STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PREMIERE RASPBERRIES, LLC, dba DUTRA FARMS,	)	Case Nos. 2012-CE-003-SAL
	)	2012-CE-029-SAL
	)	2012-CE-030-SAL
	)	2012-CE-038-SAL
Respondent,	)	2012-CE-046-SAL
	)	2012-CE-047-SAL
	)	
and	)	
	)	
	)	38 ALRB No. 11
UNITED FARM WORKERS OF AMERICA,	)	
	)	(October 24, 2012)
	)	
Charging Party.	)	

DECISION AND ORDER DENYING APPLICATION FOR INTERIM APPEAL

On September 19, 2012, the General Counsel filed an interim appeal pursuant to Title 8, section 20242(b) of the Board's regulations[1] seeking review of an interlocutory ruling of Administrative Law Judge (ALJ) Douglas Gallop. ALJ Gallop refused to allow the General Counsel to introduce evidence in this matter regarding the chilling effect of Dutra Farms' (Employer) alleged actions on its employees' exercise of their rights under the Agricultural Labor Relations Act (ALRA).[2] ALJ Gallop denied the introduction of said evidence on the grounds that it was irrelevant given the substance of

[1] California Code of Regulations, title. 8, section 20242. All regulatory references are to the California Code of Regulations unless otherwise stated.

[2] Labor Code section 1140 et seq. All statutory references are to the California Labor Code unless otherwise stated.

the complaint, but stated that it would be admissible if a bargaining order were being sought. The General Counsel thereafter moved to amend its complaint to seek a bargaining order, and the motion was denied.

The General Counsel filed its interim appeal without setting forth a statement as to the necessity of interim review as required by section 20242(b) of the Board's regulations. On September 27, 2012, Employer filed its statement opposing the General Counsel's appeal on the grounds that the General Counsel failed to seek permission to file it and on other grounds reaching the merits of the appeal. Charging Party United Farm Workers of America (UFW) filed a statement in support of the General Counsel's appeal despite the fact that section 20242(b) does not permit the filing of additional statements in support of the appeal absent a request from the Board through the Executive Secretary. No such request had been made.

The General Counsel's interim appeal is the second interim appeal of an evidentiary ruling of an Agricultural Labor Relations Board (ALRB or Board) administrative law judge within the same month.[3] Board precedent is limited on the propriety of hearing interim appeals, in particular interim appeals of evidentiary rulings. We write to set forth a clear standard for deciding whether to hear interim appeals and, in so doing, deny the General Counsel's application for special permission for interim appeal on the grounds that it not only failed to state the necessity for interim review as required by Regulation 20242(b), but also failed to meet our standard, to wit: The Board

[3] *H & R Gunlund Ranches, Inc.*, 2009-CE-063-VIS et al., General Counsel's Special Appeal (September 5, 2012).

will only hear interim appeals of interlocutory rulings pursuant to Regulation 20242(b) that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j).[4]

DISCUSSION

I. Procedural History

a. The Unfair Labor Practice Hearing

On August 29, 2012, the General Counsel filed an Amended Consolidated Complaint in this matter alleging, *inter alia*, that Employer committed unfair labor practices by unlawfully discharging Dalia Santiago, a UFW lead worker-organizer, in retaliation for her collective and concerted activities and in retaliation for her union activities during the UFW's campaign to organize Employer's employees. (*Premiere Raspberries, LLC dba Dutra Farms*, Case Nos. 2012-CE-003-SAL et al., Amended Consolidated Complaint filed August 29, 2012). The General Counsel later sought a temporary restraining order requiring Employer to reinstate Ms. Santiago pursuant to Labor Code section 1160.4(b)(2), which allows the General Counsel to seek temporary relief or a restraining order of an alleged unfair labor practice that, by its nature, would interfere with the free choice of employees to choose or not to choose an exclusive bargaining representative.[5]

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[4] The Board may adopt regulations through rulemaking or through ad hoc adjudication. (*ALRB v. Superior Court* (1976) 16 Cal.3d 392, 412 - 413.)

[5] *Agricultural Labor Relations Board of the State of California v. Premiere Raspberries, LLC dba Dutra Farms*, Case No. CV 173564, Superior Court of Santa Cruz

(Footnote continued….)

