Produce Magic, Inc., Employer-Petitioner *and* United Farm Workers of America, AFL–CIO. Case 32–RM–696

September 14, 1995

SUPPLEMENTAL ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, COHEN, AND TRUESDALE

On August 16, 1993, the Board issued an Order denying the Employer's request for review and affirming the Regional Director's findings in the above representation proceeding that the Employer's field employees (including cutter-packers, closures, loaders, and water persons) were not ''agricultural laborers'' and were therefore employees within the meaning of the Act except to the extent they performed actual cutting work. See 311 NLRB 1277 (1993). In so ruling, the Board specifically noted that it had considered the amici curiae briefs filed by the California Agricultural Labor Relations Board (ALRB), General Teamsters Local 890, and Bud Antle, Inc., d/b/a Bud of California, as well as the motion for administrative notice filed by the ALRB and the responses thereto. Id. at fn. 2.

On April 25, 1994, approximately 8 months after the Board's decision issued, the ALRB filed a motion for intervention and reconsideration of the Board's decision. Although acknowledging that the timing of its motion was unusual, the ALRB requested that the Board grant its motions given the importance of the issues involved and the effect on the ALRB's ability to carry out its statutory mandate.

On May 31, 1994, Local 890 filed a brief in support of the ALRB's motion, and on May 3 and June 13, 1994, respectively, the Employer and Bud Antle, Inc. filed briefs opposing the ALRB's motion. The Employer and Bud Antle opposed the motion, inter alia, on the grounds that it is untimely under Sec. 102.65(e) of the Board's Rules and raises nothing not previously considered by the Board.

Thereafter, on December 8, 1994, Local 890 filed with the Board in the instant proceeding a formal petition for the negotiation of a cession agreement with the ALRB. The petition requested that the Board enter into negotiations with the ALRB for a cession agreement under Section 10(a) of the National Labor Relations Act (NLRA), whereby the Board would cede to the ALRB jurisdiction ''with respect to all agricultural employees over whom the ALRB asserts jurisdiction under the Agricultural Labor Relations Act (ALRA), but with respect to whom the NLRB would otherwise assert jurisdiction'' under the NLRA pursuant to its decision in the instant case and in other cases. Local 890 argued that such a cession agreement would provide a workable and acceptable answer to the jurisdictional conflicts between the Board and the ALRB, and requested that the Board defer ruling on the ALRB's motion for reconsideration in the instant proceeding until such an agreement has been achieved.

Shortly thereafter, on December 13, 1994, the ALRB filed a supplemental brief in further support of its motion for intervention and reconsideration. In response to Local 890's cession petition, the ALRB stated there that, while it stood ready to work with the Board to solve the jurisdictional problems, there was no need to delay consideration of its motion for reconsideration.

Finally, on January 11, 1995, Bud of California sent a letter to the Board which also responded to Local 890's petition for a cession agreement. Bud of California argued that such an agreement would effectively overrule the Board's decisions not only in the instant proceeding, but also in several other cases, including *Bud Antle, Inc.*, 311 NLRB 1352 (1993); and *Camsco Produce Co.*, 297 NLRB 905 (1990), and requested that the Board at the very least provide industry and labor groups the opportunity to comment on the merits of the petition before entering into such an agreement.

Having duly considered the matter, we deny the ALRB's motion for intervention and reconsideration. We find, in agreement with the Employer and amicus Bud Antle, that the ALRB's motion is untimely and raises nothing not previously addressed in the ALRB's previous, December 30, 1992, amicus brief or considered by the Board.

We also deny Local 890's petition for negotiation of a cession agreement. We find, in agreement with the Regional Director in the underlying proceeding (311 NLRB at 1280), that ceding jurisdiction to the ALRB would be contrary to the Act. Although the proviso to Section 10(a) of the Act generally empowers the Board to enter into cession agreements, it expressly prohibits such an agreement where a provision of the state statute is ''inconsistent with the corresponding provision of [the NLRA] or has received a construction inconsistent therewith.''[1] The Supreme Court has interpreted

[1] The full text of Sec. 10(a) is as follows:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

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this phrase to mean that cession of jurisdiction is permissible only where the statutes have parallel provisions. *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301, 313 (1949). Further, the Board has consistently declined to enter into cession agreements where the statutes are not substantially identical. See *In re State of Minnesota*, 219 NLRB 1095 (1975) (state statute prohibited strikes and lockouts and provided for binding arbitration); and *Kaiser-Frazer Parts Co.*, 80 NLRB 1050 (1948) (state statute did not include anti-communist provisions comparable to those then-contained in Sec. 9(f), (g), and (h) of the Act). See also *L. Wiemann & Co.*, 106 NLRB 1167 (1953); *In re Sears Roebuck & Co.*, 91 NLRB 1411 fn. 2 (1950); and *Panderia Sucesion Alonso*, 87 NLRB 877 (1949). And see generally *Guss v. Utah Labor Board*, supra, 353 U.S. at 11 fn. 17, 15; and *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 659 fn. 2 (1954).

