STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BUD ANTLE, INC., Respondent, and TEAMSTERS UNION, LOCAL 890, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party.	)	Case No. 2012-CE-007-SAL 39 ALRB No. 12 (July 29, 2013)

DECISION AND ORDER

On May 22, 2013, Administrative Law Judge (ALJ) James Wolpman issued the attached decision in the above-referenced case, in which he found that Bud Antle, Inc. (Respondent or Employer) violated sections 1153(e) and 1153(a) of the Agricultural Labor Relations Act (ALRA or Act) by failing to supply the Teamsters Union, Local 890 (Union) with information requested by the Union in order to process grievances.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's decision in light of exceptions filed by the Respondent and a reply to the exceptions filed by the ALRB's General Counsel, and affirms the ALJ's recommended decision and order except where noted below.

The Union is the certified bargaining representative of the agricultural employees of Respondent. The Union and the Respondent are parties to a collective bargaining agreement (CBA) which is effective until September 15, 2014. The CBA

incorporates a May 5, 2000 letter of understanding in which the Respondent agreed to limit its use of farm labor contractors as follows:

> The Company shall not utilize subcontractors, including farm labor contractors, to perform bargaining unit work in harvest operations until it has first called the seniority list at the beginning of each season in accordance with current practice, has placed all returning seniority employees who respond to the call in accordance with the Master Agricultural Agreement in a Company crew and has made a bona fide effort to hire new employees. Such subcontractors may not be utilized in harvesting operations where harvesting employees are laid off, including discontinued harvesting operations from which harvesting employees were laid off. The Company shall use its best efforts to assign harvesting work so that subcontractors do not work longer hours than Company crews.
>
> (General Counsel's Exhibit 3)

In February and March, 2012, the Union sent the Respondent four requests for information in connection with four separate grievances that alleged that the Respondent had violated the May 6, 2000 letter of understanding. To substantiate its position in arbitration, the Union requested information about the use of subcontractors in harvests, including contracts, assigned locations, work performed, earnings, identities of contractor employees, and applications submitted by persons seeking work in Bud Antle's own harvest crews. The information requested in connection with each of the grievances was largely the same except that each separate information request was adjusted for crop, time period and location.

The Union filed an unfair labor practice charge on March 12, 2012, alleging that since February 19, 2012, Respondent had refused to provide the Union with information relevant to collective bargaining. A Complaint was issued on November 20,

2012, and an Amended Complaint issued on February 14, 2013. A prehearing conference was held on February 14, 2013, and the ALJ issued his Prehearing Conference Order the following day.

The ALJ Decision:

The ALJ found that Bud Antle violated sections 1153(e) and 1153(a) of the Act by failing to supply the Union with information necessary for it to process three grievances arising under the May 6, 2000 letter of understanding. [1]

The ALJ noted that the case presented two primary issues: 1) The relevance of the information requests to the grievances filed; and 2) whether the information requested was privileged and confidential.

Relevance

The ALJ emphasized that twice during the prehearing conference, Respondent's counsel stated without qualification that the information requests were relevant and went to the heart of collective bargaining. The Prehearing Conference Order issued by the ALJ therefore indicated in paragraph 3, "Substance of the Action" that "respondent agrees that information described in paragraphs 5 through 8 of the original complaint is relevant to bargaining between the Union and Bud Antle. The only issue is

[1] The ALJ dismissed a fourth allegation related to conduct occurring in Arizona as not subject to ALRB jurisdiction. The ALJ found that there was insufficient evidence that the respondent's actions in Arizona adversely affected any California rights of the workers involved. We affirm the ALJ's dismissal of this alleged violation.

whether and to what extent that information is subject to trade secret/proprietary/confidential protections."

Two weeks after the prehearing conference, Respondent's counsel filed an objection to the Prehearing Conference Order claiming that she had not agreed that the information sought was relevant. Relying on section 20249(f) of the Board's regulations, the ALJ issued an Order to Show Cause (OSC), to resolve the matter on March 3, 2013. The ALJ ordered that if Respondent desired to go beyond the limits imposed by the prehearing conference order, it would be required to establish good cause for such deviation at the opening of the hearing.

At the March 12, 2013 hearing, Respondent's new counsel, who had not participated in the prehearing conference, offered no evidence in support of Respondent's position. Instead, Respondent's counsel claimed that no prejudice had occurred and Respondent was entitled to litigate the relevancy issue as a matter of right. The ALRB's General Counsel asserted that the purpose of the prehearing conference was to settle and clarify issues before trial and that Respondent's attempt to reopen a material issue weeks after it had been resolved constituted a prejudicial surprise. For those reasons and because Respondent's delay in raising the issue would likely have resulted in an unwanted and unjustified continuance of the hearing, the ALJ refused to reopen the issue of relevance.

Privilege/ Confidentiality

At the hearing, Respondent acknowledged that its claims of privilege for most of the information sought were unjustified and confined its claims of confidentiality

to the contracts with labor contractors, land owners and growers, and to the names of non-union applicants. With respect to these remaining categories of information, the ALJ found that Respondent failed to specify the confidential interests involved and therefore rejected those claims, citing *Richard A. Glass Company* (1988) 14 ALRB No. 11 in which the Board ruled that a mere claim of privilege will not support an employer's categorical refusal to supply information.

The ALJ held that no privilege attached to the information concerning non-union job applicants and cited *United Graphics* (1986) 281 NLRB 463, in which the NLRB held that a union was entitled to information about temporary hires because "it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit 'relates directly to the policing of contract terms.'" (*United Graphics, supra*, at 465, citing *Globe Stores* (1977) 227 NLRB 1251, 1253-1254.)

The Respondent contended in its post-hearing brief that the information sought was in the possession and control of Dole Fresh Vegetables, Inc., not Bud Antle, and was therefore unavailable. [2] The ALJ found that Respondent could not escape responsibility for failing to provide information by merely asserting the information was in the hands of a third party. Relying on the standard discussed in *NLRB v. Rockwell-Standard Corp*. (6th Cir. 1969) 420 F.2d 953, the ALJ found that the Respondent failed

[2] The parties stipulated at the pre-hearing conference that Bud Antle, Inc. is a wholly-owned subsidiary of Dole Fresh Vegetables, Inc.

to offer the requisite sworn testimony that: 1) it did not have possession or control of the information; and 2) it had attempted to obtain it from the third party and had been rebuffed.

The ALJ went on to find that the evidence established that Bud Antle and Dole functioned as a single integrated enterprise, such that the information available to one was available to the other. The ALJ's reasoning is extensively discussed on pages 23-27 of his decision. Given his conclusion that a single integrated enterprise was created, the ALJ reasoned that Dole never had exclusive control of the information sought.

Respondent's Exceptions:

Respondent excepts to the ALJ's findings that Respondent and non-party Dole Fresh Vegetables comprise a single integrated enterprise and Respondent should have turned over information that may have been in Dole's possession and control. Respondent argues that the ALJ improperly decided an issue that had not been identified in the Prehearing Conference Order without any advance notice to the Respondent and without taking any evidence on the issue.

Respondent also excepts to the ALJ's conclusion that the information requested by the Union is relevant. Respondent argues that the only way that the information is relevant is if Respondent and Dole Fresh Vegetables and /or other Dole-related entities are in fact a single integrated enterprise.

General Counsel's Reply to Respondent's Exceptions [3]

The General Counsel argues that the ALJ's finding that Respondent and Dole constitute a single integrated enterprise is both appropriate and necessary. General Counsel expresses the concern that without a finding of single integrated enterprise, the remedy that the Board can impose would be meaningless, and Respondent would frustrate the purposes of the Act by continuing to withhold the information. The General Counsel urges the Board to uphold the ALJ's decision in its entirety.

