STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROTHERS, LP, and ARNAUDO BROTHERS, INC.,	)	Case No. 2013-MMC-001 (39 ALRB No. 7) (40 ALRB No. 2)
Employer,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	40 ALRB No. 7
Petitioner.	)	(June 27, 2014)

DECISION AND ORDER

On May 13, 2014, mediator Matthew Goldberg (the "Mediator") issued his report (the "Report") in Mandatory Mediation and Conciliation ("MMC") proceedings held pursuant to the Agricultural Labor Relations Act (the "ALRA") and involving the United Farm Workers of America (the "UFW") and Arnaudo Brothers, LP and Arnaudo Brothers, Inc. ("Arnaudo").[1] On May 22, 2014, both the UFW and Arnaudo filed petitions for review of the Report. In its order of June 3, 2014, the Agricultural Labor Relations Board (the "ALRB" or "Board") granted review of the Report with respect to two provisions of the MMC contract set forth in Appendix A of the report (the "MMC

[1] The ALRA is codified at Labor Code section 1140 et seq. The statutes governing MMC are found at Labor Code section 1164 et seq. The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

Contract") that were challenged in the UFW's petition for review.[2] These were Article 2 of the MMC Contract governing union security and Article 24 of the MMC contract governing the MMC Contract's duration. For the reasons set forth herein, the UFW's petition for review is sustained with respect to both of the challenged provisions and the matter will be remanded to the Mediator for further proceedings pursuant to Labor Code section 1164.3, subdivision (c).

1. Standards Governing Mediators' Reports In MMC Cases

At the conclusion of MMC's mediation phase, the mediator is to "file a report with the board that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process." (Lab. Code § 1164 subd. (d).) With respect to any issues that were subject to dispute between the parties, the report is to include the basis for the mediator's determinations and must be supported by the record. (*Ibid*.)

In resolving any issues in dispute, the mediator "may consider those factors commonly considered in similar proceedings" including the following:

> (1) The stipulations of the parties.
>
> (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands.

[2] The Board dismissed Arnaudo's petition for review in its entirety. (Admin. Order 2014-12.)

> (3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements.
>
> (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed.
>
> (5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed.
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> (Lab. Code § 1164, subd. (e); Board regulation 20407(b).)

Where a party petitions for review of a mediator's report and the Board accepts review of provisions challenged in a petition, the Board is to determine whether the challenged provisions violate Labor Code section 1164.3 subd. (a). (Lab. Code § 1164.3 subd. (c).) A provision violates Labor Code section 1164.3 subd. (a) when one or more of the following conditions apply:

> (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,
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> (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.
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> (Lab. Code 1164.3 subd. (a).)

If the Board finds a violation, the Board is to "issue an order requiring the mediator to modify the terms of the collective bargaining agreement" whereupon the mediator is to meet with the parties for further mediation for up to 30 days and then issue a second report resolving any outstanding issues. (Lab. Code § 1164.3 subd. (c).)

2. The UFW's Petition For Review

As noted above, the UFW's petition for review challenges the Mediator's rulings on Articles 2 and 24 of the MMC Contract, dealing with union security and contract duration, respectively.

a. Article Two (Union Security)

Article 2 of the MMC Contract provides for no union security clause from the MMC Contract's effective date of January 1, 2014, through June 30, 2014. Effective July 1, 2014, Arnaudo is required to advise new employees that they must become UFW members or pay agency fees, that employees may be terminated if they fail to become members or pay agency fees, and that Arnaudo will deduct dues or fees from employees' checks. [MMC Contract, Art. 2.]

During the final mediation session, the UFW argued for what it described as standard union security language in the contract while Arnaudo argued for an "open shop" provision with no union security language. [MMC Report, Exhibit B (transcript of December

16, 2013 mandatory mediation session ("Tr.") 47-48.][3] The pertinent part of the Mediator's discussion on union security consisted of the following:

> MEDIATOR GOLDBERG: I'm placed in a very uncomfortable position of requiring a group of employees to pay dues into an organization that they may or may not wish to be represented by.
>
> The Union's concern that this is standard language in all of its contracts is virtually irrefutable. It is part of every agreement that I have seen.
>
> And there are positives and negatives to the union security clause, not the least of which may involve the reluctance of some employees to pay this wage –
>
> * * *
>
> In consideration of all the facts and circumstance (sic), especially the fact that every Union contract contains a union security clause, this contract also will contain a Union security clause.
>
> However, the implementation of the provisions of the Union security clause will be held in abeyance up until July 1st, 2014. And it is at that point that section -- that Article 2 will go into effect, and the wording in Section 1 will reflect that fact.
>
> And it will say, prior to all of the other language that is in there, beginning July 1st, 2014 the Company will advise new employees, et cetera.
>
> [Tr. 49-50.]

