STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| KAPLAN'S FRUIT & PRODUCE CO., INC., HAROLD E. AND MARJORY DERFELT, JACK BURR RANCH, Employers | ) | Nos. 75-RC-33-F<br>75-RC-97-F<br>75-RC-101-F |
| and | ) | 3 ALRB No. 28 |
| UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner. | ) | |

These cases come before the Board on timely petitions for extension of certification, filed under Labor Code Section 1155. 2 (b) and the Board's interim procedures, re-enacted as 8 Cal. Admin. Code Section 20382 (1976). The UFW requests extension of certification on a number of different grounds not dealt with in this opinion. The employers have informed the Board that they are willing to continue bargaining with the union, but have expressed doubt that they are permitted to do so if the certification is not extended. The employers have therefore requested the Board[1/] to rule on a question of paramount importance to the effectuation of the Act: In the absence of an extension of certification, do employees lose the right, after one year, to be represented by the bargaining agent they have chosen by secret ballot?

[1/] There is no procedure specified, either in the Act or in our regulations, for requests of this sort. We issue this opinion because the matter is of great importance and because the issue can effectively be isolated from the facts of any particular case.

The NLRB's answer to this question is clear:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a prima facie case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful.

Terrill Machine Co., 173 NLRB 1480, 70 LRRM 1049 (1969). No section of the ALRA expressly negates this rule. The question is whether Labor Code Section 1155.2(b)[2/] impliedly does so. If Section 1155.2(b) indeed causes the employer's bargaining obligation to lapse one year after certification, it would in effect require annual elections at every organized ranch in the State. We regard such an interpretation as both incorrect and highly mischievous, for the reasons discussed below.

The argument runs that if "certification" lapses after one year, the duty to bargain must also lapse, since Labor Code Section 1153 (f) forbids bargaining "with any labor organization not certified pursuant to the provisions of this part." This argument overlooks one crucial point: that certification is not a single, all-purpose concept, but rather serves two distinct functions. First, "certification" creates a duty to bargain. Labor Code

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[2/] Section 1155.2(b): Upon the filing by any person of a petition not earlier than the 90th day nor later than the 60th day preceding the expiration of the 12-month period following initial certification, the board shall determine whether an employer has. bargained in good faith with the currently certified labor organization. If the board finds that the employer has not bargained in good faith, it may extend the certification for up to one additional year, effective immediately upon the expiration of the previous 12-month period following initial certification.

Section 1153(e), which states this duty, contains no time limit. It is equivalent to the duty to bargain expressed in Section 8(a)(5) of the NLRA. See Terrill Machine, supra. Secondly, "certification" creates an election bar, as stated in Labor Code Section 1156.6:

> The board shall not direct an election in any bargaining unit which is represented by a labor organization that has been certified within the immediately preceding 12-month period or whose certification has been extended pursuant to subdivision (b) of Section 1155.2.

Section 1156.6 is a codification of NLRB case law. This election bar does have a time limit, both under this Act and the NLRA. In other words, a "certification" may lapse for one purpose, but not for another. We do not believe that the Act, construed as a whole, and in the light of NLRB precedent, requires us to eliminate this important distinction.

In Ray Brooks v. NLRB, 348 U.S. 98, 35 LRRM 2158 (1954), the United States Supreme Court described the rationale of the certification bar as follows:

> (a) In the political and business spheres, the choice of the voters in an election binds them for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations.
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> (b) Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth.
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> (c) A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out.

> (d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment repudiate their agent.
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> (e) In these situations, not wholly rare, where unions are competing, raiding and strife will be minimized if elections are not at the hazard of informal and short-term recall.

The effect of the bar is to bind employees to their choice of bargaining agent for a period of time sufficient to allow the bargaining relationship to mature and bear fruit. The mechanism of the bar, under the NLRA, is to raise an irrebuttable presumption of the union's majority status during the specified period.

Ray Brooks, supra.

Section 1156.6 makes this irrebuttable presumption a part of the ALRA: no one may raise a question as to the union's representative status during the first year of certification. This protection may be extended when "certification" is extended under Section 1155.2(b). We note that Section 1156.6 contains the only specific reference in the Act to Section 1155.2(b). Accordingly, we hold that the relevance of Section 1155.2(b) is to the certification bar, and the policies underlying the certification bar in turn define the relevant considerations in proceedings under Section 1155.2(b). The balance to be struck is between the employees' right to reject the incumbent union and the need for stability in bargaining relationships. The employer's "right" not to bargain is no part of the equation.