DISCUSSION AND ANALYSIS

Relevance of information requests

As discussed above, the ALJ concluded that the prehearing conference resolved the issue of relevance. The Respondent's position is that there was a dispute over what was actually agreed to at the prehearing conference with respect to the relevance of the requests. Respondent was given an opportunity at the hearing to show good cause why the stipulation concerning relevance reached during the Prehearing Conference Order should not control the subsequent course of the proceeding, and Respondent's counsel failed to do so. Therefore, we agree with the ALJ's conclusion that

[3]The General Counsel filed a motion to correct an error in the hearing transcript separately from her reply to the Respondent's exceptions. General Counsel points out that on page 80, lines 22-23 of the transcript reflect that counsel for Respondent stated "I would assume they have that information, but they would clearly not be entitled to it." The General Counsel argues that the word "not" has been erroneously included in the sentence and requests that the second phrase be corrected to read "but they would clearly be entitled to it." The ALJ also noted this error on page 17, footnote 9 of his decision. We grant the General Counsel's request to correct the transcript as requested.

as applied in this case, under section 20249(f) of the Board's regulations, the Prehearing Conference Order's stipulations establish the relevance of the information requests.

Further, we reject Respondent's argument that the only way that the information is relevant is if Respondent and Dole Fresh Vegetables and/or other Dole related entities are in fact a single integrated enterprise. Respondent's corporate structure has nothing to do with determining the relevance of the information requests to the grievances filed.

Moreover, even if the Prehearing Conference Order had not established relevancy in this case, we would still conclude that the information requested was relevant.

An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative. (*NLRB v. Truitt Mfg. Co*., (1956) 351 U.S. 149, 152; *NLRB v. Acme Industrial Co.*, (1967) 385 U.S. 432, 435-436; *Detroit Edison Co. v. NLRB*, (1979) 440 U.S. 501.) This includes information pertaining to the decision to file or process grievances, *Beth Abraham Services*, (2000) 332 NLRB 1234. Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant. (*Disneyland Park* (2007) 350 NLRB 1256, 1257.)

While the NLRB held in *Disneyland Park* that information about subcontracting agreements is not presumptively relevant, the NLRB also held that the General Counsel can demonstrate relevance by presenting evidence that either 1) the union demonstrated relevance of the non-unit information, or 2) the relevance of the

information should have been apparent to the Respondent under the circumstances. (*Disneyland Park*, *supra*, 350 NLRB 1256, 1257-1258.)

Disneyland Park is distinguishable under the ALRA because, under Section 1140.4(c) of the ALRA, the employees of a farm labor contractor are part of the bargaining unit. Therefore, information about the terms and conditions of farm labor contractors' employees' work is presumptively relevant and subject to disclosure. Even if this were not the case, we find that the relevance of the information has also been established under the *Disneyland Park* test. Based on the record, it has been established that the Union needed the information requested to determine whether or not Respondent violated the CBA or the letter of understanding. The Union was aware that farm labor contractor crews were being used, and the information requested was directly related to the grievances filed.

Respondent's claim that the information sought was privileged and confidential

When Respondent received the grievances, and in response to the Complaint and at the prehearing conference, Respondent claimed that the information sought was privileged and "was considered Dole's operational business decision and was not subject to disclosure."

In *SBC California* (2005) 344 NLRB 243, the NLRB held that a generalized contention that information is confidential or privileged because of business needs does not warrant complete refusal to provide that information. In addition, the party asserting confidentiality has the burden of proof. (*Postal Service* (1988) 289 NLRB 942, enf'd (11th Cir. 1989) 888 F.2d 1568.)

Similarly, in an ALRB case involving information requests, the court held that the burden is on the employer to prove a trade secret privilege in fact exists and to show how disclosure would injure the business. (*ALRB v. Richard A. Glass Co*. (1985) 175 Cal.App.3d 703, citing *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 303; *Western Mass. Elec. Co. v. NLRB* (1st Cir. 1978) 589 F.2d 42, 47; and *Ingalls Shipbuilding Corp*. (1963) 143 NLRB 712.)

We find that Respondent did not meet its burden of showing any privilege exists. In fact, during the hearing, Respondent's counsel admitted that the information regarding hours worked by farm labor contractor (FLC) crews was not privileged. (TR: 78.)[4] He also agreed that the number of boxes harvested by FLC crews, piece rate earnings of FLC crews, the blocks where non-Bud Antle employees harvested Dole-label produce, the farmers for whom non-Bud Antle employees harvested Dole-label produce, the crews assigned to each farmer, and information regarding the names, addresses and phone numbers of agricultural employees, including FLC employees, were not proprietary information. (TR: 79.) While the Respondent's counsel claimed that the information involving contracts with labor contractors, land owners and growers, and the names of non-union applicants was privileged, he provided no evidence at the hearing in support of this position. [5]

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[4] References to the hearing transcript are identified by "TR" followed by the page number.

[5] On June 26, 2013, the National Labor Relations Board (NLRB) issued a decision in *Bud Antle and Teamsters Local Union No. 890* (2013) 359 NLRB No. 140. This involves the same parties and same set of facts as the instant case. The NLRB affirmed the finding by the

(Footnote continued….)

In the Respondent's post-hearing brief, the claim of privilege was not even discussed. Rather, Respondent argued that in each instance where there was a request of information from Dole Fresh Vegetables, the information request was beyond Respondent's reach and not in its possession.

The Board has held that an employer's claim that information was not readily available was insufficient to satisfy the duty to provide it, because [the employer's] obligation requires a reasonably diligent effort to obtain the requested data. (*Cardinal Distributing Co. v. ALRB* (1984)159 Cal. App. 3d 758, 768, citing *John S. Swift Co*.(1959) 124 NLRB 394.) Employer presented no evidence that the information was unavailable or that it made a reasonably diligent effort to obtain it. We affirm the ALJ's conclusion that Respondent failed to produce the requisite proof of non-possession of the relevant information.

<u>ALJ's finding that the evidence established that Bud Antle and Dole functioned as a single integrated enterprise</u>

As discussed above, the ALJ concluded that the Respondent and Dole Fresh Vegetables functioned as a single integrated enterprise. This issue was never alleged in

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(Footnote continued)
ALJ that Bud Antle violated the National Labor Relations Act (NLRA) by failing to provide information about subcontracting because the information was relevant, and because Bud Antle failed to offer any evidence to support its confidentiality claims. On July 1, 2013, the Charging Party filed a request that the Board take judicial notice of the NLRB's decision. On July 16, 2013, the Respondent filed an opposition to the Charging Party's request, informing the Board that Respondent had filed a Petition for Review of the NLRB's decision, and the D.C. Circuit Court of Appeal had issued a stay of the NLRB's decision on July 15, 2013. We did not rely on the NLRB's decision in *Bud Antle and Teamsters Local Union No. 890, supra,* 359 NLRB No. 140 in reaching our conclusions in this matter, and so we find no need to rule on the parties' filings regarding the NLRB case.

the Complaint, it was not identified as an issue in the pre-hearing conference order, no direct evidence regarding this issue was produced at the hearing by either the General Counsel or the Respondent, and the single integrated enterprise theory was not advanced in the General Counsel's post-hearing brief. While it is permissible to reach an issue not alleged in the complaint, the issue must be one that was related to the subject matter of the complaint and that was fully litigated during the hearing. (*C. Mondavi & Sons* (1979) 5 ALRB No. 53 p. 2 ("When an incident not alleged in the complaint as a violation has been fully litigated by the parties and is related to the subject matter of the complaint, we are not precluded from determining whether the conduct violates the Act."); *D'Arrigo Bros. Co*. (1982) 8 ALRB No. 45, p. 2.)

