Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case No. 2013-MMC-003
	)	
	)	
Employer,	)	39 ALRB No. 16
	)	(39 ALRB No. 13)
and	)	(39 ALRB No. 11)
	)	(39 ALRB No. 5)
UNITED FARM WORKERS OF AMERICA,	)	
	)	(October 25, 2013)
	)	
Petitioner.	)	

DECISION AND ORDER

The United Farm Workers of America ("UFW") filed a declaration on March 29, 2013 requesting Mandatory Mediation and Conciliation ("MMC") with the employer, Gerawan Farming, Inc. ("Gerawan"), pursuant to Labor Code section 1164, subdivision (a)(1). On April 16, 2013, the Board issued *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, finding that all statutory prerequisites had been met and referring the parties to the MMC process. The parties met with mediator Matthew Goldberg on several occasions in June and August of this year, but were unable to voluntarily agree to all terms of a collective bargaining agreement. Accordingly, pursuant to the authority of Labor Code section 1164, subdivision (d), the mediator issued a report, dated September 28, 2013, fixing the terms of a collective bargaining agreement.

On October 15, 2013, Gerawan filed a Petition and Brief in Support for Request for Review of the Mediator's Report. In its petition, Gerawan contests the propriety of numerous provisions, including wage rates, in the collective bargaining

agreement fixed by the mediator.[1] Gerawan also argues that the Board erred previously when 1) it determined that all statutory prerequisites for referral to MMC had been met, and 2) it excluded Gerawan workers from the MMC proceedings. Lastly, Gerawan asserts that the MMC process suffers from several constitutional infirmities.

Gerawan's arguments regarding statutory prerequisites were addressed in *Gerawan Farming, Inc*. (2013) 39 ALRB No. 5 and need not be reiterated here. The exclusion of workers from the MMC proceedings was addressed by the Board in *Gerawan Farming, Inc.* (2013) 39 ALRB No. 13. No variance from that analysis is necessary to dispose of Gerawan's identical contentions here. With regard to alleged constitutional infirmities, as the Board observed earlier in these proceedings, pursuant to Article 3, section 3.5 of the California Constitution it has no authority to declare a statute unconstitutional or to refuse to enforce it on that basis. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, p. 4.)

Pursuant to Labor Code section 1164.3, subdivision (a), the Board may accept for review those portions of a petition for review for which a prima facie case has

[1] While not entirely clear, Gerawan seems to suggest that there is some confusion over the accuracy of the matrix reflecting the parties' final positions that the mediator utilized and is attached to his report. In any event, there is no merit to such a contention, as a review of the matrix attached to the report reveals that it is identical to the final positions of the parties contained in Gerawan's final submission to the mediator, dated August 30, 2013 and entitled "Positions of the Parties on Outstanding Issues and Gerawan's Supporting Arguments." Gerawan also appears to assert that it was improper for the mediator to require the parties to submit various documents to the Board so as to complete the record rather than the mediator providing those documents to the Board directly, but Gerawan fails to explain how it was prejudiced by that action so it need not be addressed further. In any event, the Board has received the entire record.

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 finding 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.

After careful evaluation of Gerawan's contentions regarding the numerous provisions of the mediator's report disputed in the petition for review, we grant review only as to the provisions discussed below. We will remand this matter to the mediator, in accordance with Labor Code section 1164.3, subdivision (c). In all other respects we find that Gerawan has failed to show that the mediator's findings of material fact are clearly erroneous, or that the provisions fixed in his report are arbitrary or capricious in light of his findings of fact.

Article I—Recognition

Section 4 — The mediator accepted what he characterized as the UFW's proposed text, stating that it requires both parties not to disparage or undermine the other. However, as Gerawan points out, the actual language of the UFW's proposal restricted only the employer: "The Company, its supervisors, and/or agents will not communicate with employees in any way to disparage the union or undermine its status as exclusive representative of employees, nor will the company disparage or undermine union membership." In any event, Gerawan's additional argument renders moot the failure to include language creating mutual obligations.

As Gerawan asserts, the prohibition on disparagement is not consistent with an employer's explicit free speech rights under the ALRA, which mirror free speech rights under the U.S. and California Constitutions. Section 1155 provides:

> The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit.

