STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC.,	)	Case Nos. 2011-MMC-001 (38 ALRB No. 9) (38 ALRB No. 7) (38 ALRB No. 2) (37 ALRB No. 5)
Employer,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	41 ALRB No. 1
Petitioner.	)	(January 13, 2015)

DECISION AND ORDER

This decision arises from allegations made by Petitioner, United Farm Workers of America (Petitioner or UFW), to the effect that Employer, San Joaquin Tomato Growers, Inc. (Employer or SJTG), has failed to comply with the terms of the collective bargaining agreement (CBA) between the two parties. The Agricultural Labor Relations Board (ALRB or Board) has considered the record in light of the pleadings and briefs filed in this matter, and DENIES the UFW's request for intervention in this matter at this time.

Procedural History

On October 9, 2012, the Board, in its decision and order in *San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 9, implemented a CBA between the UFW and SJTG. The CBA had been reached via the Mandatory Mediation and Conciliation (MMC) procedures specified by the Agricultural Labor Relations Act (ALRA or Act) and

the Board's regulations.[1] On April 14, 2014,[2] the UFW sent a position statement to ALRB Visalia Regional Director Silas M. Shawver, alleging that SJTG had, on multiple occasions, failed to comply with the terms of the CBA. These alleged violations included, without limitation, interference with UFW access; disparaging anti-union comments made by supervisors; and failure to provide accurate addresses of agricultural employees. On May 15, the Regional Director wrote the UFW a letter to the effect that the position statement should be sent to the Board itself. On May 20, the UFW filed its position statement with the Board via letter, with proper service on SJTG.

On June 23, the Board provided SJTG with an opportunity to respond to the UFW's position statement. SJTG's response was timely filed with the Board on July 17. SJTG argued in its response that the UFW had failed to provide any evidence of the alleged violations of the CBA; that if such violations did occur, the exclusive remedy would be the grievance-arbitration procedure contained in the CBA; that if such violations were sufficiently egregious, the UFW could file unfair labor practice (ULP) charges with the General Counsel of the Board, which it had not; and that the Board had no grounds to act upon the alleged violations.

On July 24, in Administrative Order (Admin. Order) 2014-20, the Board posed the following questions to the parties and four amici:

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[1] The Act is codified at Labor Code sections 1140 et seq. The Board's regulations are codified at California Code of Regulations, title 8, section 20100, et seq.

[2] All dates are for calendar year 2014 unless otherwise specified.

Question 1: Should the Board intervene in this matter in some form for the purposes of compliance with the CBA?

Question 2: Should (and may) the Board order enforcement of the CBA?

Question 3: Should such enforcement take the form of an order directing the parties to arbitration, as provided for in the CBA? What, if any, federal or state jurisprudence dictates or argues for Board intervention as described above?

Question 4: Assuming that the Board directs the parties to arbitration, what, if any, principles of exhaustion apply? In *Republic Steel Corp. v. Maddox* (1965) 379 U.S. 650, the Supreme Court held that, under federal policy, the grievance procedures set forth in a CBA must be exhausted before direct legal redress is sought, where such grievance procedures are specified in the CBA as being exclusive. With respect to the current matter, what would be the indicia of exhaustion? (*Cf. Glover et al. v. St. Louis-San Francisco Ry. Co. et al.* (1969) 393 U.S. 324, where the High Court ruled that where the effort to proceed formally with contractual/administrative remedies would be futile, exhaustion would not be required under *Republic Steel.*) Would such reasoning apply to the present situation? Why or why not?

Question 5: Note that section 1164.3(f) of the Act provides a mechanism for the parties and the Board to file an action to enforce the CBA. Also consider that section 1165 of the Act, which is analogous to section 301 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185), authorizes the bringing of a suit in the appropriate superior court for violations of a CBA by parties to the agreement. How do

sections 1164.3(f) and 1165 interact, if at all? Is there any manner in which the two sections may be applied in combination or concert, and if so, how?