While the ALJ pointed to strong circumstantial evidence that tended to show that Dole's relationship with Respondent was not at arms' length, the matter of whether the entities were a single integrated employer was not fully litigated. (*Enloe Medical Center* (2006) 346 NLRB 854, 855 ("the presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated.") quoting *Conair Corp. v. NLRB* (D.C. Cir. 1983) 721 F.2d 1355, 1372.) We therefore must reject the ALJ's conclusion that Bud Antle and Dole functioned as a single integrated enterprise based on the current record. However, the ALJ's discussion of this issue gives us reason to seriously doubt Respondent's claim that it does not have access to this information. We emphasize that Respondent cannot escape responsibility for failing to provide information by merely asserting the information is in the possession of

a third party. Moreover, our conclusion does not preclude the parties from litigating the issue of single integrated enterprise in the compliance phase of this case. [6]

We conclude that that Respondent has violated sections 1153(a) and 1153(e) of the Act by not providing the information it requested as described in paragraphs 5, 6, 8 and 9 of the Amended Complaint.

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[6] In *Andrews Distribution Company* (1988) 14 ALRB No. 19, the ALRB adopted the NLRB's test for determining whether two or more entities are in fact a single employer for collective bargaining purposes. The analysis used by the NLRB and courts in determining whether two or more entities are sufficiently integrated so that they may fairly be treated as a single employer is that set out in *Parklane Hosiery Co*. (1973) 203 NLRB 597. The four principal factors considered by the NLRB in *Parklane, supra*, were: 1) Functional interrelation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership or financial control. In *NLRB v. Carson Cable TV, et al*. (9th Cir. 1986) 795 F.2d 879, the court observed that the NLRB has often stressed the first three of the factors listed above, particularly that which relates to control of labor relations, because such factors are reliable indicators of an operational integration. The court cautioned that while no one factor is controlling, neither must all four factors be present in order to find single employer status. Thus, single employer status depends on all of the circumstances and has been characterized as an absence of an "'arm's length relationship . . . among unintegrated companies." (*Blumenfeld Theaters Circuit* (1979) 240 NLRB 206, 215, enforced (9th Cir. 1980) 626 F.2d 865.)

ORDER

The decision and order of the ALJ is AFFIRMED except where noted above.

DATED: July 29, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

Bud Antle, Inc.
(Teamsters Union, Local 890)

Case No. 2012-CE-007-SAL
39 ALRB No. 12

ALJ Decision

On May 22, 2013, the Administrative Law Judge (ALJ) issued a decision in the above-referenced case in which he found that Bud Antle, Inc. (Respondent) violated sections 1153(e) and 1153(a) of the Agricultural Labor Relations Act (ALRA) by failing to supply the Teamsters Union, Local 890 (Union) with information requested by the Union in order to process grievances. The ALJ noted that the case presented two primary issues: 1)The relevance of the information requests to the grievances filed; and 2) whether the information requested was privileged and confidential. The ALJ concluded that the issue of relevance had been resolved because Respondent's counsel stipulated at the prehearing conference that the information sought was relevant. Respondent was given an opportunity at the hearing to show good cause why the stipulation concerning relevance should not control, but Respondent's counsel failed to do so. The ALJ held that the mere claim of privilege did not support Respondent's categorical refusal to supply the information. The Respondent contended that the information sought was in the possession and control of Dole Fresh Vegetables, Inc. (Dole), not Respondent, and was therefore unavailable. The ALJ found that Respondent could not escape responsibility for failing to provide information by merely asserting the information was in the hands of a third party. The ALJ found that the Respondent failed to offer the requisite sworn testimony that it did not have possession or control of the information and it had attempted to obtain it from the third party and had been rebuffed. The ALJ went on to find that the evidence established that Respondent and Dole functioned as a single integrated enterprise, such that the information available to one was available to the other.

The Board Decision

The Board affirmed the ALJ's decision except that the Board rejected the ALJ's conclusion that Respondent and Dole functioned as a single integrated enterprise. The Board concluded that while the ALJ pointed to strong circumstantial evidence that tended to show that Dole's relationship with Respondent was not at arms' length, the matter of whether the entities were a single integrated employer was not fully litigated.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 2012-CE-007-SAL
	)	
BUD ANTLE, INC.,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
TEAMSTERS UNION, LOCAL 890,	)	
INTERNATIONAL BROTHERHOOD	)	
OF TEAMSTERS,	)	
	)	
Charging Party.	)	
________________________________	)	

Appearances:

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For the Charging Party:
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DECISION OF ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN. Administrative Law Judge: I heard this unfair labor practice case at Salinas, California on March 12, 2013.

I. PROCEDURAL HISTORY

On March 12, 2012, Teamsters Union, Local No 890, International Brotherhood of Teamsters, filed unfair labor practice charge No. 2012-CE-007-SAL with the Salinas Office of the Agricultural Labor Relations Board (ALRB or Board), against Bud Antle, Inc., alleging that it violated the Agricultural Labor Relations Act (Act) by failing and refusing to provide the Union with information necessary for and relevant to collective bargaining issues and to the representation of bargaining unit employees. (Board Exhibit 1.)

On November 20, 2012, the Regional Director of the Salinas Office issued a Complaint alleging that Bud Antle, Inc., violated Sections 1153(a) and 1153(e) of the Act on four occasions by failing and refusing to supply relevant information to Local 890, the certified bargaining representative of its employees. (Board Exhibit 2.) On December 5, 2012, Bud Antle, Inc. filed its Answer denying the alleged violations and raising a number of affirmative defenses. (Board Exhibit 3.) On February 14, 2013, the Salinas Regional Direction amended the Complaint to allege an additional instance of refusing to supply relevant information (Board Exhibit 16), and on February 25, 2013, the Respondent filed its Answer to the Amended Complaint, denying the alleged additional violation. (Board Exhibit 18.) The Union has intervened in these proceedings. After the hearing, the parties filed briefs, on April 12, 2013, which have been carefully considered.

Upon the entire record in this case, including the testimony, documentary

evidence, briefs and oral arguments made by counsel, the undersigned makes the following findings fact and conclusions law.

II. STIPULATIONS: JURISDICTIONAL AND SUBSTATIVE

At the Prehearing Conference, held February 14, 2013, the following jurisdictional and substantive matters were stipulated to:

a. The union properly filed and served Bud Antle with charge 2012-CE-007-SAL on March 12, 2012. b. At all times material herein, the Union was a labor organization within the meaning of Section 1140.4(f) of the Act.

c. At all times material herein, the Union was certified as the excusive bargaining representative for Bud Antle's agricultural employees in California.

d. At all times material herein, Bud Antle was an agricultural employer within the meaning of Sections 1140.4(a) and (c) of the Act.

e. Bud Antle is a corporation duly organized and existing under the laws of California and is a subsidiary of Dole Fresh Vegetables, Inc.

f. Bud Antle's principal place of business is in Salinas, California.

g. Bud Antle is engaged in harvesting and processing fresh vegetables in various counties throughout California.

h. Since on or about February 17, 2012, the Union has requested Bud Antle in writing to provide the documents listed in Paragraph 5 of the original complaint for the period of November 6, 2011 to February 19, 2012.

i. On or about March 12, 2012, the Union requested that Bud Antle provide it with the information described in Paragraph 5 of the original complaint for the weeks ending March 10 and 17, 2012.

j. On or about March 26, 2012 the Union requested that Bud Antle provide it with the information described in Paragraph 5 of the original complaint relating to Antle head lettuce harvesting activities for the week of March 17 up to March 26, 2012.

