Sacramento, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PEREZ PACKING, INC.,	)	Case No. 2014-MMC-001
	)	
Employer,	)	
	)	
and	)	
	)	40 ALRB No. 1
UNITED FARM WORKERS OF AMERICA,	)	
	)	(March 26, 2014)
	)	
Petitioner.	)	

DECISION AND ORDER

On January 21, 2014, the United Farm Workers of America (hereafter the "UFW") requested that the Agricultural Labor Relations Board (the "ALRB" or "Board") order the UFW and Perez Packing, Inc. (hereafter "the Employer") to engage in mandatory mediation and conciliation ("MMC") in order to reach a collective bargaining agreement pursuant to section 1164, subdivision (a)(1), and section 1164.11 of the Agricultural Labor Relations Act ("ALRA")[1]. In support of its request, the UFW submitted the declaration of Maria Guadalupe Larios (the "Larios Declaration"). The Larios Declaration asserted that the UFW was certified as the exclusive collective bargaining representative for all of the Employer's agricultural employees on December 5, 1989; that it requested negotiations with the Employer in mid-December of 1989, with said negotiations failing to reach a collective bargaining agreement (hereafter

[1] The ALRA is codified at Labor Code section 1140, et seq. All further statutory citations are to the Labor Code unless otherwise indicated.

"agreement"); that on January 30, 2012, the UFW again contacted the Employer and requested to engage in negotiations toward reaching an agreement; that negotiations since January 30, 2012, have failed to result in an agreement; that there has never been an agreement in place between the UFW and the Employer; that the Employer is an agricultural employer as defined by section 1140.4(c) of the ALRA and has engaged 25 or more agricultural employees during more than one calendar week in the year preceding the filing of the UFW's request; and that the Employer had committed an unfair labor practice ("ULP"), as found by the Board in its decision in *Perez Packing, Inc.* (2013) 39 ALRB No. 19, issued December 19, 2013.

On January 24, 2014, the Employer timely filed an answer to the Request. In its answer, the Employer denied that Ms. Larios had personal knowledge of the facts set forth in the declaration (and alleged that many of her statements in the declaration were inadmissible hearsay), denied that the UFW made an initial demand to bargain prior to January 1, 2003; and denied that there was a final decision that the Employer had ever committed an unfair labor practice as the Employer has filed a petition for review of the Board's decision in *Perez Packing, Inc.* with the Fifth District Court of Appeal.[2] The Employer did not dispute that it is an agricultural employer as defined by the ALRA, that there has never been an agreement in place between the UFW and the Employer, or that it engaged 25 or more agricultural employees during the relevant time period.

[2] See *Perez Packing, Inc. v. Agricultural Labor Relations Board*, Case No. F068697 (petition for writ of review filed January 17, 2014).

The UFW's request (hereafter "Request") that the parties be directed to participate in MMC is held in abeyance. As explained below, an expedited evidentiary hearing is necessary to resolve several factual issues concerning whether the UFW's Request met the prerequisites set forth in sections 1164(a)(1) and 1164.11 of the ALRA, as well as Board Regulation 20400(a).[3]

DISCUSSION

Where the labor organization in question was certified prior to January 1, 2003, as is the case here, the prerequisite conditions for referral to MMC are set forth in Labor Code sections 1164(a)(1) and 1164.11, and section 20400(a) of the Board's regulations. Pursuant to these provisions, a declaration requesting referral to MMC must be signed under penalty of perjury and include a statement that: 1) The labor organization was certified as the exclusive bargaining agent prior to January 1, 2003; 2) the parties have failed to reach agreement for at least one year after the date of the initial request to bargain; 3) there was a renewed demand to bargain at least 90 days prior to the filing of the declaration requesting referral to MMC; 4) the employer has committed an unfair labor practice, along with the nature of the violation and the corresponding Board decision number or case number; 5) the parties have not previously had a binding contract between them; and 6) the employer employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. (Lab. Code §§ 1164(a)(1) & 1164.11; *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, at

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

pp. 1-2.) A declaration failing to meet these requirements must be dismissed pursuant to Board Regulation 20402(a). Board Regulation 20402(c)(3) provides that in the event of a timely filed answer disputing any of the prerequisites for referral to MMC, the Board shall order an expedited evidentiary hearing to resolve any factual issues regarding the existence of said prerequisites.

Application of the Unfair Labor Practice Prerequisite in Section 1164.11

Pursuant to section 1164.11, a referral to MMC may only be directed where "the employer *has committed an unfair labor practice*…." (Emphasis added.) Under Board Regulation 20400(a)(1), the required unfair labor practice must be one "*where a final Board decision has issued* or where there is a settlement agreement that includes an admission of liability." (Emphasis added.) The Larios Declaration states that the Employer committed an unfair labor practice as held by the Board in 39 ALRB No. 19.