Question 6: May the Board bring comparable actions? Should such action be brought under section 1164.3(f), 1165, or both? What federal or state jurisprudence, as noted above, argues for the Board bringing such actions?

Question 7: What argues against such Board intervention or bringing such actions in superior court? Again, what federal or state jurisprudence noted above argues against such action?

Question 8: Should the Board take some other course of action? If so, what, and pursuant to what authority?

Question 9: Should whatever course of action taken by the Board apply exclusively to CBAs reached via the MMC process, or not?

The four amici are all experienced in the area of labor law – the first two with representing unions, the second two with the representation of employers. All briefs in this matter, from the parties and all amici, were due no later than 4:00 p.m. on August 25. Ultimately, two amicus briefs were submitted in a timely fashion. One amicus brief was submitted by David A. Rosenfeld of the law firm Weinberg, Roger & Rosenfeld, a firm that represents labor unions (the "Rosenfeld Brief"). Another was submitted jointly by a group of attorneys and associations "on behalf of employer

interests" (the "Joint Amicus Brief").[3] SJTG itself also submitted a brief (the "SJTG Brief"). The UFW failed to submit its brief in a timely manner, as its faxed submission was received at approximately 4:51 p.m. on August 26. On August 29, the Board issued Admin. Order 2014-23, rejecting the UFW's brief as untimely filed. The UFW's brief will therefore not be considered.

The issue at this stage is how the Board should handle the request made by the UFW in its original position statement, now that briefing on the questions posed to the parties and amici has been completed.

Discussion and Analysis

The Rosenfeld Amicus Brief

This brief argued, inter alia, that the Federal Arbitration Act (FAA), title 9 United States Code sections 1-16, should apply to CBAs under the Act – which would require the parties to engage in arbitration pursuant to the arbitration clause in the CBA, as any state law to the contrary would be preempted. This appears to be correct, as the U.S. Supreme Court, in *Preston v. Ferrer* (2008) 552 U.S. 346, stated, at page 349: "We hold today that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." In *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, the Court ruled that an agreement in a CBA to arbitrate claims arising under the Federal Age

[3] These were amici Ronald H. Barsamian and Robert K. Carrol of Barsamian & Moody and Nixon Peabody, LLP, respectively, along with Western Growers Association, the Ventura County Agricultural Association, and the California Farm Bureau Federation.

Discrimination in Employment Act was enforceable as long as it was clearly and unmistakably stated, reasoning: "As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a [CBA] in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange." (*Id.* at p. 257.) The Court explained that an arbitrator's decision which rested on an interpretation of a federal antidiscrimination statute would be subject to judicial review under the FAA, although the Court did not discuss why the FAA (as opposed to section 301 of the LMRA) was applicable. (*Id.* at p. 269.)

The Supreme Court, again without discussion of section 301, assumed, in *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287* (2010) 561 U.S. 287, that the FAA applies to labor cases involving a CBA which clearly and validly commits disputes to arbitration, unless there is a question as to the formation of the arbitration agreement, or as to whether such agreement applies to the specific dispute at issue. (*Id.* at pp. 299-303.) Thus, the Supreme Court has effectively ruled that a CBA is a contract for purposes of the FAA.[4]

The Rosenfeld Brief argued that absent unusual circumstances such as employer repudiation of contractual grievance-arbitration procedures, the statutory

[4] Curiously, neither *14 Penn Plaza LLC v. Pyett* nor *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287* take account of Section 301. Since those decisions, one circuit has said: "If there were a conflict between the statutes, [section 301 of the NLRA and the FAA] moreover, we would apply § 301, because it is a specific directive to create the substantive law that governs collective bargaining agreements, and the specific governs over the general." (*Alcan Packaging Co. v. Graphic Communication* (8th Cir. 2013) 729 F.3d 839, 841.)

