What's New Under the ALRA

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I have been asked to speak about two recent Supreme Court cases, *Gerawan Farming, Inc. v Agricultural Labor Relations Board* and *Tri-Fanucchi v Agricultural Labor Relations Board.*

The *Gerawan* case conclusively settled one issue that had never been put to rest by the Supreme Court and another that, although long settled at the Board level, had agitated the employer community for years,[2] The first issue was the constitutionality of what is generally referred to as the Board's MMC procedure. The Supreme Court overruled the court of appeal and declared the procedure to be constitutional. For those who don't know what MMC is, I will shortly describe it. The second issue was the reasonableness of the Board's rejection of employer arguments that the protracted failure of a union to seek to bargain on behalf of employees constituted grounds for the employer to withdraw recognition. In *Tri-Fanucchi,* the Supreme Court affirmed the court of appeal's holding that this doctrine, commonly called the "abandonment" doctrine, applied in the ordinary case, and in *Gerawan* the Supreme Court rejected the court of appeal's holding that an MMC procedure was not an ordinary case.

Since questions about the applicability of the abandonment doctrine are common to both cases, before going further, I will explain a little bit more about how the abandonment doctrine originated. In 1983,[3] in a case that had nothing to do with the endurance of the bargaining obligation during a period of prolonged union absence, the Board held that under the ALRA a union remains "certified until it is decertified" in a Board conducted election. In 1985, again in a case that did not involve a union's prolonged absence from the fields, this rule was upheld as a reasonable interpretation of the Act.[4] In 1996, the Board

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[1] The views expressed in this paper are those of the author alone.

[2] See the Board's discussion of 'dormant certifications' in *Bruce Church* (1991) 17 ALRB No. 1.

[3] *Nish Noroian* (1983) 8 ALRB No. 25:

> The Agricultural Labor Relations Act (ALRA) differs from the NLRA in its requirements and procedures for recognition. The essential requirement for initial recognition is certification. * * * Even if there were proof of 100 percent support in the appropriate unit, it is unlawful, under our Act, for an employer to recognize the bargaining representative, or for the union to attempt to force recognition through any means other than the election process. [Citation omitted] Majority support and/or a good-faith belief of majority support do not control. Under our Act, the only means by which a union can be recognized is through winning a secret-ballot election and being certified by the Board. * * * Under the ALRA, employers cannot petition for an election, nor can they decide to or voluntarily recognize or bargain with an uncertified union. By these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of this Board. Likewise, whether or not recognition should be withdrawn or terminated must be left to the election process. D a

[4] *F & P Growers Ass'n v. Agricultural Labor Relations Board* (1985) 168 Cal App. 3d 667:

clearly extended this principle to cover cases in which a union had been absent from the fields for years, holding that under the "certified until decertified" rule the bargaining obligation would only be extinguished if a union was defunct or had disclaimed interest in representing the unit.[5] Although the Board adhered to this doctrine for well over a decade, no court of appeal had ever addressed the issue until the *Gerawan* and *Tri-Fanucchi* cases[6] and, as noted above, in the court of appeal the cases provided mixed results for the Board. In *Tri-Fanucchi* the court upheld the Board's doctrine but reversed the Board's award of

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> We therefore agree with the Board and the Union that the NLRA precedent is inapplicable here because of California's legislative purpose and because of the differences in the two Acts. While it does not follow inexorably that the agricultural employer's good faith belief is not a defense for refusal to bargain just because the Legislature prevented an agricultural employer from electing a union or from filing a decertification petition, nor is such a conclusion demanded by pure syllogistic reasoning, it does appear that the Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit an agricultural employer to be able to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the NLRA loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly.