[3] The Mediator's report did not include a discussion of his findings and conclusions but rather incorporated by reference the MMC Contract itself and the transcript of the final mediation session.

The UFW argues that the Mediator's decision to delay the effective date of the union security clause was based on the Mediator's erroneous finding that Arnaudo's employees "may or may not" wish to be represented by the UFW. The UFW argues that there was no record evidence to support a finding on employee support for the UFW and, even if there were evidence that employees desired an election, consideration of such evidence would conflict with the Board's "certified until decertified" rule. [UFW Pet. p. 9.]

As reflected in the above-quoted portion of the transcript, the Mediator found that union security provisions are a standard feature of the contracts negotiated by the UFW and, in fact, found that they appear in "every union contract." [Tr. 49.] Although the contracts relied upon by the Mediator have not been provided to the Board, the Mediator gave no indication that any of the contracts he reviewed featured delayed union security implementation such as the Mediator ordered in this case. The only factor cited by the Mediator other than the comparable contracts was his conjecture that the members of the bargaining unit "may or may not" wish to be represented by the UFW.[4] Therefore, the only reasonable conclusion that can be drawn from the Mediator's report is that he relied upon his conjecture concerning employee support for the UFW as the basis for delaying the effective

[4] The Mediator did not explain the basis for his doubts concerning employee support for the UFW and the record that was before the Mediator has not been supplied to the Board. However, it appears that the Mediator was supplied with a copy of a decertification petition filed by Arnaudo employee Francisco Napoles. [See Tr. 6.] Said petition was filed in May 2013 but was dismissed because there was an unfair labor practice complaint against Arnaudo that would have blocked the election even if the petition itself was valid (and there were allegations that it was not). (See *Arnaudo Brothers, LP* (2013) 39 ALRB No. 9.)

date of the union security provision. The issue is whether it was permissible for the Mediator to do so. We conclude that it was not.

Reliance upon the perceived presence or absence of employee support runs up against the policies of the exclusive bargaining representative concept, which, under the ALRA, are solely dependent upon certification through the ALRA's election procedures. Once a union is certified as the bargaining representative, it retains that status unless and until the bargaining unit employees choose to remove or replace it through a Board-conducted election. (*Nish Noroian Farms* (1982) 8 ALRB No. 25.) This has come to be known as the 'certified until decertified' rule.

A corollary to this rule is that, in contrast to the rule under the National Labor Relations Act ("NLRA"), under which an employer may withdraw recognition from a union that has lost majority support, under the ALRA, the employer must continue to bargain with the union and "[a] filed petition, direction of election, or tally of ballots does not affect that duty." (*Nish Noroian Farms, supra,* 8 ALRB No. 25 p. 14; *F&P Growers Association v. Agricultural Labor Relations Board* (1985) 168 Cal.App.3d 667, 677-678 (rejecting loss of majority support as a defense to the duty to bargain under the ALRA).) Because loss of majority is irrelevant to the continuing validity of a union's certification, which mandates collective bargaining with an exclusive representative, it would be improper for an alleged loss of employee support to be treated as a factor undermining a union's position in MMC proceedings or as justifying ordering less favorable terms than would otherwise be ordered.

Thus, under the ALRA, employee support issues generally are to be resolved through union certification or decertification and not through the MMC process. This, along

with the potential for much litigation involving the employee support issue under the MMC process and re-litigation of union recognition issues which would undermine speedy resolution and produce delay, argues for the conclusion that employee support is an impermissible factor to be relied upon by the mediator.