On September 13, 2012, ALRB attorney Sarah Martinez, on behalf of the General Counsel, called Norma Morales as a witness. Ms. Martinez asked Ms. Morales if she had attended court proceedings (presumably the temporary restraining order proceedings) for Ms. Santiago in April. Employer's counsel objected to the question on the grounds of relevance. ALJ Gallop asked Ms. Martinez the relevance of the question, and she responded that she wanted to make an offer of proof that Ms. Morales, along with 10 other workers who were at that hearing, understood that Ms. Santiago was to return to work, and understood what the effect was of Employer's refusal to rehire Ms. Santiago after the court order reinstating her. (RT III, Part 1[6], pp. 22:17 – 23:5). ALJ Gallop did not think the testimony was relevant, as he viewed the relevant legal issue as whether Employer was obligated to reinstate Ms. Santiago prior to exhausting its appeals. (RT, Part I, pp.: 23:16 – 24:1).

ALJ Gallop stated that this testimony might be relevant if a bargaining order were required. (RT III, Part I, p. 24: 17-21). ALRB Supervising Attorney Alegria De La Cruz stated that the General Counsel might seek a bargaining order, to which ALJ Gallop replied that he wanted a formal amendment of the complaint to seek a bargaining order before he would allow the testimony, noting that seven or eight witnesses had

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(Footnote continued)
County. Our statement of the procedural history should not be taken as findings of facts binding on the ALJ in this matter.

[6] There were two Volume III record transcripts filed as expedited transcripts in this matter. The testimony of Norma Morales is in the first transcript, which we have designated as Part I. The testimony of Patrick Mood and Ana Toledo, and the additional testimony of Norma Morales, are in Part II.

already testified. (RT III, Part I, 25:2-7). Patrick Moody, counsel for Employer, also stated that there had already been three complaints in this matter. (RT III, Part I, 25:8.) After some discussion about the fact that the issue whether the Employer should have reinstated Ms. Santiago after the temporary restraining order was granted was currently before the Court of Appeals, ALJ Gallop declined to allow the General Counsel to amend the complaint for a bargaining order. (RT III, Part I, 27 – 28:15.)

b. The General Counsel's Interim Appeal and Responsive Pleadings Filed Thereto

The General Counsel filed its Interim Appeal on September 19, 2012 without stating the necessity for interim review as required by section 20242(b) of the Board's regulations. The General Counsel argued on the merits that: (1) the General Counsel was not required to specifically request "in black and white" a bargaining order in her request for relief in order to introduce evidence as to the chilling effect of Employer's alleged actions with respect to the unfair labor practice charges; and (2) the General Counsel did not have the opportunity to elicit testimony regarding the chilling effect that Employer allegedly caused by its disobedience of a court order to reinstate Ms. Santiago, thereby depriving the Board of a record that is adequate to determine what forms of relief are just and proper to remedy the unfair labor practice charges in the complaint. The General Counsel argued that in *Harry Carian Sales v. ALRB* (1985) 39 Cal.2d 209, the only case in which the Board has imposed a bargaining order, a bargaining order was not sought by the General Counsel. (General Counsel's Interim Appeal at pp. 3-4.)

Per order of the Board, Employer filed its response on September 27, 2012 arguing that the General Counsel's appeal should be summarily denied for failure to actually seek permission to appeal in compliance with Section 20242(b) of the Board's regulations. (Employer's Statement at p. 2.) Employer argued that, unlike the situation in *Harry Carian*, Employer had no indication whatsoever that the General Counsel might be seeking a bargaining order. (Employer's Statement at p. 6.) Employer went on to argue that, unlike the 30 egregious and pervasive unfair labor practices found to have been committed in *Harry Carian*, the present case deals mostly with allegations of access violations and a couple of allegations of surveillance. (Employer's Statement at p. 8.) Employer also argued that the General Counsel's reliance on *Harry Carian* was misplaced because, unlike *Harry Carian*, no election has occurred in this matter, no petition for election was filed (Employer's Statement at p. 5), and the General Counsel neither alleged nor made any effort to introduce evidence of majority status. (Employer's Statement at pp. 8-9.)[7]

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[7] Again, we take neither the General Counsel's nor the Employer's allegations as facts.