We find that the Board's decision and order in 39 ALRB No. 19 is a final Board decision for purposes of section 1164.11 of the ALRA for the reasons discussed below. Section 1160.8 of the ALRA describes a "final order of the Board" in a ULP case as one where review may be sought in the Court of Appeal having jurisdiction over the county where the alleged ULP occurred. Nothing in section 1160.8 states that such an order of the Board is final only after it has been reduced to an enforceable judgment via superior court order or appellate court decision. Furthermore, nothing in section 1160.8 indicates that an ongoing appellate review, as in the instant case, precludes the finding of a ULP from being considered a "final order of the Board."

Section 1160.8 of the ALRA is functionally identical to section 10(f) (29 U.S.C. § 160(f)) of the National Labor Relations Act ("NLRA").[4] The U.S. Supreme Court has held that, with respect to the NLRA and the National Labor Relations Board ("NLRB"), an NLRB decision finding a ULP pursuant to section 10(f) becomes a "final order" of the NLRB at the time of issuance. [5]

A Board finding of a ULP pursuant to section 1160.8 is similarly a "final order." Moreover, this conclusion, set forth in *Boire v. Greyhound Corp*. (1964) 376 U.S. 473, has been consistently applied in both California and federal decisions. (See *Agricultural Labor Relations Board v. Superior Court* (1996) 48 Cal.App.4th 1489, at p. 1498; *National Labor Relations Board v. S.D.R.C., Inc.* (9th Cir. 1995) 45 F.3d 328, at p. 330, fn. 2.) Therefore, the fact that the ULP at issue in 39 ALRB No. 19 is undergoing appellate review is irrelevant to the requirements for referral of the parties to MMC. Although the Board does not currently possess jurisdiction to enforce its final decision and order in 39 ALRB No. 19 due to the pending appellate review of that matter, such enforceability, or the lack thereof, is also irrelevant for the purposes of section 1164.11 of the ALRA and Board Regulation 20400(a)(1).

It must be remembered that one of the objectives of the administrative process is to resolve the bulk of disputes at the administrative level to avoid the delays

[4] Section 1148 of the ALRA states that the Board shall follow applicable precedents of the National Labor Relations Act (NLRA).

[5] *Boire v. Greyhound Corp.* (1964) 376 U.S. 473, at pp. 476-477 citing *American Federation of Labor v. Labor Board* (1940) 308 U.S. 401.

inherent in judicial review. The administrative agency, in this case the ALRB, possesses special expertise in labor-management relations and the law involving such. (See, e.g., *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236 at 242, "[C]ongress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." Furthermore, in *United Farm Workers of America, AFL-CIO v. Superior Court of Kern* (1977) 72 Cal.App.3d 268, the California Court of Appeal for the Fifth District held, at pp. 276-277:

> In summary, the Legislature, confronted with violence in the fields, sought peace and stability in agricultural relations by adoption of the Act. That Act established a centralized expert agency with a primary jurisdiction over agricultural labor disputes. With limited exceptions not applicable to the facts of this case, the judiciary enters the scene only after the Board has passed on a labor relations question, and then only for limited purposes of review.

See also *NLRB v. Erie Resistor Corp*. (1963) 373 U.S. 221, 236. Cf. *In the Matter of Theodore R. Schmidt* (1944) 58 NLRB 1342, 1344-1345 (standing for the proposition that the NLRB does not acquiesce in contrary circuit court decisions unless or until the U.S. Supreme Court reverses the Board). This expertise is closely connected to another principal virtue embedded in the statutory scheme, i.e., the objective of relatively speedy resolution of labor-management disputes.

To allow regular or repeated judicial review to delay the initiation of MMC would run counter to the legislative intent to fashion an expedited collective bargaining

process. The value of the administrative process would be lost if it was assumed that only judicial review could make the Board's order "final" under the Act.

This conclusion is bolstered by the fact that, more recently, the Legislature amended section 1158 of the ALRA. (Stats. 2011, ch. 697, § 2 (SB 126).) Section 1158 provides that after an investigation into election proceedings for the certification of a union, the Board may issue a decision and order finding a ULP based on the facts certified pursuant to the investigation.[6] The amendment provided that the filing of a petition to review in the Court of Appeal by an employer in furtherance of a technical refusal to bargain would not be grounds to stay the MMC process, because that would produce delay and thus work against the principal reasons for the MMC process. This is significant because it shows that the Legislature intended for the MMC process to go forward even when the ULP at issue involves the representation process itself, a most fundamental prerequisite to MMC.

In construing section 1164.11(b), as we do here, we note that it is a cardinal rule of statutory construction that statutory language "must be given such interpretation as will promote rather than defeat the general purpose of the law." (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, at p. 233 citing *People v. Centr-O-Mart* (1950) 34 Cal. 2d 702, 704.) A key policy at the heart of both the MMC process and the amendments to

[6] The nature of the ULP referred to is a refusal to bargain in violation of section 1153(e) of the ALRA, a violation an employer risks committing when it engages in a "technical refusal to bargain" with the union in order to test the certification of the union by the Board.

1158 noted above is to diminish delay, a phenomenon always at war with the effective implementation of labor law.