[5] See, *Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4. The Board, and even the Supreme Court in *Gerawan*, have taken *Bruce Church* (1991) 17 ALRB No. 1, to have first established the principle. Citing *Lu-Ette Farms* (1982) 8 ALRB No. 91, the Board in *Bruce Church* does state that it has held that a Union remains the certified representative until decertified or until it becomes defunct or disclaims interest in continuing to represent the unit. However, it goes on to note that in *O.E. Mayou* 11 ALRB No. 25, at 12 it

> defined abandonment as a showing that the Union was either *unwilling* or unable to represent the bargaining unit. [Citation omitted.] The above standards were set out by the Board in rejecting employer claims that, as under the [NLRA], the bargaining obligation may cease upon a showing of good faith belief in the loss of majority support. The Board found the language of the ALRA instead required formal decertification or, in essence, a showing that the Union *had effectively left the scene altogether*. In the present case, while there is evidence of evasive bargaining conduct, there is nothing that indicates that the Union disclaimed interest in, or was *unwilling* or unable to represent, the bargaining unit. *Bruce Church,* at p. 6 [Emphasis added]

While "defunctness" appears in these formulations as part of the definition of "abandonment," so does "unwillingness." This is problematic since "unwillingness," which, in the passage above, the Board appears to treat as a synonym for "disclaim," ordinarily means "reluctant, loath, averse," all of which may be demonstrated silently or even inferred by an outsider (as in "I can tell that you are [loath, averse, reluctant] to do this or that.") See, *The American Heritage Dictionary*, 1976; *The Random House Unabridged Dictionary, 2nd Ed.*, 1966. However, as the Board's most recent cases on disclaimer make clear, disclaimer is anything but silent. And if "unwillingness/reluctance" may be inferred from conduct, wouldn't a union's failure to request bargaining for 17 or for 25 years (as in the two cases discussed) be at least some evidence for it? Ignoring *Dole Fresh Fruit,* which clarified the Board's definition*,* this was one of Tri-Fanucchi's arguments*. Bruce Church* may have pointed the way towards the "abandonment" standard that eventually emerged, but it was only in cases after *Bruce Church* that the Board made it clear that "unwillingness" meant only "disclaimer."

[6] This is ironic because the only part of the court of appeal opinions in the two cases that remains in the wake of the Supreme Court decision is the holding that in the ordinary case a union does not lose its representative status despite its failure to demand bargaining for an extended period of time, which as noted above in the *Tri-Fanucchi* case was roughly 25 years and in the *Gerawan* case was roughly 17 years.

contractual makewhole because no court had previously upheld it,[7] and in *Gerawan,* the court held that abandonment could be a defense in MMC cases.

In reversing the court of appeal on the Board's award of makewhole in *Tri-Fanucchi*, the Supreme Court did not establish any new principle but put an exclamation point on the long-established one that courts should not substitute their judgment for that of the Board in the exercise of the Board's remedial power. Although the principle is as often honored in the breach as in the observance, the Court's strong statement in support of it may prove in the long run to be as important to the administration of the Act as the MMC and abandonment decisions in *Gerawan* appear to be at the moment.

Little more need be said about *Tri-Fanucchi*. For the rest of my time, I am going to concentrate on the Supreme Court's *Gerawan* case since it did more than strongly endorse familiar principles. MMC is a procedure inserted into the Agricultural Labor Relations Act effective 2003. The initials stand for Mandatory Mediation and Conciliation. In the Act it appears simply as Contract Dispute Resolution. No more succinct explanation of how it works can be provided than that given by the Supreme Court in *Gerawan*:

> In certain cases in which an employer and a labor union have failed to reach a first contract, either party may invoke MMC, which involves a mediation process before a neutral mediator. [Citation omitted.] If the parties do not reach an agreement on all terms through mediation, the mediator resolves the disputed terms and submits a proposed contract to the Board, which can then impose that contract on the parties.[8]

Imposing a contract on the parties is not really mediation and it is generally referred to as interest arbitration. It is a powerful and controversial tool for ensuring first-time contracts.

