

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	Case Nos.: 00-CE-5-SAL
)	01-CE-16-SAL
D'ARRIGO BROS. CO. OF)	02-CE-14-SAL
CALIFORNIA,)	04-CE-18-SAL
)	04-CE-18-1-SAL
Respondent,)	
)	
and)	30 ALRB No. 1
)	(August 2, 2004)
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

Introduction

This issue has arisen as a result of pre-hearing discovery disputes between the parties in the above case. The matter is before the Agricultural Labor Relations Board (ALRB or Board) because D'Arrigo Bros. Co. of California (Respondent) has applied to the Board for permission to appeal the Administrative Law Judge's (ALJ's) denial of Respondent's request that the ALJ reconsider her decision to deny the Respondent's request for a protective order limiting disclosure of discoverable information in the case.

Background

On April 6, 9, and 15, 2004 the ALRB General Counsel and the United Farm Workers of America, AFL-CIO (Charging Party or UFW) served Respondent with notices in lieu of subpoena requesting various documents and records from the

Respondent including notes taken by the Respondent's representative during collective bargaining sessions with the UFW.

On June 2, 2004, the Respondent filed a motion with the ALJ for a blanket protective order that would prevent the disclosure of six categories of documents (including the collective bargaining notes) obtained through the notices in lieu of subpoena to anyone outside of the litigation presently before the ALRB.

On June 14, 2004, the parties appeared before the ALJ in a telephonic pre-hearing conference regarding the Respondent's initial June 2, 2004 motion for a blanket protective order. The ALJ denied Respondent's motion during the telephone conference, but she did not issue a written order following the June 14 telephone conference as no party requested one.

On June 24, 2004, the Respondent sent the ALJ a letter requesting that she reconsider her June 14, 2004 decision to deny the protective order; however, it asked the ALJ only to reconsider the request with respect to the notes Respondent's representatives had taken during negotiation sessions with the UFW.

On July 2, 2004, the ALJ issued a written order denying the Respondent's request for reconsideration. The ALJ stated that she was denying Respondent's request for reconsideration for many of the same reasons she denied its original motion for a protective order during the June 14, 2004 telephone conference. The ALJ concluded that a protective order was not necessary or appropriate as Respondent had failed to show good cause for the order. Respondent filed an Application for Permission to Appeal Ruling of Administrative Law Judge (hereafter 'Application') with the Board on July 12, 2004.

Analysis and Discussion

A. Timeliness of Respondent's Application

The Respondent filed its Application pursuant to Board regulation section 20242(b).¹ Section 20242 (b) allows a party to apply to the Board "for special permission for an interim appeal from any ruling by...an administrative law judge...within five (5) days from the ruling..." Respondent indicates that it is applying for permission to appeal the ALJ's written order denying its request for reconsideration that was issued on July 2, 2004.

The ALJ orally issued her ruling on the Respondent's original motion for a protective order during the June 14, 2004 teleconference. Under the Board's regulations, the ALJ has the authority to rule on motions made at or after pre-hearing conferences and prior to the close of hearing, either orally on the record or in writing. (section 20241 (a) and (c).)² At the close of the June 14, 2004 teleconference no party requested that the ALJ reduce her ruling to writing.

The Respondent's Application is untimely as it was not filed within five days from the ALJ's June 14, 2004 ruling. The fact that the June 14 ruling was oral makes it no less of a final ruling of the ALJ. Regulation section 20242 makes is clear that oral rulings are subject to a request for permission to appeal the ruling to the Board. The Respondent's June 24, 2004 letter to the ALJ requesting reconsideration of her June 14 ruling, coming more than five days after that initial ruling, does not toll the five-day period for seeking appeal of the ALJ's ruling. While the Board's regulations do not

¹ The Board's regulations are codified at California Code of Regulations, Title 8, section 20100 et. seq

² In conformity with Board regulations, all pre-hearing conference calls in the matter were recorded and are part of the official record of the proceeding. (See section 20241 (d).)

prohibit the filing of requests for reconsideration of an ALJ's ruling, we believe the clear import of section 20242 is that the five-day period for seeking permission to file an interim appeal runs from the initial ruling of the ALJ. If motions for reconsideration filed after the five-day period were allowed to toll the deadline or trigger a new filing deadline, the five-day period would be rendered meaningless. In contrast, the construction of section 20242 adopted here, preserves due process while ensuring the orderly process of hearings. As it was untimely filed, we deny Respondent's Application for Permission to Appeal Ruling of Administrative Law Judge. Even if the Application had been filed in a timely manner, we still would deny the Application on its merits for the reasons discussed below.

