ALJ concluded that there was no binding agreement because the intent and belief of both parties was that execution of the agreement was required to manifest final consent to its terms. San Joaquin Tomato Growers, Inc. (SJTG) filed exceptions to the ALJ's decision. On March 29, 2012, the Board issued San Joaquin Tomato Growers, Inc. (2012) 38 ALRB No. 2, affirming the ALJ's decision and referring the parties to MMC.

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Board Decision

In light of the mediator's stated intent to track wage increases in the recently negotiated Pacific Triple E contract, there appeared to be an arithmetic error based on awarding a $0.02 increase per bucket in the second year and a $0.01 increase in the third year when the corresponding $0.02 and $0.01 increases in the Pacific Triple E contract were for two buckets. The Board also found that the inclusion of tractor drivers in an incentive program, without explanation for their inclusion, appeared to be clearly erroneous. Therefore, the Board found that granting review was warranted so that the mediator could clarify his intent as to 1) the amount of the picking piece rate increases in the second and third year of the contract and 2) the inclusion of tractor drivers in a bonus (incentive) program. The Board found no basis for review regarding SJTG's other contentions.

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