The statute differentiated between the MMC requirements for certifications issued prior to 2003 and those issued after 2003, with more stringent requirements for invoking the process for the pre-2003 certifications. For the pre-2003 certifications, a petitioning union had to show 1) that after the date of the union's initial demand to bargain, a year had passed without the parties' having reached agreement, 2) that the parties had never had a previously binding contract between them, and 3) that the employer had committed an unfair labor practice.[9] When the United Farm Workers petitioned for MMC at units with

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[7] The Board sought review on the makewhole question. Tri-Fanucchi sought, and was granted, review of the Court's affirmance of the "abandonment" doctrine. The Supreme Court disposed of its abandonment argument on the basis of the decision in *Gerawan,* which became the lead case.

[8] *Gerawan Farming Co. v Agricultural Labor Relations Board* (2017) 3 Cal 5th 1118

[9] Labor Code Section 1164.11. Analysis of the chronology laid out by the Board in the 1986 *Joe G. Fanucchi/Tri-Fanucchi* unfair labor practice case (12 ALRB No. 8,) indicates that there was never a one-year period between the onset of negotiations and their interruption; as a result, it is unclear that the union could show that it met all the requirements for MMC. This may account for why the union did not petition for MMC in *Tri-Fanucchi.*

pre-2003 certifications with respect to which they had not sought to bargain for years,[10] the absence of any judicial authority affirming the Board's rule that a union remained the representative of these units all but guaranteed that, sooner or later, a challenge to MMC would be linked to a challenge to the Board's "certified until decertified" rule as elaborated in the abandonment doctrine.

Two petitions for MMC were filed after the effective date of the Act, one by the United Food and Commercial Workers at the Hess Collection Winery, and the other by the United Farm Workers at Pictsweet Mushroom Farms. Among other grounds for opposing the union's petition in Pictsweet, the employer raised union abandonment as an issue but the Board dismissed the argument on the basis of the "abandonment" doctrine.[11] Pictsweet did not pursue the matter by way of petitioning for review of the Board's decision upholding the Mediator's report.

Although the abandonment issue was not present in Hess, the employer did challenge the constitutionality of MMC. The court granted review and during the period when the petition was pending in the court of appeal, MMC was not again invoked. In 2006, the court of appeal issued a 2-1 decision upholding the constitutionality of the procedure.[12] Although the California Supreme Court denied Hess's petition for review, the decision of an intermediate appellate court in California is not binding on other courts of appeal, which meant that *Hess* did not conclusively settle the issue of the constitutionality of MMC. The court's decision did not open the floodgates to MMC. In the dozen years since the *Hess* Court of Appeal decision, unions have resorted to the procedure sparingly. The tally of new petitions for MMC is: two filed in 2006, one in 2007, none in 2008, one in 2009, none in 2010, one in 2011, one in 2012, two in 2013, one in 2014, none in 2015, one in 2016, none in 2017, and one in 2018.[13]

In 2013, one of the employers with whom the UFW sought MMC was Gerawan, whose employees the union had not sought to bargain for since 1994. Although Gerawan

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[10] In 2007, the union filed for MMC at D'Arrigo Bros. which was certified in 1978; in 2011 it filed for MMC at San Joaquin Tomato Growers, which was certified in 1993; in 2012 it filed for MMC at Ace Tomato Company, which was certified in 1992 and at Papagni Fruit Co., which was certified in 1984; in 2013, it filed for MMC at Arnaudo Bros., which was certified in 1977 and at Gerawan Farming Co., which was certified in 1992; in 2014, it filed for MMC at Perez Packing Co., which was certified in 1989.

[11] *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3. As noted above, the Board adopted its "certified until decertified" rule in the context of rejecting the NLRA's "good faith doubt" doctrine. In *Pictsweet*, the Board noted that the NLRA did not apply its "good faith doubt" doctrine where, as in *Pictsweet*, a union had once again become active.

[12] *Hess Winery v Agricultural Labor Relations Board* (2006) 140 Cal App 4th 1584.