k. On or about March 29, 2012, the Union requested that Bud Antle provide it with the information described in Paragraph 5 of the original complaint related to harvesting fresh vegetables under the Dole label from November 5, 2011 through March 31, 2012. In addition, the Union requested that Bud Antle provide it with the names, addresses, and phone numbers of all agricultural workers performing work for Bud of California and/or Dole Fresh Vegetables, including those employed through Farm Labor Contractors from November 6, 2011 through March 21, 2012.

l. The respondent has not complied with the requests described in paragraph h through k, above.

m. The existence of the "letter of understanding" described in Paragraph 4 of the original complaint, which reads as follows:

> "The Company shall not utilize subcontractors, including farm labor contractors, to perform bargaining unit work in harvest operations until it has first called the seniority list at the beginning of each season in accordance with current practice, has placed all returning seniority employees who respond to the call in accordance with the Master Agricultural Agreement in a Company crew and has made bona fide effort to hire new employees. Such subcontractors may not be utilized in harvesting operations where harvesting employees are laid off, including discontinued harvesting operations from which harvesting employees were laid off. The Company shall use its best efforts to assign harvesting work so that subcontractors do not work longer hours than Company crews." [1]

[1] The quoted language is Paragraph 2 of a two page document entitled: "May 6, 2000 Agreement" (G.C. Exhibit 3) which is incorporated into Article XIII of the 2011-2014 Master Agricultural Agreement between Bud Antle, Inc. and Teamsters Local 890, and made subject to the grievance procedure found in Article IX of that Agreement. (G.C. Exhibit 2.)

III. FINDINGS OF FACT

A. Background

The Respondent has four commodity departments—cauliflower, broccoli, celery and lettuce.[2] Those commodities are grown and harvested in various locations in California and Arizona.

The refusals to supply information arose out of four grievances filed under Article IX, of the Collective Bargaining Agreement. All concern alleged violations by the Respondent of the Letter of Understanding quoted above; three of the four concern the requirement that, before resorting to subcontractors at any harvest, the Respondent must make a "bona fide effort[s] to hire new employees." That requirement, in turn, ties into the "current practice" of "call[ing] the seniority list at the beginning of each season" before utilizing subcontractors.

Fritz Conle, the union representative who filed the grievances, described the "current practice." Those farmworkers who complete the previous harvest season at one location are entitled to preference in hiring for the following season at the same location. As such, their names appear on the field seniority list.[3] Just before a new harvest begins at each location, prospective workers—both those with seniority and others interested in obtaining employment—assemble for the reading of the list. As it is read, those whose names appear, answer "here" and are assigned to crews of their choosing. When the reading is completed, any vacancies left in the crews are filled

[2] The lettuce department is operated under the name of another Dole acquisition, Royal Packing Company. The legal niceties of its relation to Dole and to Antle are unclear.
[3] Supplemental Agreement A, Section 14(B) to the Master Agricultural Agreement establishes 9 discrete field seniority lists. (G.C. Exhibit 2, p. 29, and Schedules I to VII, pp. 32-47.)

from among those non-seniority applicants who are present and qualified. Only after that process is completed, may the Respondent resort to subcontractor labor.

In order to see to it that the Respondent carries out its promise to make "a bona fide effort to hire new employees" the Union has, for sometime now, sought to publicize the availability of work in Respondent's harvesting operations to prospective applicants—both union members and qualified outsiders. This outreach has been accomplished by word-of-mouth and by written circular. (Tr. 33-35 52-54, 56-57 and G.C. Exhibit 15, translated at Tr. 34.)

B. The Specific Requests for Information.

Each request was made in connection with a specific grievance, and is best considered in relation to that grievance; indeed, each filing concludes with a list of "Information Requested." (G.C. Exhibits 4, 9, 12 & 20.)

1. Grievance and Request of February 17, 2012—The Celery Harvest in Oxnard (G.C. Exhibit 4.)

Fritz Conle testified that he filed the grievance with Antle's Labor Relations Manager, Laborio Rodriquez, "because I was contacted by Juan Heredia.…an experienced celery cutter, celery harvester who had previously worked for Bud of California…[who] had been…going to the different supervisors requesting work, and he had been denied work, and then contacted me." (Tr. 23-24.)

In his grievance, Conle requested 9 items of information—all concerned with labor contractors—in order to establish that Respondent had utilized them in the Oxnard celery harvest without first making a "bona fide effort to hire new employees." Specifically, he requested:

"[R]ecords and other documents for the weeks of 11/6/2011 thru 2/19/2012 which indicate:

1. Hours worked each day by each labor contractor or 'custom harvester' crew engaged in harvesting celery under the Dole label.
2. Number and type of boxes harvested each day by each labor contractor or 'custom harvester' crew engaged in harvesting celery under the Dole label.
3. Piece rate earnings each day by each labor contractor or 'custom harvester' crew engaged in harvesting celery under the Dole label.
4. Copies of all contracts between Bud of California and/or Dole Fresh Vegetable and/or other Dole related entities and each and every farmer, grower, partner, corporation, labor contractor or 'custom harvester' or other entity engaged in harvesting celery under the Dole label or for Dole Fresh Vegetables.
5. Copies of agreements and/or correspondence written or electronic between farmers and Dole Fresh Vegetables and/or Bud of California related to growing, harvesting, subcontracting where the farmer's crop is being harvested under the Dole label.
6. Copies of agreements between farm labor contractors and or custom harvesters and farmers involving the harvesting of fresh vegetables under the Dole label. Also a description of the rules for each such farmer as to what say Dole Fresh Vegetables has in who harvests produce under the Dole label.
7. A list of the blocks where non-Bud of California employees harvested Dole label produce in November and December 2011, and January and February 2012.
8. A list of the farmers for whom non-Bud of California employees harvested Dole label produce in November and December 2011, and January and February 2012, and the crews assigned to each farmer.
9. Copies of all applications for work submitted to Bud of California and/or Dole Fresh Vegetables and/or other Dole related entities involved in harvesting in the Oxnard area, from October 1, 2011 to date."[4] (G.C. Exhibit 4.)

In response, Rodriquez denied violating the Agreement and alleged that Heredia was disqualified for employment because of misconduct occurring the pervious season. (G.C. Exhibit 6.) As for the information requested, he claimed that contractor information was "irrelevant to this case" and "is considered Dole's operational business decision…not subject to disclosure." (G.C. Exhibit 6.) He provided only Heredia's

[4] This final request was mistakenly omitted form the original Complaint; the mistake was corrected in the Amended Complaint. (G.C. Exhibit 16.)

personnel record (G.C. Exhibit 7) and a list of people who were actually hired in Oxnard for the 2012 harvest. (Tr. 27.)

At the subsequent grievance meeting, Conle testified:

> "I told Mr. Rodriguez that Mr. Heredia and several other employees, who were present, denied that he had driven unsafely, and we needed the information about the labor contractors to determine if the company was making a bona fide effort to hire experienced, qualified people." (Tr. 29.)

In response, Rodriquez, "referred back to his letters, and indicated that we would receive a more detailed response [concerning the requested contractor information] from the legal department." (Tr. 28.)

No response arrived from Respondent's Legal Department, either to this or to any of the other requests for which Rodriquez promised a legal response. (Tr. 29.) Nor did Respondent ever seek clarification of the various requests or discuss the possibility of keeping the information sought confidential. (Tr. 29.) Had that happened, Conle testified, "We would have been more than willing to discuss it and negotiate it, and work something out." (Tr. 88.) He noted that with other employers, "I have signed confidentiality agreements at times, in order to get information that we needed for bargaining," but with Respondent, "They never asked us to sign anything confidential. They just refused to provide." (Tr. 88.)