We recognize that the ALRA was modeled after the NLRA, as many of its provisions are virtually identical to those in the NLRA. Moreover, the ALRA creates an administrative agency (the ALRB) which essentially duplicates the NLRB in both form and responsibilities, and requires the ALRB to follow applicable precedents of the NLRA.[2]

As Local 890 and the ALRB acknowledge in their briefs however, there are also numerous differences between the ALRA and the NLRA. For example, contrary to the NLRA, the ALRA prohibits voluntary recognition based on authorization cards by making it an unfair labor practice to bargain with a union that has not been elected by secret ballot and certified.[3] Similarly, the ALRA also prohibits even the limited recognitional picketing permitted under the NLRA.[4] Further, the ALRA requires that a representation petition be supported by a ''majority'' rather than merely a ''substantial'' showing of interest,[5] and limits the right to file a decertification petition by providing that such petitions may only be filed where the employer and union have reached a collective-bargaining agreement and that agreement will expire within 1 year.[6] Finally, there also appear to be significant differences between various other provisions of the two statutes, including, inter alia, the union-security provisions[7] and secondary boycott provisions.[8] The foregoing differences are clearly substantial,[9] and in our view preclude us from entering into a cession agreement with the ALRB.[10]

Accordingly, it is ordered that the ALRB's motion for intervention and reconsideration is denied. Further, in the absence of a majority for reversal, we affirm the prior decision not to enter into a cession agreement.

CHAIRMAN GOULD and MEMBER BROWNING, dissenting in part.

We join our colleagues in denying the ALRB's motion for intervention and reconsideration for the reasons stated by them. We do not join them, however, in denying Local 890's petition for negotiation of a cession agreement.

The proviso to Section 10(a) of the Act empowers the Board by agreement to cede to a state agency jurisdiction over any cases in any industry, with certain exceptions not relevant in this case, ''unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.'' Citing ''substantial'' differences between the provisions of the NLRA and the ALRA, our colleagues conclude that the Board is precluded from negotiating a cession agreement with the ALRB.

Before ruling on the cession petition, we believe that the Board should seek further public comment. Although we recognize that prior Board cases have interpreted the 10(a) proviso narrowly, we are concerned that such decisions have effectively rendered the proviso a nullity, as evidenced by the absence of any cession agreements since the proviso was added by the 1947 amendments.

The 10(a) proviso ''is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the NLRB.'' *Guss v. Utah Labor Board*, 353 U.S. 1, 9 (1957).

[2] See Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro* (hereinafter Levy), 15 Santa Clara L. Rev. 783, 785–788 (1975).

[3] ALRA, Sec. 1153(f). See Levy at 789. See also *Harry Carian Sales v. ALRB*, 216 Cal. Rptr. 688, 698 (1985).

[4] Compare ALRA Sec. 1154(g) and (h), with NLRA Sec. 8(b)(7)(C). See also Levy at 795.

[5] ALRA, Sec. 1156.3. See Levy at 797.

[6] See ALRA, Sec. 1156.7(c) and (d). See also *Yamada Bros. v. ALRB*, 159 Cal. Rptr. 905, 913 (1979) (''Unlike the federal law, employees have no right to petition for a decertification election to depose an incumbent labor organization unless the union has reached a collective bargaining agreement with the employer and the currently effective bargaining contract will expire within a year.'')

[7] See ALRA, Sec. 1153. See also Levy at 790–791. The ALRB asserts in its supplemental brief that some of the ALRA's differences in this regard have been been removed through interpretation or construction of the statute, such as the ALRA's provision that unions may require membership ''in good standing'' as a condition of employment. Assuming arguendo that there are no differences in this respect, other differences appear to remain, such as the ALRA's provision allowing agreements requiring such membership on or after the 5th day of employment.

[8] See ALRA, Secs. 1154(d) and 1154.5. See also Levy at 793–794.

[9] See Levy at 785.

[10] Our colleagues would seek public comment on the issue of whether there should be a cession agreement. We disagree. As noted above, the NLRA and the ALRA are, in the language of Sec. 10(a), ''inconsistent'' in many respects. In these circumstances, Sec. 10(a) clearly forbids a cession agreement. Accordingly, we see no point in seeking public comment on whether there should be a cession agreement.

We therefore believe that additional public comment on the matter would be beneficial and preferable to our colleagues' ruling on Local 890's petition on the basis of the Board's prior decisions. Given that a cession agreement with one State might lead to requests for similar agreements from other States, we would publish a Federal Register notice soliciting comments on Local 890's petition from all interested persons. Accordingly, we dissent from our colleagues' denial of Local 890's cession petition.