Our conclusion that the duty to bargain does not lapse following the end of the certification year is not based solely on this reading of our statute in the light of NLRB precedent. The

policy arguments in support of this conclusion are powerful. To hold that the duty to bargain lapses after one year would strike at the Act's central purpose of bringing "certainty and a sense of fairplay to a presently unstable and potentially volatile condition in the state", Section 1, ALRA. At the heart of the Act is the plan that agricultural labor relations will come to be regulated by a process of collective bargaining conducted in good faith by both labor and management. If the duty to bargain is held to lapse after one year, the potential effects are incongrous with this goal.

In the first place, such a policy would inhibit good faith bargaining. If an employer has, in fact, been bargaining in good faith throughout the certification year, and if, as the argument would have it, the duty to bargain ends after one year, the Act would operate to terminate, rather than to encourage, the good faith process in which the parties were then actually engaged. We cannot imagine a doctrine more mischievous to the policy of encouraging good faith bargaining than one which requires the parties to bargain, not until they reach agreement or impasse, but only until a year's time has slipped past in good faith negotiations.[3/]

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[3/] The passage of time is in fact essential to the proper nurturing of the process:

> Collective bargaining is curiously ambivalent. . . In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics. As the relation matures, Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power. Initially it may only be fear of the economic consequences of disagreement that turns the parties to facts, reason, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion. Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1409 (1958).

In the second place, such a policy would promote strikes by placing the union under great time pressure to obtain an agreement before its certification lapses. A union which must obtain an agreement within one year might strike to force concessions because it does not have the luxury of taking time to work out reasonable compromises. Moreover, since the most effective strike may be one during a peak season, such a strike might well be called whenever a peak season fell during that one year. To place unions under such pressure to strike whenever peak season falls, without regard to the progress of good faith negotiations, is not conducive to the development of fruitful bargaining relationships or to agreements which realistically reflect the needs of both agricultural labor and management.

In the third place, this theory seriously impairs the employees' right to be represented in their relationships with employers. If, as will often happen, certification lapses when the employer has just passed his peak season, the effect would be to preclude the possibility of any representation for employees until the following peak season, when the entire election process would have to begin again.

Finally, we note the increased burden on this Board's resources of requiring annual or bi-annual elections whenever the parties bargain in good faith but fail to reach an agreement within one year. We fail to see the need to commit our resources to a process of ritual reaffirmance of certifications in cases where employees are satisfied with their representatives.

We do not believe that the legislature could have intended to make the process of collective bargaining into a kind

of sporting event in which the parties play against each other and against a clock at the same time, with the employees' right to effective representation as the stakes. Yet that would be precisely the effect if we allow the duty to bargain to lapse. The legislature, obviously desiring collective bargaining, could not have intended to place a moratorium on the very process it wished to promote.

The language of Section 1153(f) does not persuade us to the contrary. The prohibition against an employer's recognizing an uncertified union is clearly directed, not towards an arbitrary time limit on bargaining, but towards preventing voluntary recognition of labor organizations. The facts in Englund v. Chavez, 8 Cal. 3d 572, are too much a part of the history leading to the enactment of the ALRA for us to consider 1153(f) as anything but a guarantee of freedom of choice to agricultural employees through the machinery of secret ballot elections. The prohibition against bargaining with an uncertified union does not and should not preclude bargaining with a union that has been chosen through a secret ballot election.

Nothing we declare in this opinion alters the statutory protection given to employers. Their duty to bargain, no matter how long its duration, does not compel them to agree to a proposal or require them to make a concession. Furthermore, a finding of bad faith in an extension of certification proceeding is not admissible in an unfair labor practice proceeding, so that an employer cannot be prejudiced by it. 8 Cal. Admin. Code 20382(g) (1976). We reject the idea that requiring an employer to continue to meet and confer with a union prejudicies it in any way: it is the policy

of this state that an employer has this obligation whenever his employees have properly designated their representative.

Dated: April 1, 1977

Gerald A. Brown, Chairman

Robert B. Hutchinson, Member

Ronald L. Ruiz, Member

MEMBER JOHNSEN, Concurring:

I concur in the desirability of a means whereby good faith bargaining may continue beyond the expiration of a certification period, but I disagree with my colleagues who would place an unending responsibility to bargain on employers in-the absence of reasonable means whereby the representation desires of workers can be determined.

Dated: April 1, 1977

Richard Johnsen, Jr., Member