2. Grievance and Request of March 12, 2012—Cauliflower in Yuma (G.C. Exhibit 9)

The Union's March 12th grievance presents a somewhat different issue. It does not involve the failure of Bud Antle to hire new applicants, but rather the failure to give its own crews—which included both seniority workers and new hires—hours equal to or greater than those allotted subcontractor crews. (G.C. Exhibit 9.) As such, it alleges

a violation of another promise in the Letter of Understanding: "The Company shall use its best efforts to assign harvesting work so that the subcontractors do not work longer hours than Company crews." [5]

And, for the purposes of this decision, there is another, more important difference: the alleged violation occurred in Yuma, Arizona, not in California.

Though the circumstances are different, Bud Antle's response was the same: denial accompanied by a non-negotiable claim that the "Company operation[al] business decision[s] and information are not subject to disclosure." (G.C. Exhibit 10, Tr. 88.)

3. Grievance and Request of March 26, 2012—Lettuce Harvest in Huron and Salinas (G.C. Exhibit 12)

This Grievance, though it involves a different applicant—Pedro De Anda—and a different crop and locations, parallels the February 17th Juan Heredia Grievance. It asserts Antle resorted to the use of labor contractors in the Huron and Salinas lettuce harvests, before considering De Anda who was experienced and available. In response, Labor Relations Manager Rodriquez denied the violation and claimed that De Anda was not entitled to seniority status because he had been terminated for absence the previous season.[6] With respect to the accompanying information request—patterned after the earlier February 17th request but adjusted for time, crop and location—Rodriquez again asserted that "Company operational business decisions and

[5] That is why the "Information Requested" portion of the Grievance, while using much the same language of earlier and later Grievances, does not include Paragraph 9 of those grievances, seeking applicant information. (Compare G.C. Exhibit 9 with Exhibits 4, 12 & 20.)

[6] On this record, it is difficult to tell whether Anda's claim is based on the field seniority list for the previous season, or as a qualified and available new hire, or—quite possibly—both.

information are not subject to disclosure," and that he would "forward your request to the Company's legal department and have them reply to your requests as they see appropriate." (G.C. Exhibit 13.) Once again, there was no reply from counsel and no effort to work out a confidentiality arrangement.

The Union Business Representative assigned to the matter, Crispin Leon, replied to Rodriquez, asserting that De Andra not been terminated the previous season and reiterating the Union's information request. (G.C. Exhibit 14.)

4. Grievance and Request of March 29, 2012—All Lettuce, Cauliflower, Broccoli, and Celery Harvesting and All Field Hauling and Greenhouse and Transplant Operations since February 28, 2012 (G.C. Exhibit 20).

This grievance encompasses the earlier grievances and goes beyond them to include all of the field seniority lists—Lettuce, Cauliflower, Broccoli, Celery Harvesting and Field Hauling; Greenhouse; and Transplant Operations—maintained by Antle throughout California and Nevada. (See G.C. Exhibit 2, Supplemental Agreement A to the Master Agricultural Agreement; and footnote 3, above.) The accompanying information request is patterned on the original grievance but is much broader, extending back to November 6, 2011 and including an additional request for, "The names, addresses, and phone numbers of all agricultural employees performing work for Bud of California and/or Dole Fresh Vegetables, including those employed thru Farm Labor Contractors." (Item 2 of Information Requested, G.C. Exhibit 20.)

It was precipitated by the difficulties experienced by non-seniority applicants who sought work in the Huron lettuce harvest and in the Salinas Broccoli harvest, both of which began in March, 2012. Rodriquez told Conle that those who wish to work the

broccoli harvest should present themselves at Antle's Salinas payroll office on March 13th. (G.C. Exhibit 19, first e-mail [which appears last on the Exhibit]) When they arrived, they were met by an office clerk who told them she new nothing about any jobs. (Tr. 37.) "There was no applications given out. There was no list of names; no list of phone numbers taken, nothing." (Tr. 38.) In his response, Rodriquez offered no explanation for the misleading information he had provided and asserted that the crews had not yet started. (G.C. Exhibit 19, second e-mail.) Conle asked why, if that was so, he had not at least made out a list of people who showed up and given out applications. (G.C. Exhibit 19, third e-mail.) He received no response. (Tr. 38.) Eventually, several applicants were hired, but most were not. (Tr. 38.)

In Huron, Conle was told that the seniority list would be read on Friday, March 17th and applicants should show up then for employment in the harvest scheduled to begin the following Monday, March 19th. (G.C. Exhibit 18, first e-mail; Tr. 39.) Conle immediately provided that information to the 100 or so prospective applicants who responded to his earlier flier. (G.C. Exhibit 15; Tr. 35.) The reading was held but, unlike previous seasons, no applicants were hired; instead they were told to return on Wednesday, the 21st (Tr. 40), but when Conle went out to the fields on the 19th, he found several contractor crews already at work—an indication that Antle had failed to make a bona fide offer to hire new employees before resorting to labor contractors. (Tr. 41.)

At that point Conle concluded that Antle's actions indicated a widespread rejection of the good faith requirement in the Letter or Understanding. (See G.C.

Exhibit 22.) He therefore filed the general grievance of March 29th, accompanied by a broad information request. (G.C. Exhibit 20.)

Antle's response was more detailed, but the message was the same: denial of the violation and refusal to provide information because it, "considered Dole's operational business decisions and the information is not subject to disclosure." (G.C. Exhibit 21 and 23.)

Conle's reply contains the clearest justification for the information requests in this and the other grievances:

> "All of the requested information is highly relevant to this case. When you provide all of the requested information, it will be much more clear whether or not the Employer is using Farm Labor Contractors and/or custom harvesters, as well as how many such employees have been used in each department during each payroll period." (G.C. Exhibit 22.)

At the hearing, Conle went on to say that the Union had been unable to process any of the grievances "because in order to take any of them to an arbitrator, we would have to have evidence that there are labors contractors working, and that's the basis of information request." (Tr. 43-44.)

IV. FURTHER FACTUAL FINDINGS AND LEGAL ANALYSIS

This case presents two, primary issues, one of which—the relevance of the information requests to the grievances filed—was resolved by rulings before and at the hearing. In its posthearing brief, Respondent reargues that matter. The other issue—the claim that the information requested was privileged as confidential—was considerably narrowed at hearing and all but abandoned in Respondent's posthearing brief.

A. The Disposition of the Relevancy Issue

Pursuant to Section 20249 of the Board Regulations a telephonic prehearing conference was held in this matter on February 14, 2013. During the conference all of the matters described in subsection (c) as constituting the agenda for the conference were considered—in particular the requirement that there be a "through discussion of the issues and positions of the parties, including a careful explanation of the factual and legal theories relied upon." (§20249(c)(1)). The discussion of that agenda item focused primarily on the issue of relevancy. Twice during the discussion Respondent's counsel stated, without qualification, that the requests were relevant, acknowledging that they went to the heart of collective bargaining.[7] (See Board Exhibit 23.) The Prehearing Conference Order therefore indicated that relevancy was no longer contested. (Board Exhibit No. 17.)