scheme envisioned that the collective bargaining agreement would be enforced by the parties through the grievance-arbitration procedure. Because Labor Code section 1165 is, as the Board noted, almost verbatim, the language of section 301, enforcement of collective bargaining agreements in the Superior Court would be governed by the same rules applicable to section 301, including exhaustion of any grievance and arbitration procedure. Rosenfeld argued that once a contract is achieved, there is no need for the Board or any other reviewing authority, including a court, to treat a dispute arising under the agreement any differently than it would a dispute under a subsequent CBA, unless there is conduct that undermines the goals of the process by which the contact was achieved. Rosenfeld noted that the Board retains the power under section 1153(e) to enforce the bargaining obligation, and thus effectively enforce the agreement.[5] The Rosenfeld Brief views section 1164.3(f) as a limited remedy to seek enforcement before a petition for review is filed or when no petition for review is filed, and noted that the Board has effectively ruled that it can seek direct court enforcement of a CBA reached through MMC after the 30-day period to file a petition for review is filed and a petition has not been filed. (Citing *Ace Tomato Co*. (2012) 38 ALRB No. 8.)[6]

[5] Rosenfeld opined that generally speaking, if a union files a ULP charge alleging a unilateral change during the early period of an initial MMC contract, the General Counsel should proceed with the investigation of the charge without delay and allow deferral of the charge for no more than six-months.

[6] Chairman Gould had no involvement in the *Ace Tomato* decision. He expresses no opinion of the validity of that decision.

The Joint Amicus Brief

The Joint Amicus Brief argued, inter alia, that the grievance-arbitration clauses in this matter clearly constitute the exclusive remedy available to the UFW under the CBA. The brief further argued that the Board should not, and indeed, could not, become involved in this matter in any way, stating that the UFW's recourse would be to file a motion in superior court to compel arbitration. The brief asserted that, under section 1164.3(f) of the Act, the Board only had power to file an action for enforcement of the CBA in this case for 60 days after its order in 38 ALRB No. 9 took effect.

Moreover, the brief argued that section 1165 of the Act, by its very language allows only for labor organizations, and not the Board, to bring suit to enforce a CBA – and that this is also true for section 301 of the NLRA (29 U.S.C. § 185), which is analogous to section 1165. The brief further pointed out that there had been no showing that the grievance-arbitration procedures had been repudiated or were futile. The brief concluded that the Board should take no action in this matter, and that the UFW's proper course of action would be to exhaust its grievance-arbitration procedures under the CBA – and only after doing so, or after demonstrating that such procedures were repudiated by SJTG or were futile – could it file suit under section 1165.

The SJTG Brief

SJTG also argued that the grievance-arbitration procedures of the CBA are the exclusive methods of contract enforcement. SJTG argued that the 60-day window for a party to seek court enforcement of the ALRB's MMC decision (38 ALRB Nos. 9 and 7) closed in 2012. Moreover, SJTG argued that as section 1165 of the ALRA does not

apply to the Board because the Board is not a party to the CBA, the Board would have no standing to bring an enforcement action.

The UFW Has Failed to Exhaust its Grievance-arbitration Procedures under the CBA, and Has Failed to Demonstrate that Such Procedures Would Be Futile.

In the current case, the UFW has not exhausted its negotiated grievance-arbitration procedures – in fact, it has not yet invoked them. Nor has it shown that submission of its claims to arbitration would be futile or that SJTG has repudiated the CBA's grievance-arbitration procedures.

Assuming, arguendo, that the Board has the authority to enforce the CBA in this matter, ample judicial precedent indicates that in the absence of the establishment of an exception such as futility or the employer's repudiation of grievance-arbitration procedures, a union must exhaust its contractual remedies before seeking judicial relief. (*Republic Steel Corp. v. Maddox, supra*, 379 U.S. 650, 652; *Glover et al. v. St. Louis-San Francisco Ry. C. et al., supra*, 393 U.S. 324, 330; *Vaca v. Sipes* (1967) 386 U.S. 171, 186.) These principles would appear to have equal application to a union's attempt to obtain enforcement of a CBA from this Board, assuming, *arguendo* that such enforcement authority exists. In *Sidhu v. Flecto Co., Inc.* (9th Cir. 2002) 279 F.3d 896, appellant employee grieved his layoff (which occurred after an industrial injury) through his union, and the union ultimately filed a petition for arbitration, which was dismissed as untimely. (*Id.* at p. 898.) The union filed another grievance when the employee's request to return to work after receiving a medical release was denied. (*Ibid*.) The union made

