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,	)	ORDER ACCEPTING PETITIONER'S PETITION FOR REVIEW OF MEDIATOR'S REPORT; DENYING EMPLOYER'S PETITION FOR REVIEW OF MEDIATOR'S REPORT; DENYING MOTION TO STAY MMC PROCEEDINGS
and	)	
UNITED FARM WORKERS OF AMERICA,	)	
Petitioner.	)	Admin. Order No. 2014-12

On May 13, 2014, the mediator in this Mandatory Mediation and Conciliation ("MMC") case, Matthew Goldberg (the "Mediator"), filed his report (the "Mediator's Report") with the Agricultural Labor Relations Board (the "ALRB" or the "Board") pursuant to section 1164(d) of the Agricultural Labor Relations Act (the "ALRA" or "Act") and section 20407(c)-(d) of the Board's regulations.[1] On May 22, 2014, the petitioner, the United Farm Workers of America (the "UFW"), and the employer, Arnaudo Brothers, LP and Arnaudo Brothers, Inc. ("Arnaudo"), timely filed petitions for review of the Mediator's Report pursuant to section 1164.3(a) of the Act

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

and section 20408(a) of the Board's regulations. Additionally, Arnaudo moved the Board to stay the MMC proceedings pending resolution of certain unfair labor practice charges involving Arnaudo that are currently pending before the Board. (See *Arnaudo Brothers, LP*, Case No. 2012-CE-030-VIS.) On May 23, 2014, the UFW moved to strike Arnaudo's motion to stay the MMC proceedings.

Upon receipt of a petition for review of a mediator's report, the Board is to determine whether the petition, or any portion of it, establishes a prima facie case that a provision of the collective bargaining agreement set forth in the report is: (1) unrelated to wages, hours, or other conditions of employment; (2) based on clearly erroneous findings of material fact; or (3) arbitrary and capricious in light of the mediator's findings of fact. (Lab. Code § 1164.3(a).) Where the Board finds that a prima facie case has been established with respect to a provision of the report, the Board will grant review of that provision. (Lab. Code § 1164.3(b)-(c).)

1. Arnaudo's Petition for Review

Disclaimer and Abandonment

Arnaudo argues that the Board's initial referral of the parties to MMC was improper because the UFW had previously disclaimed interest in representing the bargaining unit and had abandoned the bargaining unit. Arnaudo did not, however, claim in its answer to the UFW's request for MMC that the UFW had disclaimed interest. [Respondent's Answer to Declaration of Maria Guadalupe Larios and Declaration of Robert K. Carrol ("Answer").] Arnaudo claimed in its answer that, in 1982, a UFW negotiator stated that the UFW "no longer wanted a contract" with

Arnaudo but did not assert in its answer that this statement represented a disclaimer of interest. [Answer ¶ 4.] Even if Arnaudo had made such a claim, the alleged statement would not have represented an unequivocal good faith statement of a disclaimer as required under Board precedent. (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 p. 14; *Vaughan & Sons, Inc*. (1986) 281 NLRB 1082, 1084 (Union's statement that "we are pulling out" was not a clear and unequivocal statement of disclaimer in light of the surrounding circumstances.")[2] Furthermore, with respect to Arnaudo's claim of abandonment, to the extent that claim was raised in Arnaudo's answer, the Board has recently reaffirmed its holdings that abandonment is not a defense to the duty to bargain. (*Arnaudo Brothers, LP, supra*, 40 ALRB No. 3; *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.)

Arnaudo also argues that each and every term of the Mediator's Report is based on clearly erroneous findings of fact and is arbitrary and capricious because the Mediator allegedly made a finding of fact that the UFW had disclaimed interest in representing the bargaining unit and had abandoned it. The Mediator made no such finding. In fact, upon being presented with the parties' arguments on disclaimer and abandonment, the Mediator stated that "these are all matters that are well beyond my

[2] Although the Board recently directed the administrative law judge in Case No. 2012-CE-030-VIS to take evidence on Arnaudo's claim in that case that the UFW disclaimed interest, Arnaudo actually raised the issue of disclaimer in that case, unlike here. Furthermore, Arnaudo claimed in that case that a UFW negotiator stated that the UFW "no longer wanted anything to do with the Company, or words to that effect" whereas in this case, the only allegation was that a negotiator stated that the UFW "no longer wanted a contract." (*Arnaudo Brothers, LP, supra,* 40 ALRB No. 3 p. 13.)

prerogative, my authority." [Mediator's Report, Exhibit B (Transcript of December 16, 2013 final mediation session ("Tr.") p. 9.]

Article Two – Union Security

Arnaudo argues that it was arbitrary and capricious in light of the findings of fact for the Mediator to include a union security clause in the MMC contract. Arnaudo argues that the Mediator "acknowledged the inequities" of including a union security clause in light of what Arnaudo claims is "strong evidence" that Arnaudo's employees do not desire representation by the UFW. [Arnaudo Brothers LP's Petition for Review of Mediator's Report ("Arnaudo Pet.") p. 18.] However, while the Mediator noted that Arnaudo's employees "may or may not" wish to be represented by the UFW, not only did the Mediator make no finding of fact on that issue, he found that "every union contract contains a union security clause," a finding of fact that Arnaudo does not contest. [Tr. 49.]