As noted by the mediator, such language does appear in some collective bargaining agreements. However, this merely illustrates that an employer is free to agree to restrict its free speech rights and be subject to breach of contract remedies. It is entirely another matter for the Board or a mediator, in fixing the terms of an imposed contract, to require an employer to waive, in whole or in part, its statutory rights. We are aware of no basis for the Board to assert such authority. Therefore, the language regarding disparagement must be stricken with the issue remanded to the mediator to determine an appropriate provision, if any.

Article V—Layoffs and Recalls

Section 3—Permanent Reduction in Bargaining Unit Jobs — The UFW proposed that in the event of a permanent reduction in bargaining unit jobs, employees be laid off in order of seniority, while Gerawan proposed meeting and discussing particular issues concerning the reduction, with Gerawan otherwise complying with applicable state and federal laws concerning permanent reductions in force. The mediator determined that the UFW's proposal needed to be modified to account for use of skill and ability in the layoff of cultural employees. He opined that the provision should provide that cultural labor should be laid off in order of seniority when skill and ability are equal, as this provides a measure of job

security while recognizing the contribution of their labor and their value to the company. The mediator concluded that the provision should read as follows:

> In the event there is a permanent reduction of bargaining unit work, the Company will notify the Union, and will negotiate with the Union over the effects of any such reduction. If the reduction occurs among cultural labor employees, those employees will be laid off in order of their Company length of service with those with the lowest amount of service being laid off first.

As Gerawan points out, the language set forth by the mediator reflects only seniority as a factor to be considered in permanent reduction of cultural employees. It appears that the mediator simply failed to add a clause regarding equal skill and ability to conform to his earlier discussion. Accordingly, we remand this provision to the mediator to allow him to clarify his intent.

Article IX—Discipline and Discharge

Section 4—Expungement of Warning Notices — The UFW proposed that warning notices have no force or effect after six months from their issuance, while Gerawan rejected this proposal. The mediator observed that two of the contracts in evidence did not contain such a provision and the other two had a twelve-month period before warning notices were expunged. The mediator went on to explain that under a just cause system warning notices are designed to alert employees to performance deficits so that they have the opportunity to correct their performance. They are not intended to place the employee at a disadvantage for the entirety of their tenure, especially where their performance has improved and met expectations. The mediator therefore endorsed an expungement requirement, but

found twelve months to be a more reasonable period. He therefore adopted the UFW's proposal with that modification.

Gerawan objects to this provision, claiming that it conflicts with the mediator's decision that length of service need not be continuous for those first hired after the effective date of the contract. For example, where a former employee is rehired after more than a year gap in service, Gerawan would not be able to consider any warnings given during the prior tenure. In light of his earlier findings regarding length of service, it is likely that the mediator intended the twelve-month period to be defined as "twelve months of service" but did not say so expressly. This would resolve the inconsistency identified by Gerawan. We shall remand this provision to the mediator so that he may clarify his intent.

Article X—Leaves of Absence

Section 9—Notice of Work Related Injury — The UFW proposed a requirement that Gerawan provide written notice of any employee unable to work due to a work related injury within 48 hours. Gerawan rejected this proposal. As Gerawan points out, the mediator failed to resolve the parties' differences on this provision. By letter dated October 17, 2013, the UFW offered to withdraw its proposal in order to expedite the Board's decision. Gerawan responded to that filing by moving that it be stricken, asserting that such a filing was improper and asserting that unresolved issues must be remanded back to the mediator, at which time the UFW can withdraw its proposals.

It is unnecessary to address the propriety of the UFW's filing because this matter is being remanded to the mediator for resolution of several other provisions on which

review has been granted. Should the UFW not continue its willingness to withdraw its proposal, the mediator shall resolve the dispute.

Article XI—Working Conditions and Safety

Section 7 — Gerawan's only contention regarding this article is to point out that the mediator failed to resolve the parties' differences as to section 7. That section relates to baseline testing of employees who apply agricultural chemicals. The UFW proposed testing every 12 months, while Gerawan proposed testing every 24 months. In its October 17, 2013 letter, the UFW also offered to withdraw its proposal and accept Gerawan's proposal. In the same manner as Article X, section 9 discussed above, this issue shall be remanded to the mediator for resolution as necessary.

Article XXVII—Successorship

The UFW's proposal on successorship purports to bind successors to the contract, while Gerawan's proposal simply states that there will be no successors. The mediator pointed out that Gerawan's proposed language would seem to eliminate the possibility of a successor arising by operation of law. He also pointed out that three of the four contracts submitted by Gerawan did not contain a successorship clause and the fourth contained only a requirement of notification to the union of the sale or transfer of any part of the operation. The mediator nevertheless adopted the UFW's proposal.