[13] I am indebted to Laura Heyk for much of this summary review. This summary is derived from a search of the Board's decision index and Administrative Orders index at the Board's website, www.alrb.ca.gov. I should add that the Board sometimes orders MMC in a formal decision and sometimes in an Administrative Order so that tracing the procedural history of an MMC case requires moving between the two indices and it can be confusing. MMC petitions appear in the format yyyy-MMC-01, 02, 03 . . . .

contested the union's continued status as representative of its employees on the grounds that the union had abandoned them, the Board dismissed the contention on the familiar grounds discussed above and ordered Gerawan to participate in MMC. Some months after the Board's order, some of Gerawan's employees also rejected the UFW's claim to continue to represent them and sought to decertify the union. I will sum up a vastly more complicated procedural history than is necessary to relate simply by saying that Gerawan and the union, the union and the decertification petitioners, and Gerawan, the union, the decertification petitioners, and the Board became locked in a struggle over the validity of the union's claim to represent Gerawan's employees. This struggle continues even now in Gerawan's challenge to the Board's dismissal of the decertification petition filed by Gerawan's employees.

In any event, after the Board's approval of the Mediator's contract, Gerawan petitioned for review in the Fifth District court of appeal on the grounds that MMC was unconstitutional. Gerawan also argued that, even if it were constitutional, the Board was required to take evidence on whether the union had abandoned Gerawan's employees. The Court of Appeal agreed with both these arguments. On review, the Supreme Court rejected both of them.

Much of the Supreme Court's decision is highly abstract and I am not sure much purpose is served in getting into the fine points. Gerawan's main argument in the Supreme Court was that because each MMC contract was unique to the employing unit, each employer was treated differently from every other employer subject to MMC, and a regime that does not treat every employer the same constituted inherently unequal treatment across all of them. The Court rejected the argument.

With respect to the argument that the Board's application of the "certified until decertified" was unreasonable in the context of the MMC procedure, the Court held that the Legislature was aware of the rule when it enacted MMC in 2002, and was aware of the Board's application of it in MMC cases, when it amended the MMC procedure in 2003. Accordingly, the Court held that the Legislature must be held to have accepted the Board's interpretation of the statute. Finally, the Court held that there was no reason to treat MMC as a *sui generis* post-bargaining process that the Legislature intended to exempt from the Board's "abandonment" doctrine.

Gerawan has petitioned for certioriari in the United States Supreme Court and it remains possible that our Supreme Court's decision on the constitutionality of MMC may be reversed. Whether MMC is ultimately held constitutional or not, our Supreme Court's decision upholding the Board's "abandonment" doctrine is a matter of state law and should remain untouched. Supposing that Gerawan's continued challenge to MMC is unsuccessful and interest arbitration remains available to unions, what will the now-conclusive rejection of employer's claims of union "abandonment" in the context of MMC proceedings mean for collective bargaining?

Earlier, I noted how little MMC had been resorted to in the nearly 15 years since it was added to the statute. The impact of the procedure has, therefore, not been great. What is even more significant is that it has been used mostly with respect to pre-2003 certifications and not with respect to new certifications. Between 1975, when the agency came into existence and 2003 when MMC became operative, the Board has certified a labor organization as the collective bargaining representative of employees in hundreds of units. Some of the employers of those units reached contract, some never committed an unfair labor practice, and some, who might have met all the statutory requirements for MMC, are no longer in business. I don't know how big the remaining population of active employers with pre-2003 certifications who meet all the requirements for MMC is, but it is a closed set. Concentrating on pre-2003 certifications can only produce so many contracts.

It is clear from the passage of MMC that the Legislature concluded that the requirements of good faith bargaining and the threat of makewhole did not produce the kind of stable collective bargaining relationships the Act aimed to produce and it remains to be seen if MMC will do any better or whether first-time contracts will prove to be the only contracts. I say this for two reasons. First, in view of that disappointing history, one wonders whether, after the expiration of the initial MMC contract, the requirement of good faith bargaining and the threat of makewhole will now be enough to lead to further agreements. Second, unless the contracts that result from the process as well as their administration prove advantageous enough for employees to want continued representation, the procedure itself may introduce its own kind of instability into the Act. Put another way, will there be more decertification efforts out there? As important as *Gerawan* is in settling the issues that it did settle, much else remains undetermined.