Appendix A – Wages

During the final mediation session, the Mediator ruled that wages for employees previously earning the minimum wage would be $9.25 per hour effective January 1, 2014, rising to $9.50 effective July 1, 2014, when the state minimum wage was scheduled to increase, with employees previously earning more than the minimum wage receiving a wage increase of $1.25 per hour starting January 1, 2014 and an increase of an additional $0.25 starting July 1, 2014. [Tr. 47; Mediator's Report Exhibit A, Appendix A.]

Arnaudo argues that its competitors only pay the minimum wage (currently $8.00 per hour and scheduled to rise to $9.00 per hour effective July 1, 2014) and asserts that the MMC Contract will require Arnaudo to pay "a full dollar and a half more than their (sic) competitors in the region for the entire period until the minimum wage increases." This argument is factually incorrect in that it ignores that the Mediator, at Arnaudo's urging, changed his initial ruling that base wages would be set at $9.50 per hour and lowered them to $9.25 per hour for the period January 1 to June 30, 2014. [Tr. 43-47.] More importantly, although Arnaudo argues that the Mediator "discounted compelling evidence presented by Arnaudo" that its competitors pay only the minimum wage, Arnaudo does not identify any such evidence, citing only to a passage from the transcript in which Arnaudo's attorney made this claim without referring to any evidence. [Arnaudo Pet. p. 19 & Tr. 40.] (*San Joaquin Tomato Growers, Inc*. (2012) 37 ALRB No. 5 (finding that employer failed to establish prima facie case to warrant review of an MMC report where it failed to cite "any relevant evidence in the record.").)

For the reasons described above, Arnaudo has failed to establish a prima facie case that the Mediator's Report, or any provision of it, violates the provisions of subdivision (a) of section 1164.3 of the Act. Accordingly Arnaudo's petition for review of the Mediator's Report is dismissed in its entirety.

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2. The UFW's Petition for Review

Article Two – Union Security

The Mediator ruled that the MMC Contract would contain a union security provision after finding that such provisions are included in "every union contract." [Tr. 49.] However, he determined that, in this case, while the MMC Contract would go into effect on January 1, 2014, the union security provision would not go into effect until July 1, 2014. The UFW contends that the delayed effective date of the union security provision was based upon the Mediator's allegedly erroneous and arbitrary findings concerning employee support (or lack thereof) for the UFW. The UFW points out that, although the Mediator found that "every Union contract contains a union security clause," he concluded that the union security clause should not be effective during the first half of the Contract's term due to his belief that Arnaudo's employees might no longer wish to be represented by the UFW. [Tr. 49.] Apart from his statement concerning employee support for UFW representation, the Mediator did not give any explanation for delaying the effective date of the union security clause. The UFW has established a prima facie case that this provision of the Mediator's Report was based upon a clearly erroneous finding of fact and/or was arbitrary or capricious in light of the Mediator's findings of fact within the meaning of subdivision (a) of section 1164.3 of the Act. Accordingly, the Board accepts review with respect to this portion of the UFW's petition for review.

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Article Twenty-Four – Duration of Agreement

With respect to the duration of the MMC Contract, the Mediator rejected both the Employer's proposal for a contract expiring on March 1, 2014, and the UFW's proposal for a three-year contract, ruling instead that the duration of the contract would be one year commencing on January 1, 2014 and terminating on December 31, 2014. [Tr. 17; Mediator's Report, Exhibit A, Article 24.] The UFW argues that the Mediator's ruling was based on clearly erroneous findings of fact and was arbitrary. The UFW points out that, in ruling on the duration of the Agreement, the Mediator stated that he was ruling "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 [UFW]" and that a one-year contract "will give employees the opportunity to vote on whether they wish to be represented by the [UFW]." [Tr. 17-18.] The UFW also argues that the Mediator's ruling was contrary to a prior ruling by this same Mediator in another case, which the UFW argues, presented indistinguishable circumstances.

The UFW has established a prima facie case that this provision of the Mediator's Report was based upon a clearly erroneous finding of fact and/or was arbitrary or capricious in light of the Mediator's findings of fact within the meaning of subdivision (a) of section 1164.3 of the Act. Accordingly, the Board accepts review with respect to this portion of the UFW's petition for review.

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3. Arnaudo's Motion to Stay and the UFW's Motion to Strike

In conjunction with its petition for review, Arnaudo moved the Board to stay the MMC proceedings until such time as Case No. 2012-CE-030-VIS, and specifically, Arnaudo's claim in that case that the UFW disclaimed interest in representing its employees, is adjudicated. Arnaudo argues that the outcome of that case may render the MMC case moot or render an MMC contract unenforceable. Arnaudo cites no authority for the proposition that MMC proceedings are stayed when there are concurrent unfair labor practice proceedings that put at issue the validity of the union's certification. To the contrary, the Board has declined to stay MMC proceedings even when there were concurrent proceedings to decertify the union, which also put the union's continuing right to serve as the bargaining representative at issue. Accordingly, Arnaudo's motion to stay the MMC proceedings is denied and the UFW's motion to strike is dismissed as moot.

Dated: June 3, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member