II. Analysis

Most appellate bodies do not hear appeals of interlocutory rulings[8] on evidentiary issues. This approach conforms with the "final judgment" doctrine of withholding appellate review until there is one final judgment in a matter. Judges, including the Board's ALJs, can best exercise their responsibility to issue rulings of law left to their discretion if the Board does not repeatedly intervene to second-guess their prejudgment rulings. (*See, e.g., Mohawk Industries v. Carpenter* (2009) 558 U.S. 100, 130 S. Ct. 559, 605 ("[T]he district judge can better exercise his responsibility to police the prejudgment tactics of litigants if the appellate courts do not repeatedly intervene to second-guess their prejudgment rulings.")

Under the standards applied by the federal courts, the California courts, the National Labor Relations Board (NLRB), and our sister California labor relations agency, the California Public Employee Relations Board (PERB), an interlocutory appeal of an evidentiary ruling would not be heard by these bodies, with the possible exception of the NLRB.[9]

[8] An interlocutory order is an order issued by a tribunal before a final determination of the rights of the parties has occurred. "In determining whether a judgment is final or merely interlocutory[,] the rule is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only; . . . ." (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.)

[9]The NLRB's standard for hearing such an appeal is not clear, though on the merits it would review such a ruling for abuse of discretion. *See* note 14 and text accompanying note, *infra.*

a. Standards Applied by the Courts, PERB, and the NLRB in Deciding Whether to Hear Interlocutory Appeals

Both the federal and California courts follow the final judgment doctrine of limiting appellate review to final decisions[10] and the collateral order exception to it. An interlocutory appeal of an evidentiary ruling would not be possible under the federal or state statutes codifying the final judgment doctrine.

Both the federal courts and the California courts follow the collateral order doctrine, considered an exception to, or an application of, the final judgment doctrine, that allows for appellate review of interlocutory orders that are effectively final with respect to an issue that is independent of the merits of the case, i.e., are collateral orders. (*Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U.S. 541, 545-546; *Meehan v. Hopps* (1955) 45 Cal.2d 213, 270.) An interlocutory order will be considered a collateral order reviewable on appeal if the order: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. (*Will v. Hallock* (2006) 546 U.S. 345, 350.) Under the collateral order doctrine, an interlocutory

[10] The federal appellate jurisdiction statute, 28 United States Code section 1291, limits the jurisdiction of the federal courts of appeals to final decisions except as provided for in sections 1292(b) and (d) and 1295 of the same title, which address interlocutory appeals. California Code of Civil Procedure section 904.1, considered a "codification of the final judgment rule," *Steen, supra,* 9 Cal.App.4th at 1226, excludes evidentiary rulings from judgments and orders that may be appealed. A writ of prohibition or mandate will not lie in the California appellate courts to resolve an issue as to the admissibility of evidence. (*People v. Municipal Court for the Central Judicial District of Marin County* (1974) 12 Cal.3d 658, 660 - 661.).

appeal of an evidentiary ruling would not be heard because it is not completely separate from the merits and is effectively reviewable on appeal.

Both the federal and California courts provide for certain interlocutory appeals by statute. California Code of Civil Procedure section 904.1 and 28 United States Code section 1292 provide for certain interlocutory appeals. California Code of Civil Procedure section 904.1 excludes evidentiary rulings from matters that may be appealed, while 28 United States Code section 1292(b) provides for interlocutory review in a civil case when a district judge certifies that the order at issue involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (28 U.S.C. § 1292(b).) In this case, the admission of evidence on the issue of a bargaining order is not a controlling question of law, and an immediate appeal may not materially advance the ultimate termination of the litigation.

PERB allows for appeals of interlocutory orders under similar conditions as required under the federal interlocutory appeal statute. California Code of Regulations, Title 8, section 32200 of PERB's regulations allows for appeals of interlocutory rulings only when a PERB Board agent joins in the request, and the agent may not join in the request unless the issue being appealed is one of law, is controlling of the case, and an immediate appeal of the issue will materially advance the resolution of the case. (Cal. Code Regs., tit. 8, § 32200). In this matter, the issue at hand is not a controlling question of law, nor would an appeal of the issue materially advance the resolution of this case.