It is also relevant that Labor Code section 1164, subdivision (e) directly addresses matters such as consideration of comparable collective bargaining agreements and states that "corresponding wages, benefits, and terms and conditions of employment" are relevant statutory criteria to be considered and relied upon by a mediator. Similar language is contained in Labor Code section 1164, subdivision (e)(4), which focuses upon "corresponding wages, benefits, and terms and conditions of employment" in comparable firms or industries. These are the standards to be employed by mediators whenever disputes arise about contract clauses in MMC proceedings. Because this is the approach contemplated by the Legislature, the mediator's reliance upon perceived doubts as to employee support was arbitrary and capricious.[5]

[5] In this case, because the Board has not been provided with the record that was before the Mediator, it is not clear what evidence (if any) was presented to the Mediator on loss of employee support. However, the Mediator's statements on the record indicate that his conclusions on employee support may have been largely or entirely speculative in nature, which, in itself, would render the Mediator's conclusions arbitrary and capricious. (Lab. Code § 1164 subd. (d) ("The mediator's determination shall be supported by the record.") However, even if the Mediator were presented with evidence that the UFW had lost the support of Arnaudo's employees, the Mediator would not be permitted to consider such evidence in setting the terms of the MMC Contract for the reasons stated herein.

For the foregoing reasons, this matter will be remanded to the Mediator for further proceedings on this issue pursuant to Labor Code section 1164.3, subdivision (c) and consistent with this Decision and Order.

b. Article Twenty-Four (Duration of Agreement)

With respect to the duration of the MMC Contract, Arnaudo proposed that the agreement expire on March 1, 2014. [Tr. 17.] The UFW sought a three-year contract. [*Ibid*.] The Mediator chose neither of these proposals, instead deciding that the MMC Contract would have a duration of one year, commencing on January 1, 2014, and terminating on December 31, 2014. [*Ibid*.] The Mediator based his ruling on his conclusion that Arnaudo's employees had not expressed a desire to be represented by the UFW and should have an opportunity to vote on whether to be so represented. Thus, the Mediator stated,

> The Mediator has concluded that given the lack of expression by this workforce that they wish to be represented by the United Farm Workers Union, a contract for a duration of one year commencing January 1st, 2014 and running through December 31st, 2014 will be appropriate.
>
> This will give employees the opportunity to vote on whether they wish to be represented by the United Farm Workers Union and will also give them the benefit of the experience of working under the Union contract.
>
> Then, they made (sic) decide whether or not being represented by a union is a good idea for them. And I think that's very important from the simple point of view that in ever (sic) democratic institution the authority to represent is derived from the consent of the people who are being represented.
>
> And without that consent, it's very difficult for me to envision that somebody actually has the legal authority to speak for

> anyone else.
>
> So, given the fact that the law requires this agreement to be concluded and in light of the fact that the workforce has never had an opportunity to express their own particular wishes as to whether they want to be represented by the United Farm Workers Union, I determine a one-year agreement is what I would consider a reasonable compromise, which will allow these workers to express their personal choice, and they will not be required to be members of the union for an extended period of time without having the opportunity.
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> [Tr. p. 17-18.]

The UFW argues that the Mediator's ruling was based upon clearly erroneous findings of fact and was arbitrary. [UFW Pet. p. 1.] It argues that the ruling effectively rejects the Board's "certified until decertified" doctrine and the MMC statute itself. [*Ibid*.] The UFW argues that the Mediator's ruling ignores Arnaudo's history of violating the ALRA. The UFW also argues that the Mediator's ruling conflicts with the Mediator's prior rulings in MMC cases involving similar circumstances as well as non-MMC contracts featuring multi-year terms.

As he did with respect to his ruling on union security, the Mediator impermissibly based his ruling on contract duration upon his conclusions concerning employee support for the UFW and his belief that employees may desire an election. The Mediator relied on his conclusion that there was a "lack of expression by this workforce" of a desire to be represented by the UFW and that "the workforce has never had an opportunity to express their own particular wishes as to whether they want to be represented by the [UFW]" as a basis for ordering a one-year contract which would "allow these workers to express their personal choice" and relieve them of the obligation of being "members of the union" for an extended period without the opportunity to exercise that choice. These statements must also be read in

light of the Mediator's statement, discussed previously, that Arnaudo's employees "may or may not" wish to be represented by the UFW.

For the reasons discussed with respect to Article 2, it was improper for the Mediator to consider perceived lack of employee support for the UFW in fashioning the terms of Article 24 of the MMC Contract. The Mediator's reliance on his conclusions concerning a possible desire on the part of employees for an election to remove or replace the union as a basis for his ruling was improper for the same reasons. The Mediator's reliance upon these considerations was not the appropriate standard to be followed; i.e., this consideration was not contemplated by the Legislature in connection with contract disputes of this kind. Therefore, the Mediator's approach was arbitrary and capricious. Furthermore, the Mediator's statement that Arnaudo's employees have never had an opportunity to express their wishes as to union representation is clearly erroneous, as Arnaudo's employees did participate in an ALRB-conducted election in 1975, wherein the UFW was elected as the bargaining representative.[6] As described above, the Board has consistently held that, under the ALRA, a union, once certified, remains certified until removed or replaced through an election.