Our result reached today is further supported by the fact that when then-Governor Gray Davis signed the bill approving the MMC process into law, he said that the ALRA was "broken," adding: "The appeals process . . . often takes so long that the farmworkers can no longer be located by the time the award is made. The bottom line is that too many people who were supposed to benefit from the protections of the ALRA are left without a contract, without a remedy, and without hope." (Stats. 2002, ch. 1156 (SB 1156) and Stats. 2002, ch. 1146 (AB 2596).) This indicates that it was not intended that initiation of the MMC process would be postponed while the Board's orders are judicially reviewed.

Factual disputes as to other prerequisites for MMC

As described above, the Employer timely filed an answer to the Request, in which it raised several factual questions as to whether the declaration accompanying the Request fulfilled all the prerequisites for an order directing the parties to MMC. Specifically, the Employer denies that the UFW ever made an initial demand to bargain in December of 1989 or at any other time before January 1, 2003. The Employer contends that the first time the UFW ever sought negotiations was January 21, 2012 and that therefore, the prerequisite of a "renewed demand to bargain" was not satisfied, which would prohibit directing the parties to MMC. The Employer also maintains that many of the statements in the Larios Declaration were inadmissible hearsay, and alleges that Larios could not have had personal knowledge of the facts therein, especially with respect

to the UFW's assertions that it requested negotiation with the Employer in December of 1989.

CONCLUSION

Thus, we conclude that although the Request has fulfilled most of the prerequisites for MMC, there remain factual issues material to the question of whether the UFW ever made an initial demand to bargain before January 1, 2003, as required by statute and regulation, and also as to whether Larios was competent to make the representations in her declaration. Pursuant to Board Regulation 20402(c)(3), an expedited evidentiary hearing must therefore be held to resolve these disputed questions of fact.

ORDER

See the Board's Administrative Order No. 2014-001, issued on March 25, 2014, attached hereto.

DATED: March 26, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PEREZ PACKING, INC.,	)	Case No. 2014-MMC-001
	)	
Employer,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	ORDER SETTING EXPEDITED HEARING
	)	
Petitioner.	)	Admin. Order No. 2014-001

Pursuant to sections 1164(a)(1) and 1164.11(b) of the Agricultural Labor Relations Act, the United Farm Workers of America's request that the parties in this matter be directed to participate in Mandatory Mediation and Conciliation is held in abeyance, pending the outcome of an expedited evidentiary hearing. It is hereby ordered that an expedited hearing pursuant to Board Regulation 20402(c)(3) be set in which the hearing examiner shall take evidence on whether the UFW made qualifying initial and renewed demands to bargain

/

/

/

/

/

/

with the Employer before October 23, 2013, in accordance with section 1164 of the ALRA. The Board's Decision will be issued shortly.

By Direction of the Board.

Dated: March 25, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

PEREZ PACKING, INC. Case Nos. 2014-MMC-001
(United Farm Workers of America) 40 ALRB No. 1

Background

Petitioner, United Farm Workers of America ("UFW"), has been the certified collective bargaining representative for the agricultural employees of Perez Packing, Inc. ("Employer") since December 5, 1989. On January 21, 2014, the UFW requested that the Board direct the UFW and the Employer to engage in mandatory mediation and conciliation ("MMC") pursuant to sections 1164(a)(1) and 11641.11 of the Agricultural Labor Relations Act ("ALRA" or "Act"), with the goal of reaching a collective bargaining agreement ("CBA"). In support of its MMC request, the UFW submitted declarations pursuant to sections 1164(a)(1) and 1164.11 of the Act, and implementing regulation, California Code of Regulations, title 8, section 20400. One of the declarations stated that the Employer had committed an unfair labor practice ("ULP") as found by the Board in its decision in 39 ALRB No. 19. On January 24, 2014, the Employer timely filed an answer to the UFW's MMC request, denying there was a final decision that it had committed a ULP, as the decision in 39 ALRB No. 19 was under appellate review. The Employer further challenged the UFW's declarations as being based on inadmissible hearsay, and also denied that the UFW ever made an initial demand to bargain as required by the aforementioned statutes and regulation.

Board Decision

Where a labor organization was certified for a particular bargaining unit before January 1, 2003, sections 1164(a)(1) and 1164.11 of the Act, as well as Board Regulation 20400, require that in order for MMC to be imposed, there must be a final determination that the involved employer has previously committed a ULP. For the purposes of directing parties to MMC under said provisions, such a determination may be made when the Board has issued a final decision and order finding the Employer liable for a ULP. This is true even if the ULP has not been reduced to a judgment, or is undergoing appellate review. This standard comports with the similar standard set forth in section 10(f) of the National Labor Relations Act ("NLRA" ; 29 U.S.C. § 160(f)), which provides that a finding that a ULP has been committed is a final order, as it is reviewable – and whether such review is sought is irrelevant to the finality of the order.

The Board, pursuant to Board Regulation 20402(c)(3), ordered an expedited hearing to resolve the factual questions raised by the Employer with respect to the UFW's alleged failure to make an initial demand to bargain, as well as the hearsay issues in the UFW's declarations in its request for MMC.

***