Finally, the NLRB's standard with respect to interlocutory appeals is controlled by 29 Code of Federal Regulations part 102.26 of the NLRB's Rules and Regulations.[11] Like our own regulation, it merely states the procedural requirements for filing a special appeal and not a standard for deciding whether to hear such an appeal. The standard of review the NLRB applies when it entertains such appeals is whether the judge acted arbitrarily or capriciously or otherwise abused his discretion. (*Consumers Distributing Co. Ltd.* (1985) 274 NLRB 346.) The NLRB affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. (*Aladdin Gaming, LLC* (2005) 345 NLRB 585.) Were we to apply the NLRB's abuse of discretion standard of review to the merits and assume the allegations before us to be true, this appeal would be denied. On the limited record before us, ALJ Gallop has not abused his discretion to exclude testimony about an extraordinary remedy raised for the first time, by ALJ Gallop no less, after a significant portion of the proceedings had already occurred. In addition, the NLRB's standard fails to provide guidance as to the

[11] 29 Code of Federal Regulations part 102.26 of the NLRB's Rules and Regulations provides in relevant part:

> Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the administrative law judge on motions and/or by the administrative law judge on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in review of the record if the exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46. Requests to the Board for special permission to appeal from a ruling of the regional director or of the administrative law judge, together with the appeal from such ruling, shall be filed promptly, in writing, and shall state the reasons special permission should be granted and the grounds for the appeal . . . . (29 C.F.R. § 102.26)

circumstances in which we should hear interlocutory appeals. The Board is not required by Labor Code section 1148 to follow NLRB procedure. (*Tex-Cal Land Management, Inc. v. ALRB* (1979) 24 Cal.3d 335, 350-351.)

b. Standard Applied by the Board

The standard applied herein, limiting Board review of interlocutory rulings sought pursuant to Regulation 20242(b) to those that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j), is in line with other appellate bodies' efforts to strike the proper balance between judicial efficiency and providing an avenue of review of rulings that would otherwise be effectively unreviewable on appeal.

c. The UFW's Statement in Support

Section 20242(b) of the Board's regulations clearly prohibits the filing of further pleadings in support of a special appeal unless requested by the Board through the Executive Secretary. No such request was made. The UFW's Statement in Support is STRICKEN.

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ORDER

PLEASE TAKE NOTICE that the General Counsel's Application for Special Permission for Interim Appeal is DENIED. The United Farm Worker's Statement in Support of the General Counsel's Application is STRICKEN.

DATED: October 24, 2012

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

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dba DUTRA FARMS 38 ALRB No. 11
(United Farm Workers of America)

On September 19, 2012, the General Counsel filed an interim appeal pursuant to Title 8, section 20242(b) of the Board's regulations seeking review of an interlocutory evidentiary ruling of Administrative Law Judge (ALJ) Douglas Gallop. ALJ Gallop refused to allow the General Counsel to introduce evidence regarding the alleged chilling effect of Dutra Farms' (Employer) refusal to reinstate an employee on the grounds that it was irrelevant unless the General Counsel were seeking a bargaining order. The General Counsel moved to amend its complaint to seek a bargaining order, and the motion was denied.

The General Counsel filed its interim appeal without setting forth a statement as to the necessity of interim review as required by section 20242(b) of the Board's regulations. In its appeal, the General Counsel argued, *inter alia,* that it was not required to specifically request a bargaining order in its request for relief in order to introduce evidence regarding the chilling effect of Employer's refusal to reinstate the employee. On September 27, 2012, Employer filed its statement opposing the General Counsel's appeal on the grounds that the General Counsel failed to seek permission to file it. Employer argued that a bargaining order was not appropriate in this case because, *inter alia,* no election had been held, no petition for election had been filed, Employer had no notice that a bargaining order would be sought, and the General Counsel neither alleged nor made any effort to introduce evidence of majority status. The United Farm Workers of America (UFW) filed a statement in support of the General Counsel's appeal despite the fact that section 20242(b) of the Board's regulations does not permit the filing of additional statements in support of an appeal absent a request from the Board through the Executive Secretary. No such request had been made.

The Board denied what it construed to be the General Counsel's application for special permission for interim appeal on the grounds that it not only failed to state the necessity for interim review, but also failed to meet the Board's newly adopted standard, to wit: The Board will only hear interim appeals of interlocutory rulings pursuant to Regulation 20242(b) that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j). The Board reviewed the standards applied by the federal and California courts, the National Labor Relations Board (NLRB), and the California Public Employee Relations Board (PERB) to decide whether to hear interlocutory appeals in deciding to adopt its own standard. The Board noted that it may adopt regulations through ad hoc adjudication, *ALRB v. Superior Court* (1976) 16 Cal.3d 393, and is not required to follow NLRB procedure, *Tex-Cal Land Management, Inc. v. ALRB* (1979) 24 Cal.3d 335. The Board also struck the UFW's statement in support.

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