B. Evaluation of Respondent's Application on its Merits

The Respondent argues that a protective order with regard to the negotiation notes is necessary and appropriate to protect the confidentiality of the notes and to preserve the stipulated protective order entered in the pending federal case in which the UFW's counsel is representing the plaintiff and D'Arrigo Bros. is the defendant.³

According to Respondent, the negotiation notes at issue were taken during various collective bargaining sessions between the UFW and Respondent between 1988 and the present. The notes were taken by Respondent's counsel Geoffrey Gega, and Respondent's representatives, John Snell and Jim Manassero. In support of its appeal, Respondent has submitted declarations from Gega, Snell and Manassero stating that the

³ *Medrano et al. v. D'Arrigo Bros. Co. of California* USDC Case no. C-00-20826 JF RS. The UFW is not the plaintiff in the federal case. The plaintiffs are past and present employees of D'Arrigo Bros. represented by the UFW.

notes were taken for the purposes of recording what was being said between the UFW and Respondent, to record private conversations among Respondent's bargaining representatives, and to outline potential issues that the Respondent's bargaining representatives might want to discuss after the bargaining session was over. They each state that they did not contemplate that their notes would ever be disclosed to the UFW, ALRB or any third party.

The Respondent argues that a protective order in the instant case is necessary because of an unrelated pending matter in federal court in which the UFW's counsel represents the plaintiffs and Respondent is the defendant. In that case the parties stipulated to a protective order that limited the disclosure of documents obtained during discovery to anyone outside of the litigation. Respondent expresses concern that if a protective order is not issued in the matter before the Board, the UFW's counsel might circumvent the protective order in the pending federal case.

Standards for Evaluating Appropriateness of Protective Orders

Section 20262 (m) of the Board's regulations give an ALJ the authority to grant a protective order "as may be appropriate and necessary." The regulations do not define "appropriate and necessary." The Board will therefore look to California and federal case law holding that protective orders may issue upon a showing of "good cause" in determining when a protective order is appropriate and necessary under the Board's regulations.

Pertinent case law provides that protective orders should be granted only upon a showing of good cause. *Welsh v. City & County of San Francisco*, 887 F. Supp. 1293 at 1297, citing *Blankenship v. Hearst Corp.*, (9th Cir. 1975) 519 F. 2d 418. (See also

Federal Rule of Civil Procedure 26 (c) and California Code of Civil Procedure section 2031 (f).⁴)

In order to demonstrate "good cause" a party must show: (1) that the documents in question truly are confidential, and (2) that disclosure of the documents would cause a 'clearly defined and very serious injury.' (*Welsh, supra*, at 1297 citing *Traveler's Ins. Co. v. Allied-Signal Inc.* (D. Conn 1992) 145 F.R.D. 17.)

The injury alleged "must be significant, not a mere trifle." (*Cipollone v. Liggett Group, Inc.* (3rd Cir. 1986) 785 F. 2d 1108.) Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are not sufficient. *Id.* A party requesting a protective order must provide "specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm". (*Deford v. Schmid Prods. Co.* (D. Md. 1987) 120 F.R.D. 648.)

a) Burden of Proof

The Respondent argues that the burden of proof is on the UFW to establish a reason for the denial of the protective order. In support of this contention Respondent cites *Moskowitz v. Superior Court* (1982) 137 Cal. App. 3d 313. This case is inapposite as it and other cases where the court shifted the burden to the party opposing the protective order involved discovery of financial records in the context of punitive

⁴ Federal Rule of Civil Procedure 26(c) provides that: "upon motion by a party...from whom discovery is sought...for good cause shown, the court...may make any order which justice requires to protect a party...from annoyance, embarrassment, oppression, or undue burden or expense..."