Two weeks later, Respondent's counsel filed an objection to the Order claiming that she had said only the Union believed the requests to be relevant. (Board Exhibit 19.) Her objection was not accompanied by a sworn declaration. The General Counsel did provide a sworn declaration contradicting her claim and pointing out, in its accompanying response, that the belated objection severely undermined the purpose of the prehearing conference "by asserting defenses and legal theories which it previously admitted were inapplicable." (Board Exhibit No. 21.) Based on what Respondent's

[7] This is hardly surprising in view of the NLRB ALJ Decision which Respondent had just received involving the identical facts. (*Bud Antle, Inc. and Teamsters Local Union No. 890,* (JD(SF)-01-13, Jan. 16, 2013). While that ruling has no precedential effect, the NLRB cases cited in it do; see especially, *United Graphics*, 281 NLRB 463, 465 (1986) ["it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit relates directly to the policing of contract terms." *Id.* at p. 12.] Indeed, under our Act, where Antle is considered the employer of its labor contractor employees, the relevance is, under the analysis used by the NLRB, not just provable; it is presumptive. (See *Disneyland Park*, 350 NLRB 1256, 1257-58 (2007) and Labor Code §§ 1140.4(c) & 1156.2).

counsel stated to me at the Prehearing Conference, as confirmed in the sworn declaration from the General Counsel, the objection was denied. (Board Exhibit No. 23.)

Concurrent with the Objection, Respondent filed a Motion for Protective Order. (Board Exhibit 20.) The motion indicated that Respondent intended to go beyond the limits imposed by the Prehearing Conference Order and litigate relevancy and other issues not addressed in the prehearing conference and subsequent order. In accordance with § 20249(f) which provides that, "Absent a showing of good cause for modifying or deviating from the terms of the [prehearing conference] order, it shall control the subsequent course of the proceeding," I issued an Order to Show Cause, returnable at hearing, giving the Respondent an opportunity to explain and justify its desire to deviate from the terms of the order. (Board Exhibit No. 23.)

At hearing the Respondent was represented by a different counsel from the same law firm. He presented no evidence to justify deviating from the order and simply argued that it should be ignored because he did not believe that doing so would be necessarily burdensome or unexpected by any of the parties and that, in any event, relevancy is largely a matter of law. (Tr. 8-9.) The General Counsel disagreed, asserting that the purpose of the prehearing conference was to settle and clarify issues before trial and that the Respondent's attempt to re-open a material issue came as an unwanted surprise, two weeks after "we thought it had been settled." (Tr. 9.) Moreover, its belated attempt to alter the terms of the Prehearing Conference Order necessitated the issuance of an Order to Show Cause which, to allow adequate notice, had to be set at or close to the actual hearing date. Had Respondent been granted the

relief it sought, the General Counsel and the Charging would have been entitled to a continuance. Whether they would have requested a continuance is uncertain, but the possibility was a real one and would have resulted unwanted delay.

I ruled that it was important to preserve the integrity of the prehearing conference procedure and that respondent's untimely and unexplained attempt to circumvent it could not be so casually ignored. (Tr. 9-10.)

In its posthearing brief Respondent once again returns to the issue. This time with a new reading of section 20249. It claims that a Prehearing Conference controls only facts, admissibility, evidentiary issues, the length of hearing, and subpoena disputes. While acknowledging that Agenda for the conference requires a thorough discussion of the issues and positions of the parties, including a careful explanation of the factual and legal theories relied upon," Respondent claims that it is in no way bound by the representations it made as to the material issues to be litigated and can—at any time prior to or during a hearing—simply repudiate them, even though other parties may have relied upon them in preparing their cases. Indeed, because its interpretation of section 20249 places the issues to be litigated beyond the reach of the Prehearing Conference Order, Respondent would be entitled to go even further and introduce entirely new issues and—contrary to its own reading of the section—new evidence in support those issues.

Long ago, the Supreme Court noted: ". . . pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (*United States v. Procter & Gamble Co*., 356 U.S. 677, 682 (1958).) While our Board has repudiated, as overly time and cost

consuming, the full range of civil discovery, it has gone beyond the NLRB and provided a mandatory procedure to ensure the parties positions on “basic issues” are disclosed prior to hearing.[8] That procedure is the Prehearing Conference and resulting Order.

A far more satisfactory reading of the §20249, is that the conference and resulting order encompass not only items which, under subsection (b), the parties are to discuss prior to the conference, but the entire agenda for the actual conference, as set forth in subsection (c), including the material issues in the case, as provided in subparagraph (c)(1). That reading is substantiated by the language in subsection (f) which provides, without qualification, that the prehearing conference order “shall control the subsequent course of the hearing.”

That being so, Respondent’s interpretation of section 20249 is rejected, and the relevance of the requests is deemed established.

B. The Claim that the Information Sought Was Privileged as Confidential or as a Trade Secret.

In its responses to the grievances, in its pleadings, and at the prehearing conference, Respondent contended that all of the information sought—save a few incidental requests— were privileged. At hearing, counsel relented, admitting that the information sought in Paragraph 5, subparagraphs A, B, C, G and H of the Amended Complaint and as re-alleged in Paragraphs 7, 8 and 9 of that Complaint, “. . . are not

[8] There has been considerable debate over pretrial and discovery proceedings under the NLRA. At present, prehearing conferences are not mandatory but, if held, cover not only the facts but the issues to be litigated. (See N.L.R.B. Casehandling Manual ¶ 10381 and 29 C.F.R. § 102.35(a)(7); and generally see, Miller and Verloren, *Discovery at the NLRB—Why Not?* (2005) 51 Wayne Law Review 1.)

privileged documents and I would not make a bad faith argument [that they were].” (Tr. 78-79.) The same is true of the request for employee names, addresses and telephone numbers and applicant lists or logs in Paragraph 9. Tr. 80.[9]) Doing so eliminated from consideration the following requests made by the Union in its grievance filings:

(1) Hours worked each day by each labor contractor or ‘custom harvester’ crew engaged in harvesting celery under the Dole label. (¶ 5A of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 1 of GC Exhibits 4, 9, 12, 20.)
(2) Number and type of boxes harvested each day by each labor contractor or ‘custom harvester’ crew engaged in harvesting celery under the Dole label. (¶ 5B of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 2 of GC Exhibits 4, 9 &12, and ¶ 3 of G.C. Exhibit 20.)
(3) Piece rate earnings each day by each labor contractor or ‘custom harvester’ crew engaged in harvesting celery under the Dole label. (¶ 5B of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 3 of GC Exhibits 4, 9 &12, and ¶ 4 of G.C. Exhibit 20.)
(4) A list of the blocks where non-Bud of California employees harvested Dole label produce in November and December 2011, and January and February 2012. (¶ 5B of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 7 of GC Exhibits 4, 9 &12, and ¶ 8 of G.C. Exhibit 20.)
(5) A list of the farmers for whom non-Bud of California employees harvested Dole label produce in November and December 20111, and January and February 2012, and the crews assigned to each farmer (¶ 5B of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 8 of GC Exhibits 4, 9 &12, and ¶ 9 of G.C. Exhibit 20.)[10]
(6) The names, addresses, and phone numbers of all agricultural employees performing work for Bud of California and/or Dole Fresh Vegetable, including those employed thru Farm Labor Contractors….In addition, the Union requested copies of any applicant log or list maintained by any Bud of California supervisor or office personnel. (¶ 9 of the Amended Complaint; ¶ 2 of G.C. Exhibit 20.)

Left for consideration is the subcontractor information sought in Paragraph 5, sub-

[9] There appears to be an error in the transcript at this point. When asked his position with respect to employee names, the transcript reads, “I would assume that they have that information, but they would not be entitled to it.” The “not” is incorrect.
[10] Each separate request and allegation is, of course, adjusted to the time, crop and location involved in the particular grievance.

paragraphs D, E, F and H of the Amended Complaint as re-alleged in Paragraphs 7, 8, and 9, and the applicant information sought in Paragraphs 6, 8 and 9.