[6] To the extent that the Mediator's reference to the purported "lack of expression" by "this workforce" and "these workers" reflects a conclusion that most, if not all, of the particular employees who participated in the 1975 election through which the UFW was certified are no longer employed by Arnaudo, it is well-established that workforce turnover does not undermine a union's certification. (*Dole Fresh Fruit Company* (1996) 22 ALRB No. 4. (stating that bargaining units "are comprised of jobs or job classifications and not of the particular persons working at those jobs at any given time.").) (See also *National Labor Relations Board v. Leatherwood Drilling Company* (5th Cir. 1975) 513 F.2d. 270, 273 (Although only four members of the original electorate remained in the 77-person bargaining unit, presumption of continued majority support was not rebutted).)

Accordingly, because the Mediator relied on a purported lack of employee support for the UFW and/or a purported desire on the part of employees for an election to remove or replace the UFW in ruling on Article 24 of the MMC Contract, and because the Mediator was not permitted to consider such matters in setting the terms of the MMC Contract, his ruling was arbitrary and capricious. Furthermore, the Mediator's factual finding that Arnaudo's workforce has never had an opportunity to express their wishes regarding representation by the UFW was clearly erroneous.

The UFW argues that the Mediator's decision to order a one-year contract conflicts with the decision issued by the Mediator in MMC proceedings between the UFW and San Joaquin Tomato Growers (2011-MMC-001) in which the Mediator ordered a three-year contract under circumstances that the UFW claims are indistinguishable. The UFW also cites the MMC contracts ordered in D. Papagni Fruit Company, 2012-MMC-002 and Ace Tomato Company, Inc., 2012-MMC-001. The UFW contends that all of these contracts were presented to the Mediator.[7]

In the San Joaquin Tomato Growers contract, the Mediator ordered a three-year contract. The UFW had proposed a three-year contract while the employer proposed two years. In adopting the UFW's proposal, the Mediator noted that the UFW had been certified for nearly 20 years without the parties having reached a contract and concluded that the

[7] The UFW also argues that there are contracts that the UFW negotiated in non-MMC cases with durations of three years or more that were presented to the Mediator. However, those contracts were not provided to the Board and, therefore, cannot be considered. The Board has also not been provided with the D. Papagni Fruit Company and Ace Tomato Company, Inc. MMC contracts, but takes administrative notice of the mediators' reports in those cases.

parties' inability to reach a contract, along with unilateral changes made by the employer indicated that "the Employer has not accepted the significance of the fact that its employees are represented by a labor organization" and that the setting of terms and conditions of employment must be done through negotiation rather than unilateral action. The Mediator concluded that "A contract for a longer term promotes greater stability in its relations with the Union, relations which will be allowed to mature as the parties gain experience with operating under an Agreement which is firmly in place for three years." The Mediator also noted that a three-year contract would give both the employer and the union certainty concerning future wage rates and that a three-year contract was "not unusual in this setting."

In the D. Papagni Fruit case, the competing proposals were the UFW's three-year proposal and the employer's two-year proposal. The Mediator found that the longer term was "more reasonable in light of the statutory considerations." The Mediator noted that contracts over two years in length were the norm in the employer's segment of the industry, that the historical relationship between the parties (including a long period where there was no bargaining) and the relatively short harvesting season supported the reasonableness of the contract term, and stated that the "three-year term gives a greater opportunity for this collective bargaining relationship to ripen and mature, as it enables the parties and the FLC (farm labor contractor) a longer period to identify the needs and requirements of each within the particular constraints of the Employer's operation and that of the FLC."