California Code of Civil Procedure section 2031 (f) states that : "When an inspection of documents, tangible things or places has been demanded, the party to whom the demand has been directed, and any other party or affected person or organization, may promptly move for a protective order...The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

damages claims. Even where financial information is sought and it is related to the underlying cause of action rather than a punitive damages claim, the party seeking the protective order is required to meet the usual burden of showing "good cause." *GT, Inc. v. Superior Court* (1984) 151 Cal. App. 3d 748.

Indeed, it is well established that a party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. (*Foltz v. State Farm Mutual Automobile Insurance Co.* (9th Cir. 2003) 331 F. 3d 1122; *Phillips v. General Motors* (9th Cir. 2002) 307 F. 3d 1206; *Valley Bank of Nevada v. Superior Court of San Joaquin County* (1975) 15 Cal. 3d 652.)

The Respondent does not allege that the negotiation notes include financial information, nor are punitive damages at issue here; therefore, the burden is clearly on the Respondent to establish good cause for the protective order limiting disclosure of documents obtained through discovery.

b) Confidentiality of Documents

The Respondent argues that the collective bargaining notes are confidential because they concern not only what was being proposed at the table, but also outline issues for future bargaining sessions.

Respondent concedes that there is no legal authority which establishes the confidential nature of collective bargaining notes *per se*, but argues that there is authority for the protection of "certain bargaining related materials," citing *UFW v. Superior Court* (1985) 170 Cal. App. 3d 391. This case is inapposite as it involved a strike situation, and the information sought through discovery was not "bargaining related materials," but was

union membership lists and the names of strikers and picketers. In addition, the court ordered the information to be submitted for *in camera* inspection, not to be released to the discovering party subject to a protective order.

The cases Respondent cites in support of its contention that the negotiation notes are confidential are also inapposite here because those cases involved discovery of financial documents. California courts are more likely to place limitations on discovery of financial information in part because financial information comes within the zone of privacy protected by Article I, Section 1 of the California Constitution. (*Valley Bank of Nevada v. Superior Court, supra*, 15 Cal. 3d 652.)

Respondent does not contend that the bargaining notes contain financial information, or any other specific information that is recognized as confidential, but only that its bargaining representatives did not contemplate that their notes would ever be disclosed to the UFW, ALRB or any third party. Respondent therefore has not provided adequate support for its argument that the negotiations notes should be protected because of their confidential nature.

c) Allegations of Significant Potential Harm

Respondent contends that a protective order is necessary to preserve the existing protective order entered in the pending federal case mentioned above. The potential harm that Respondent alleges will occur if the order is not granted is that "the door will be open to the UFW's counsel to circumvent the protective order... to defeat the litigation only purposes ordered by the federal court." Additional harm alleged is that the "opposite" could result as well, with the UFW's counsel using discovery in the instant case in the federal case.

The Respondent has failed to provide the required specific demonstrations of fact in support of these allegations. Rather the allegations in its application are the type of "broad, conclusory allegations of potential harm" that courts have held are insufficient to establish good cause. Any violation of the protective order in the federal action may, of course, be taken up with the federal court. Nor does the fact that there was a stipulated order in the other action prevent Respondent from having the burden of meeting the "good cause" standard in this case, where there has been no stipulation.

The Respondent has not met its burden of showing that its negotiation notes are confidential and that specific prejudice or harm will result if the protective order is not granted. We therefore find that Respondent has not established good cause for a protective order, and had its application been timely filed, we would still have denied its application on its merits.

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ORDER

PLEASE TAKE NOTICE that the Agricultural Labor Relations Board (ALRB or Board) hereby DENIES Respondent's Application for Permission to Appeal Ruling of Administrative Law Judge. Respondent's Application was untimely and Respondent has not established good cause for a protective order.

Dated August 2, 2004

GENEVIEVE SHIROMA, Chair

CATHRYN RIVERA-HERNANDEZ, Member

DANIEL ZINGALE, Member

MICHAEL BUSTAMANTE, Member