Does a Statute Compelling a Business to Enter into a Collective Bargaining Agreement Violate Equal Protection, or the Nondelegation Doctrine?

Later this year the California Supreme Court will hear arguments in *Gerawan Farming Inc. v. Agriculture Labor Relations Board*—a case that has already received a great deal of public attention. At issue are controversial amendments to the Agricultural Labor Relations Act. They purport to authorize the California Agricultural Labor Relations Board to order businesses into binding "interest arbitration."

Under the Mandatory Mediation and Conciliation provisions of the ALRA, the Board issues a binding order, at the request of a petitioning union, forcing a business to enter into mediation over a proposed collective bargaining agreement (CBA), and ultimately—if the union and business are unable to reach an agreement—the Board orders the business to sign a CBA drafted by an assigned arbitrator. Simply put, the MMC provisions authorize the Board to order businesses to enter into agreements governing their employment practices notwithstanding whatever objections the employer might have.

In an opinion released last May, the Court of Appeal held that the MMC provisions are unconstitutional under both the Equal Protection Clause and California's nondelegation doctrine. That opinion conflicts with a previous appellate decision, *Hess Collection Winery v. California Agriculture Labor Relations Board* (2006), which rejected a similar constitutional challenge. Instead, *Gerawan* expressly adopted much of the rationale of the dissent in *Hess*, which argued that there was no standard governing the arbitrator's decisions under the MMC regime.

Not surprisingly, the California Supreme Court took this case to resolve the dispute.

And given the gravity of the constitutional issues presented, this case might ultimately result in a worthy petition for *certiorari* to the U.S. Supreme Court.

Statutory Background for the MMC Regime

The ALRA is modeled on the National Labor Relations Act, which imposes upon employers a duty to negotiate in good faith with a union once it has been certified as the official representative of a company's employees. Because the NLRA does not cover agricultural workers, California adopted the ALRA to impose those same duties on agricultural employers and set forth procedures for certifying and decertifying unions through employee elections. Like the NLRA, the ALRA prohibits certain unfair labor practices and charges the Board with the duty of enforcing the ALRA the same way the National Labor Relations Board enforces federal labor law.

Neither statutory scheme requires anything more than a good faith effort by employers. In other words, neither federal nor California labor law has required an employer to accept the terms of a proposed CBA. And that remains the law under the NLRA. But on September 30, 2002, the California legislature amended the ALRA to authorize the Board to compel a business to enter a CBA under certain conditions (described below).

The legislature was concerned that, in many cases, CBA negotiations often stall after agricultural employees succeed in certifying a union representative for negotiations with employers. The assumption was that agricultural employees lack the bargaining power to negotiate CBAs where employers retain the freedom to refuse to enter into a contract with the union. Accordingly, the MMC scheme permits compelling a CBA where negotiations have stalled.

The MMC enables a union to petition the ALRB to force binding "interest arbitration" under the following conditions: (1) the parties have never previously agreed to a CBA; (2) the union has proposed a CBA and more than a year has elapsed without agreement; and (3) the union can demonstrate that the targeted business has committed an unfair labor practice in the past. Once a valid petition is filed requesting binding "interest arbitration" under the MMC provisions, the parties must either agree to an arbitrator or an arbitrator is determined by process of elimination.

The arbitrator is tasked with working to facilitate a mutually beneficial agreement. But if the parties will not voluntarily come to terms, the MMC provisions ultimately require the arbitrator to prepare a CBA incorporating those terms the parties agreed upon and crafting provisions addressing those points on which the parties disagreed as the arbitrator deems proper. The statute gives the arbitrator no guidance on how to resolve disputes over an agreement's terms. The MMC merely requires that arbitrators must take into account certain considerations and ensure that the decision is justified by evidence in the record.[1]

The arbitrated CBA is then submitted to the Board for approval. The statute allows the Board to reject terms of a proposed CBA only under certain narrow conditions. And once the Board approves of the CBA, its order purports to require the parties to accept its terms. Thus, the CBA is imposed by an administrative agency as binding governing law between the parties, regardless of whether there is actual assent.

The Present Controversy

In 1992 the employees at Gerawan voted to certify the United Farm Workers ("UFW") as their union representative. The union requested that Gerawan enter into negotiations over a proposed CBA. No agreement resulted. Inexplicably, after meeting to discuss a proposed CBA in 1995, UFW disappeared from the scene.

Nearly two decades passed without any further communication, until October 2012 when UFW sent "a letter reasserting its status as the certified bargaining representative for Gerawan's agricultural employees and demand[ing] that Gerawan engage in negotiations." *Gerawan* at 1037. Gerawan agreed to negotiate in good faith, but questioned whether UFW had abandoned its right to claim representation of its employees. UFW gave no explanation as to why it had disappeared, but nonetheless negotiations commenced.

The parties held ten or more bargaining sessions in early 2013. But the parties could not agree on the terms of a proposed CBA, and UFW petitioned the Board to institute MMC proceedings to compel a CBA. At that point Gerawan raised legal objections before the Board, but was nonetheless ordered into binding "interest arbitration." As the parties were still unwilling to reach a voluntary agreement after

several mediations, the arbitrator drafted a CBA for the parties. The draft agreement required that Gerawan pay its employees more. Gerawan had vigorously protested any such requirement, in part because it maintained that the company was already paying above industry standard.

In the end, the Board adopted the arbitrator's report and ordered the parties to accept the CBA as drafted. Gerawan petitioned for a writ of review in the Court of Appeal, which held on constitutional grounds that the Board could not force Gerawan to accept the CBA. The court also held that the MMC proceedings were improperly instituted in this case because Gerawan was not permitted to raise the issue of abandonment before the Board.