In the Ace Tomato case, the Mediator ordered a three-year contract and noted in the context of setting wage rates for the second and third year that the term of the contract "promotes greater stability in its relations with the Union, relations which will be allowed to

mature as the parties gain experience with operating under an Agreement which is firmly in place for three years."[8]

While a mediator is not required to treat past MMC decisions as binding precedent, and MMC itself imposes no stare decisis principle upon mediators, Labor Code section 1164, subdivision (e) does require a mediator to consider comparable contracts when ruling on competing proposals. (*Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal.App.4th 1584, 1607.) The cases cited by the UFW demonstrate that this Mediator has an established record of ordering three-year contracts in MMC cases. In each of those cases, the Mediator concluded that a three-year contract was appropriate because it would promote stability between the parties and permit their relations to mature. In one of the cases, the Mediator also cited the certainty of future wage rates as a factor favoring a three-year contract. In this matter, however, the Mediator departed from this analysis without providing any explanation except his belief that bargaining unit employees might no longer desire union representation, which, as explained, was not a legitimate basis for his ruling.

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[8] Ace Tomato Company petitioned for review of the Board's final order upholding the Mediator's report in that case. The Fifth District Court of Appeal granted review and the case is pending the setting of oral argument. (See *Ace Tomato Company v. Agricultural Labor Relations Board*, Case No. F065589.)

Furthermore, the Mediator did not discuss or distinguish his prior MMC contracts, although, as the UFW argues, those contracts appear to support a three-year contract rather than a one-year contract.[9]

Accordingly, the matter will be remanded to the Mediator for further proceedings on this issue pursuant to Labor Code section 1164.3, subdivision (c) and consistent with this Decision and Order.

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[9]Chairman Gould is of the view that a requirement for the mediator to provide a reasoned distinction between prior and subsequent reports may impose a standard which unduly diminishes the flexibility desirable for a third party mediator. In this regard, I am of the view that the mediator should possess an ability to depart from prior reports so long as his or her conclusions are rooted in the relevant MMC criteria found in that statute. What the mediator did in prior reports should matter little, or not at all—just as arbitrators are not bound by stare decisis, in my view, even when they depart from their own awards. (Cf. *Metropolitan Edison Co. v. NLRB* (3d Cir. 1981) 663 F.2d 478, 483, affd. *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693; *New Orleans Steamship Association v. General Longshore Workers* (5th Cir. 1980) 626 F.2d 455, 468, cert. granted *sub nom, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association* (1981) 450 U.S. 1029; *Riverboat Casino, Inc. v. Local Joint Executive Board* (9th Cir. 1978) 578 F.2d 250, 251 ("… arbitrators in labor disputes are not bound by the decisions of prior arbitrators unless the collective bargaining agreement so stipulates."); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Dana Corporation* (6th Cir. 2002) 278 F.3d 548, 555 ("…absent a contractual provision to the contrary, an arbitrator is free to decide that rigid adherence to a prior award would impair the process of flexible resolving current or future disputes."); *Courier-Citizen Co. v. Boston Electrotypers Union No.* 11 (1st Cir. 1983) 702 F.2d 273, 280.) It is for the third party neutral to make this decision. (*Brotherhood of Maintenance of Way Employees v. Burlington N. R.R. Co.* (7th Cir. 1994) 24 F.3d 937, 940 ("...one arbitrator's interpretation of a collective bargaining agreement is not binding on subsequent arbitrators."); *General Commission of Adjustment, United Transp. Union, W. Md. Ry, Co. v. CSX R.R. Corp.* (3d Cir. 1990) 893 F.2nd 584, 593, n.10 (quoting *Butler Armco Indep. Union v. Armco Inc*. (3d[rd] Cir. 1983) 701 F. 2d 253, 255.) (Cf. *Oil, Chemical and Atomic Workers International Union Local No 4 v. Ethyl Corporation* (5th Cir. 1981) 644 F.2d 1044, 1049.) Again, so long as the mediator adheres to the relevant statutory criteria, we should not require him or her to distinguish prior mediator reports in the absence of extraordinary circumstances.

ORDER

For the reasons described herein, the UFW's petition for review of the Mediator's Report is SUSTAINED as to Articles 2 and 24 of the MMC Contract. Accordingly, this matter is remanded to the Mediator for further mediation proceedings concerning those articles pursuant to Labor Code section 1164.3, subdivision (c) and Board regulation 20408, subdivision (c). Pursuant to Board regulation 20408, subdivision (c), further mediation proceedings are to commence "as soon as practical" but in no event later than 30 days following the date of this Decision and Order. Once commenced, the additional mediation period shall not exceed 30 days. (Lab. Code § 1164.3, subd. (c).) Because mandatory mediation in this case has already far exceeded the timelines set forth in the statute, the parties and the Mediator shall conclude their additional mediation as expeditiously as possible. The applicable time limits are not to be extended without the written leave of the Board's Executive Secretary, who is to grant such extensions only for good cause shown and only to the extent reasonably necessary.