repeated requests to arbitrate this second grievance, but the employer refused. (*Ibid*.) The union did not seek to compel arbitration, but filed a section 301 lawsuit. (*Ibid*.) The employer claimed that the employee had not exhausted his grievance procedures under the CBA. (*Ibid*.) The Court ruled in the employee's favor, holding that the employer, by its conduct, had repudiated the CBA: "If the employer repudiates the procedures established in a CBA to govern a particular grievance, the aggrieved employee is relieved of the usual requirement to exhaust administrative remedies as to that grievance." (*Id.* at p. 900.)

The instant case is quite dissimilar, as there has been no evidence presented that the employer, SJTG, has repudiated the CBA by refusing to engage in arbitration. Thus, the UFW would not be relieved of its responsibility to exhaust the procedures specified in the CBA.

Further illustration is provided by *Carpenters Fringe Benefit Funds of Illinois v. McKenzie Eng'g* (8th Cir. 2000) 217 F.3d 578, where a union sued the employer under section 301 to recover unpaid dues. The Court rejected the claim, holding, at pages 585-586, that since the union had failed to seek arbitration of the dispute per the CBA, it had failed to exhaust its contractual arbitration remedies – and this was true even though the employer had clearly breached the contract. "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach....there was no evidence that [the employer] repudiated the contract's remedial provisions....on this record, [the union] had insufficient reason to assume that [the employer]...would refuse a demand to arbitrate the dispute...." (*Id.* at

p. 586.) Thus, by the same rationale, the UFW must seek arbitration before it can resort to either the Board or courts.

CONCLUSION

The Board will not take any action in this matter at this time. The UFW has not shown that it has exhausted its contractual remedies under the CBA, nor has it shown that the invocation of such remedies would be futile or that SJTG has repudiated the CBA.

ORDER

The United Farm Workers of America's request for in this matter is DENIED.

DATED: January 13, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

SAN JOAQUIN TOMATO GROWERS, INC.
(UFW)

Case No. 2011-MMC-001
41 ALRB No. 1

This case arises from allegations made by Petitioner, United Farm Workers of America (UFW), that San Joaquin Tomato Growers, Inc. (SJTG) had failed to comply with the terms of a collective bargaining agreement (CBA) reached via the Mandatory Mediation and Conciliation (MMC) procedures specified by the Agricultural Labor Relations Act (ALRA). The UFW initially requested that the Board order SJTG to cease and desist from violating specified articles of the CBA in addition to ordering other relief. SJTG responded with a position statement that argued that the UFW had failed to provide evidence of the alleged violations of the CBA, and if such violations had occurred, the exclusive remedy would be the grievance-arbitration procedure contained in the CBA.

The Board invited the filing of amicus briefs on a number of questions related to the matter, including whether the Board should or may order enforcement of the CBA, and what, if any, state or federal jurisprudence argues for Board intervention. The Board asked the amici to comment on whether such enforcement (if appropriate) should take the form of an order directing the parties to arbitration, and if so, what, if any, principles of exhaustion applied. The Board also asked amici to comment on the interaction (if any) of ALRA sections 1164.3(f) and 1165.

After reviewing briefs of the amici and of SJTG (the UFW's brief was untimely filed, so the Board did not consider it), the Board found that the UFW had failed to exhaust its grievance-arbitration procedures under the CBA, and had failed to demonstrate that such procedures would be futile. Thus, the Board concluded that the UFW must seek arbitration before it could resort to any action before the Board or courts. The Board declined to take any action in the matter at this time.

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