With respect to subcontractors three separate categories of information were requested:

(1) Copies of all contracts between Bud of California and/or Dole Fresh Vegetable and/or other Dole related entities and each and every farmer, grower, partner, corporation, labor contractor or 'custom harvester' or other entity engaged in harvesting celery under the Dole label or for Dole Fresh Vegetables. (¶ 5D of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 4 of GC Exhibits 4, 9 &12, and ¶ 5 of G.C. Exhibit 20.)
(2) Copies of agreements and/or correspondence written or electronic, between farmers and Dole Fresh Vegetables and/or Bud of California related to growing, harvesting, subcontracting where the farmer's crop is being harvested under the Dole label. (¶ 5E of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 5 of GC Exhibits 4, 9 &12, and ¶ 6 of G.C. Exhibit 20.)
(3) Copies of agreements between farm labor contractors and or custom harvesters and farmers involving the harvesting of fresh vegetables under the Dole label. Also a description of the rules for each such farmer as to what say Dole Fresh Vegetables has in who harvests produce under the Dole label. (¶ 5F of the Amended Complaint, as realleged in ¶s 7, 8 & 9; ¶ 6 of GC Exhibits 4, 9 & 12, and ¶ 7 of G.C. Exhibit 20.)

To those requests Respondent made two claims of privilege: (l) that they could well include communications protected by attorney-client and attorney work-product privileges and (2) that "the financial aspect of that information would be a proprietary trade secret." (Tr. 82.) When asked to produce specific evidence of those claims, Respondent declined to do so. (Tr. 82-83.)

The Board decision, cited by the General Counsel, in *Richard A. Glass Company* (1988) 14 ALRB No. 11, is dispositive. It involved the failure to provide the union with information concerning the improper use of non-union crews by Glass' grower-customers. The Board ruled:

> "[A] mere claim of privilege will not support an employer's categorical refusal to supply information. (*Oil, Chemical & Atomic Workers Union v. NLRB* (D.C. Cir. 1983) 711 F. 2d 348, fn. 6.) There must be "a more specific demonstration of a confidential interest in the particular information requested." (*Washington Gas Light Co*. (1984) 273 NLRB 116, 117.) As the Supreme Court indicated in *Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301, the NLRB must be permitted to balance the union's need for information against the legitimate and substantial confidentiality interests of the employer. Here, however, as in *NLRB v. Pfizer Co.* (7th Cir. 1985) 753 F. 2d 890, Respondent appears to have argued that since contractual arrangements with its grower-customers are per se confidential, it need not be required to explain the need for confidentiality. The court held that an employer's bare assertion that information sought is confidential does not entitle it to resist production with impunity." (*Id*. p. 27.)

As a practical matter, had the employer responded in good faith to the Union's requests by indicating its concerns about confidentiality, trade secrets, and attorney-client/work-product, the Union "would have been more than willing to discuss it and negotiate it, and work something out." (Tr. 88.) Instead, the Respondent chose to "stonewall" the entire matter, repeatedly promising but never delivering a detailed legal response.

In doing so, the Respondent ignored the "accommodation standard" announced by the NLRB in *Exxon Company USA*, 321 NLRB 896, 898 (1996):

> "[W]hen a union is entitled to information about which an employer has legitimately advanced a confidentiality concern in a timely manner, the employer must bargain towards an accommodation between the union's need for the information and the employer's justified confidentiality concern. *Pennsylvania Power Co*., 301 NLRB 1104, 1105-1106 (1991)."

Nor does any privilege attach to the one remaining category of information requested:

> Copies of all applications for work submitted to Bud of California and/or Dole Fresh Vegetables and/or other Dole related entities

involved in harvesting in the Oxnard area, from October 1, 2011 to date. (¶ 6, 8 and 9 of the Amended Complaint; ¶ 9 of GC Exhibits 4 &12, and ¶ 10 of G.C. Exhibit 20.)

With respect to that request, Respondent's counsel claimed that because those workers were applicants and not actual employees, the Union had no right to them. (T4. 79.)

Although the ALJ Decision in the companion NLRB case is of no precedential value, the NLRB decisions the ALJ relied upon do constitute "applicable precedents" under section 1148 of our Act. Her description of those NLRB decisions is clear and accurate:

> "In *United Graphics*, 281 NLRB 463 (1986), the parties' collective-bargaining agreement allowed the employer to acquire temporary workers from an employment agency whenever it was unable to obtain such employees through the union. After being informed by unit employees that the employer was utilizing temporary workers but learning that these temporary workers might not be receiving wages and benefits in accord with the collective-bargaining agreement, the union asked the company for the names and addresses of the temporary employees and the hourly rate and fringe benefits they received. The company refused to provide the information stating that the temporary employees were not employees of the company and the union was not entitled to this information. The Board held that even assuming that the temporary employees were non-unit employees, 'it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit 'relates directly to the policing of contract terms.' *Id*. at 465, quoting *Globe Stores*, 227 NLRB 1251, 1253–1254 (1977).
>
> "Similarly, in *Island Creek Coal Co.*, 292 NLRB 480, 490-491(1989), the union sought budget reports which it thought contained information concerning past and prospective coal production. That information could have helped the union assess whether subcontracting of unit work was occurring and would influence its decision on whether to file a grievance. The Board found that by failing to provide this information, the employer violated Section 8(a)(1) and (5) of the Act."

Respondent's assertions of privilege for subcontractor and applicant information are therefore rejected.

C. The Jurisdiction of the ALRB over Information Requested in connection with the March 12th Grievance concerning the Use of Subcontractor Crews during the Yuma Cauliflower Harvest.

The March 12th Grievance differs from the other three. It concerns the failure of Respondent to give Pedro De Anda hours equal to or greater than those allotted members of subcontractor crews working the cauliflower harvest in Yuma Arizona. There is no evidence that he was hired, or even lived, in California; no evidence that he performed work in California; and no concrete evidence that he was deprived of seniority rights which could have exercised in subsequent California harvest operations.

This last circumstance—deprivation of seniority rights—deserves some explanation because the applicable field seniority list at Yuma is found in Schedule V- Cauliflower Harvest – Southern." (G. C. Exhibit 2, Supplemental Agreement A, pp. 40-41.) The use of the word "Southern" indicates the possibility that Cauliflower harvest operations exist not only in Arizona but in California's Imperial Valley as well. (See G.C. Exhibit 2, Supplemental Agreement A, Section 14.A.2, p. 28.) If that were the case, seniority rights gained or lost by De Anda in Arizona, might well have affected his chances for later employment in the Imperial Valley. However, here, as in *Martori Brothers* (1985) 11 ALRB No. 26, fn. 9, "There is no evidence in the record that any terms or conditions of the workers' employment (i.e., field seniority) were [actually] affected by their employment history in Arizona." The same can be said of company and area seniority, which appear to be available only to "regular" employees (See, G.C. Exhibit 2, p. 58.) Without evidence concerning the grievant himself, his employment

history, the meanings of the terms used in the seniority provisions of the agreement, and the actual workings of the seniority system, there is insufficient basis for the exercise of ALRB jurisdiction over the information requests found in the Paragraph 7 of the Amended Complaint.

D. Respondent Has Failed to Sustain Its Claim that It Is Excused from Providing Material information that Is in the Hands of Third Parties.

Respondent argues that all of the information sought is in the possession and control, not of Bud Antle, Inc., but of Dole Fresh Vegetables, Inc. Since Dole is not a party to this proceeding, there is nothing to turn over and the requisite information is beyond the reach of the Union.

There is, first of all, a fundamental gap in respondent's proof.