At the conclusion of the additional mediation, the Mediator shall file a second report with the Board pursuant to Labor Code section 1164.3, subdivision (c).[10] In issuing the second report, the Mediator shall include the basis for each determination, including citation to the relevant portions of the record. (Lab. Code § 1164, subd. (d) ("the report shall include the basis for the mediator's determination" and "shall be supported by the record."); Board

[10] While Labor Code section 1164.3, subdivision (c) does not specify a deadline for the submission of the second report, such report should be filed within the same 21 day time period applicable to the first report under Labor Code section 1164, subdivision (d).

regulation 20408, subd. (a)(2) ("The mediator shall cite evidence in the record that supports his or her findings and conclusions.").) All evidence in the record before the Mediator shall be filed with the Board along with the second report. (Board regulation 20408, subd. (a)(2) ("All evidence on which the mediator relies in writing the report . . . shall be preserved in an official record").) Any petitions for review of the second report shall proceed as set forth in Labor Code section 1164.3.

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, the Board's order of June 3, 2014 (Admin. Order No. 2014-12), and the Order herein, shall constitute the final order of the Board subject to review pursuant to Labor Code section 1164.5.

DATED: June 27, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

ARNAUDO BROTHERS, LP and
ARNAUDO BROTHERS, INC.
(United Farm Workers of America)

Case No. 2013-MMC-001
40 ALRB No. 7

Background

On May 13, 2014, mediator Matthew Goldberg (the "Mediator") issued his report concerning mandatory mediation and conciliation ("MMC") proceedings between Arnaudo Brothers, LP and Arnaudo Brothers, Inc. ("Arnaudo") and the United Farm Workers of America (the "UFW"). Both the UFW and Arnaudo filed petitions for review of the Mediator's report. The Agricultural Labor Relations Board (the "Board") granted review of the UFW's challenge to Article 2 and 24 of the MMC contract, dealing with union security, and contract duration. The UFW challenged the Mediator's decisions to delay the effective date of the union security language and to order a one-year contract.

Board Decision

The Board sustained the UFW's petition for review and remanded the matter to the Mediator. With respect to Article 2, the Board concluded that the Mediator's reliance upon the perceived presence or absence of employee support for the UFW ran up against the policies of the exclusive bargaining representative concept. Under the Agricultural Labor Relations Act ("ALRA"), a certified union retains its certification unless and until it is replaced or removed through an election. Unlike the rule under the National Labor Relations Act ("NLRA"), under the ALRA, loss of majority is irrelevant to the continuing validity of the union's certification. It would be improper for an alleged loss of employee support to be treated as a factor undermining a union's position in MMC. Employee support issues are generally to be resolved through the union certification or decertification process, not through MMC, and this, along with the potential for much litigation involving the employee support issue and re-litigation of union recognition issues argues for the conclusion that employee support is an impermissible factor to be relied upon by the mediator. The Board held that it is also relevant that Labor Code section 1164, subdivision (e) directly addresses matters such as consideration of comparable contracts and terms and conditions of employment in comparable firms or industries. Because this is the approach contemplated by the Legislature, the mediator's reliance upon perceived doubts as to employee support was arbitrary and capricious.

The Board reached a similar conclusion with respect to Article 24, finding that the Mediator impermissibly based his ruling on contract duration upon his conclusions concerning employee support for the UFW and his belief that employees might desire an election. The Board also found that the Mediator's finding of fact that Arnaudo's employees had never expressed a desire to be represented by the UFW was clearly erroneous. The majority further found that, while a mediator is not required to treat past MMC decisions as binding precedent, Labor Code section 1164, subdivision (e) does

require a mediator to consider comparable contracts when ruling on competing proposals and the Mediator provided no explanation of his treatment of the prior contracts presented to him except his belief that employees might not desire union representation, which was not a legitimate basis for his ruling. Chairman Gould wrote separately on this point to state his view that a requirement for the mediator to provide a reasoned distinction between prior and subsequent reports may impose a standard which unduly diminishes the flexibility desirable for a third party mediator and that the mediator should possess an ability to depart from prior reports so long as his or her conclusions are rooted in the relevant MMC criteria found in that statute. In Chairman Gould's view, in accordance with the general rules governing arbitrators' treatment of prior awards and contracts, what the mediator did in prior reports should matter little, or not at all, so long as the statutory criteria are met.

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