Gerawan argues that the adopted proposal is arbitrary and capricious in light of the mediator's findings regarding other contracts. Gerawan also claims that the provision would constitute an unconstitutional taking, but that will not be addressed for the reasons cited above regarding Gerawan's other constitutional claims. While the mediator noted the content

of the contracts submitted by Gerawan, he failed to mention that all four of the contracts submitted by the UFW contained successorship clauses similar to the one it proposed here. Nevertheless, for the reason explained below the Board cannot approve the provision as written.

Under existing law, a successor employer, though bound by the bargaining obligation, is not bound by an existing contract unless it adopts or assumes the contract. (*NLRB v. Burns Int'l. Security Services* (1972) 406 U.S. 272.) While provisions purporting to bind successors do appear in some contracts, they run counter to a successor's prerogative not to adopt a collective bargaining agreement. Moreover, the Board does not believe that it can or should impose a term of a contract that would restrict existing statutory rights. Therefore, this issue is remanded to the mediator. He may determine if a successorship provision other than one containing the offending clause purporting to make the contract binding on a successor employer is appropriate.

ORDER

Pursuant to Labor Code section 1164.3, subdivisions (b) and (c), the Board hereby grants review as to the specified provisions of the mediator's report discussed above. Review is hereby denied as to all other disputed provisions of the report. After meeting with the parties only to the extent he deems necessary and in accordance with Labor Code section 1164.3, subdivision (c), the mediator shall file a second report addressing the matters upon which review has been granted. The findings and conclusions of the Board set forth in *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5 and *Gerawan Farming, Inc.* (2013) 39 ALRB No. 13 are incorporated herein by reference.

After the mediator issues his second report, the Board shall issue an order in accordance with Labor Code section 1164.3, subdivision (d). That order, together with the Order herein shall constitute the final order of the Board subject to review pursuant to Labor Code section 1164.5.

DATED: October 25, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

GERAWAN FARMING, INC. Case No. 2013-MMC-003
(United Farm Workers of America) 39 ALRB No. 16

Background

The United Farm Workers of America ("UFW") filed a declaration on March 29, 2013 requesting Mandatory Mediation and Conciliation ("MMC") with the employer, Gerawan Farming, Inc. ("Gerawan"), pursuant to Labor Code section 1164. On April 16, 2013, the Board issued *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, finding that all statutory prerequisites had been met and referring the parties to the MMC process. The parties met with mediator Matthew Goldberg, but were unable to voluntarily agree to all terms of a collective bargaining agreement. Therefore, the mediator issued a report, dated September 28, 2013, fixing the terms of a collective bargaining agreement. On October 15, 2013, Gerawan filed a petition for Review of the Mediator's Report. Gerawan contested the propriety of numerous provisions, including wage rates, in the collective bargaining agreement fixed by the mediator. Gerawan also reiterated claims that statutory prerequisites for referral to MMC were not met, along with claims questioning the legality of the MMC process, that were rejected by the Board in earlier related decisions. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 5; *Gerawan Farming, Inc.* (2013) 39 ALRB No. 13.)

Board Decision

The Board granted review on six provisions in the mediator's report and remanded the matter to the mediator to resolve the problems identified by the Board. In all other respects the Board affirmed the mediator's report because Gerawan failed to show that the mediator's findings of material fact were clearly erroneous, or that the provisions fixed in his report were arbitrary or capricious in light of his findings of fact. In two instances the provisions were referred back to the mediator to clarify his intent because the language of the provisions did not appear to match his accompanying analysis. The Board determined that it could not approve a provision prohibiting disparagement of the union because it would restrict the employer's statutory free speech rights. Similarly, the Board found that it could not approve a clause purporting to make the contract binding on a successor employer because existing law binds a successor only when the contract is assumed or adopted. Lastly, the Board referred to the mediator for resolution two provisions on which he failed to resolve the parties' differences. The UFW had filed a letter seeking to expedite a final Board decision by withdrawing its proposals on those two items, but the Board found it unnecessary to determine the propriety of that filing in light of the fact that the matter already was being remanded to mediator to resolve other issues. The Board incorporated by reference its earlier decisions that addressed Gerawan's other claims.

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