As this case worked its way to the California Supreme Court, it has drawn a great deal of attention in the media on an ancillary controversy. In November 2013, Gerawan's employees organized a movement to decertify UFW as their union representative (that is, if UFW had not already abandoned that role) and held a decertification election. Remarkably, no one knows whether UFW was decertified in that election because the Board has (at UFW's urging) refused to count those ballots. The cited justification is that the decertification election might have been tainted in some manner by alleged unfair labor practices, presumably on the view that the employer was inappropriately pressuring employees to organize the decertification campaign. As things stand, the Board has given no indication as to whether it will ever count those ballots.

Can an Employer Assert Abandonment as a Defense Against a Compelled CBA?

As noted above, there were a number of statutory conditions for initiating MMC proceedings. For example, the union must demonstrate that more than a year has elapsed since it first sought a CBA and that the parties have yet to enter into an agreement. Of course, Gerawan argued below that this condition should be understood as imposing a requirement on the union to demonstrate that it has sought to bargain in good faith over the course of that year. But the Court of Appeal rejected that argument, holding that the plain language required only that the union demonstrate that twelve months have elapsed since it first requested a CBA.

Similarly, since the MMC provisions require a showing that the employer has committed an unfair labor practice in the past, Gerawan argued below that this condition should be understood as requiring that the alleged labor code violation was related or relevant to the parties' stalled CBA negotiations. The court again sided with the union on this point. Thus, it held that a union could force MMC proceedings regardless of whether it has negotiated in good faith and regardless of when an alleged labor code violation occurred.

But the court accepted Gerawan's argument that the statute should be interpreted to bar invocation of MMC proceedings in a case where a union is said to have abandoned its post as a representative of a company's employees. While the opinion left undisturbed a line of precedent holding that employers must negotiate in good faith notwithstanding an elapse of time or a suspicion that a majority of employees may no longer support unionization, the court held that it would be inappropriate to construe the MMC provisions to allow a union to force a compelled CBA on an employer if it has abandoned its post. The California Supreme Court has accepted review on this statutory question, in addition to the more fundamental constitutional issues presented.

Do the MMC Provisions Violate the Equal Protection Clause or the Nondelegation Doctrine?

The Court of Appeal's decision was largely predicated upon the understanding that the Board's MMC proceedings impose special legal obligations applicable only to a single employer. For example, Gerawan was ordered to pay higher wages to its employees than is required by generally applicable law. And since the Equal Protection Clause requires that similarly situated entities must be treated alike, the court found that this special imposition violated the U.S. Constitution. The court held that the Board had failed to offer any rational explanation for why Gerawan should be singled out for special legal duties beyond the mere fact that UFW had petitioned the Board to impose a binding CBA.

Further compounding the constitutional problem, the MMC provisions leave assigned arbitrators free to haphazardly craft different rules for different employers regardless of how similar their positions may be. In the court's view, this creates a

delegation problem, because (as with the federal doctrine) there must be some guiding principle based on the statutory text that governs an agency's rulemaking in any given case. While the Board and UFW argued below that MMC provisions provided adequate direction by requiring an arbitrator to consider factors such as the economic position of the employer and living costs in the area, there was no apparent response to the notion that the arbitrator held discretion to impose different conditions on similarly situated employers. Although the arbitrator was required to take these considerations into account, the arbitrator retains practically unfettered discretion to resolve disputes. It is difficult to see the guiding principle in a scheme that grants arbitrators power to make fundamental policy choices.

If the California Supreme Court agrees with the appellate decision, this will undoubtedly be considered a landmark case. There has been, for some time, a general conception that the nondelegation doctrine is dead in California. *See Coastside Fishing Club v. Cal. Res. Agency* (2008) at 1205 (noting that the nondelegation is limited by the understanding that the legislature may make broad delegations, and observing that California's doctrine is similar to the federal nondelegation doctrine—under which no statutory provision has been struck down since 1935); *see also* Posner & Vermeule, *Interring the Nondelegation Doctrine* (2002) 69 U. Chi. L. Rev. 1721, 1762 ("[T]he non delegation doctrine, and its corollaries for statutory interpretation, are dead."). But this case seems distinguishable from any recent delegation cases and may well be decided on other grounds.

Other Looming Constitutional Issues

In addition to equal protection and delegation issues, Gerawan has raised a due process argument. In a nutshell, the company alleged that the government cannot force a business to enter into a CBA. The U.S. Supreme Court struck down a similar regime because it violated freedom of contract in *Wolf Packing Co. v. Court of Industrial Relations* (1923). Like the MMC scheme, the Kansas statute at issue in *Wolf Packing* purported to force non-consenting parties into binding CBAs. The UFW and the Board argue that *Wolf Packing* is no longer good law since post-New Deal era precedent generally holds that economic regulation is reviewed under the deferential rational basis standard. On the other hand, the U.S. Supreme Court has

never backed away from the notion that a heightened standard of scrutiny should be applied when reviewing a statute compelling non-consenting parties to enter into a contract with a specific party. The appellate opinion side-stepped the due process issue here, but it could prove to be a significant issue in the event of a remand.

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**The authors filed an amicus brief on behalf of the National Federation of Independent Business Small Business Legal Center in this case.

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[1] "In resolving the issues in dispute, the mediator may consider those factors commonly considered in similar proceedings, including: (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; (3) The corresponding wages, benefits, and terms and conditions of employment in other [CBAs] 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 price 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." Labor Code § 1164(e).