Under applicable NLRB precedent, where information material to the processing of a grievance is in the hands of a third party, an employer cannot escape responsibility for the failure to provide that information unless and until it provides sworn proof that it does not have possession or control of the material and that it has requested the information from the third party and been unsuccessful in obtaining it. The leading case is *NLRB v. Rockwell-Standard Corporation* (6th Cir. 1969) 410 F.2d 953, 958, enf'g. 166 NLRB 124 (1967) where the Court ruled:

> "[T]he Supreme Court has recently indicated that the standards of discovery procedures under the Federal Rules of Civil Procedure should be applicable to union requests for information.[11] *N.L.R.B. v Acme Industrial Co*., 385 U.S. 432, 437 (1967). Under the applicable discovery standards, if a party cannot furnish some of the requested information, it should supply that which it can and state *under oath* that it cannot furnish the rest," (emphasis supplied).

[11] California Code of Civil Procedure sections 2031.210-2031.250, contains a similar requirement.

That requirement is fully justified as a means of eliminating spurious claims of non-possession.[12] The *Rockwell-Standard* holding has been adopted and applied by the NLRB to both employers and unions claiming non-possession of relevant materials. *United Graphics*, *id*., 281 NLRB at 466; *International Brotherhood of Firemen and Oilers, Local 288*, 302 NLRB 1008, 1008-9 (1991); *NYP Holdings, d/b/a New York Post*, 353 NLRB 625, 629 (2008). And in *Doubarn Sheet Metal, Inc*. 243 NLRB 821, 824 (1979) the Board made it clear that there was no need to make the person or party possessing the information a party to the proceeding.

Here, Antle, though repeatedly asserting in unsworn statements that it had no possession and control over the information sought, failed to come forward at any point in these proceedings with a sworn statement that (1) it indeed lacked possession or control of the information and (2) that it had requested that information from Dole and other third parties and been unsuccessful in obtaining it.

Respondent has therefore failed to produce requisite proof of non-possession of relevant information.

But even if one were to overlook Respondent's basic failure to present necessary evidence, there is a serious problem with its position. That problem lies in the relationship between Antle and Dole. Antle is Dole's wholly owned subsidiary. As such, Dole appears to have taken over the tasks of negotiating and contracting with outside land-owners, growers and labor contractors for the work to be performed under the collective bargaining agreement by Antle's employees and by labor contractor

[12] Given the close relationship, described below, between Dole and Antle, sworn testimony of non-possession was especially necessary to rebut the possibility that respondent's claim was nothing more than a legal maneuver to obstruct the course of arbitration.

employees, and it took over the sale and marketing of the crops produced by Antle.

Had Dole done no more than that, its relationship with its Antle, would be of sufficiently "at arms length" to at least support a good faith argument that information relating to those contracts was unavailable to its subsidiary. But, Dole went far beyond that to so insinuated itself into the operations of its subsidiary as to obliterate any distinction between the two.

Consider the labor agreement that Respondent touts as indicating Antle's separate integrity. It bears Antle's name, but it is administered and controlled by Dole. The only witness presented by Respondent was Liborio Rodriquez. He described himself as the Labor Relations Manager hired and paid by Dole to administer the Antle contract. He exercised full and complete control over the all of the grievances on which the instant complaint was premised. He accepted the filings, investigated them, negotiated them (even offering to compromise one) and ultimately rejected them. (G.C. Exhibits 5, 6, 8, 10, 11, 13, 14, 17, 18, 19, 21, 23.) Since all of the grievances involved seniority issues, his actions indicate his control over the seniority provisions of the contract as well.

Rodriquez was not a trustworthy witness. Although he had worked for Dole for thirty-seven years he repeatedly professed ignorance of basic information about his superiors, who employed them, and what their functions were. During his testimony he often appeared unsure of his answers, looking over to his counsel for help or reassurance. He claimed to be the Labor Relations Manager for Antle, but in his e-mails to the union, he identified himself as "Liborio S. Rodriquez, Labor Relations

Manager, Dole Fresh Vegetables." (G.C. Exhibits 8. 18 (twice), & 19.)[13] He also claimed to have no authority over hiring, yet it was he who informed the Union of the calling of the Huron seniority list in March, 2012, and explained the "we" were not yet hiring in Salinas G.C. Exhibits 18 (message 3) and 19 (message 2), each time identifying himself as "Labor Relations Manager, Dole Fresh Vegetables." Other messages of similar import came form Griselda Lopez, also of "Dole Fresh Vegetables" G.C. Exhibit 18. As if that were not enough, it was Dole who notified former employees of the up coming lettuce season, told them who to contact, warned them of the legal and seniority effects of failing to return to work, and instructed them to notify its Human Resources Department of any change in their status. (G.C. Exhibit 16.) The same Human Relations Department that Rodriquez conceded was responsible for "hiring, processing, training, and orientation" of workers (Tr. 63.)

But Dole's involvement in Antle's affairs does not stop there. When, as the grievances progressed, the Union sought disclosure of the contested information, Rodriquez referred the matter to "the Company's legal department." (G.C. Exhibit 6, 13.) Rodriquez identified the Company's attorney as David Buffington, but claimed he did not know whether he worked for Dole or Antle. In his own filings, Buffingtion made it clear that Dole was his employer. (See Board Exhibits 3 & 5 where he so identifies himself and Exhibit 12 where current counsel again identify him as having been employed by Dole.) While Buffington never provided the Union with a justification for refusing to turn over the information it requested, he did appear in this

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[13] Only when using form stationery, was the "Bud of California" fiction of separation preserved. And even that is suspicious since the it reveals that both Dole and Antle, have the same Salinas P.O. Box. (Compare G.C. Exhibit 16 with G.C. Exhibits 6, 10, 13, 21 & 23.) Note also that the domain e-mail address everyone allied with the respondent is "dole.com."

proceeding acting on behalf of Dole Vegetables, Inc. in representing Bud Antle. (Board Exhibits 3, p. 1, and 5, p. 1.)[14]

The conclusion is inescapable that—by virtue of Dole's involvement in the business of its subsidiary, a single integrated enterprise was created to conduct what had once been Antle's business. That being so, there is no basis for asserting that—with respect to the integrated operation—information available to one member is not equally available to the other. And that was true from the onset. At no point did Dole have exclusive possession and control of the information. It was part and parcel of the Antle/Dole integrated enterprise.

Respondent will, I suppose, argue that there can be no finding of a single integrated enterprise unless all members are named as parties. That is not the case. A finding that an enterprise is integrated is simply a question of proof, which if supported by the evidence, can be sustained in the absence of one or the other parties, or even of both parties if it be relevant to a matter at issue. There is nothing unlawful or untoward about participating in an integrated enterprise. California farming is replete with such arrangements, as is the economy at large. The necessity of naming a party as a respondent only comes into play where that party is alleged to have been responsible for the commission of an unfair labor practice. For example, had this proceeding involved a discriminatory discharge, Dole—despite its status as a member of a single integrated enterprise—could not be held responsible unless it was a named respondent.

Here no violation is alleged or order sought against Dole Fresh Vegetables or any other entity except Bud Antle, Inc. The basis for the order is that the proof

[14] After answering the complaint and defending its late filing, Buffington appears to have left the company.

establishes that Antle, as a participant in a single integrated enterprise has at its disposal all information relevant to that enterprise and therefore can be compelled to produce it.[15]

IV. CONCLUSIONS OF LAW

By failing and refusing to furnish the information set forth in the Amended Complaint, paragraphs 5, 6, 8 and 9, Respondent has engaged in unfair labor practices within the meaning of section 1153(a) and 1153(e) of the Act. Because ALRB jurisdiction has not been established concerning the allegations arising out of paragraph 7 of the Amended Complaint, those allegations are dismissed.

In fashioning the relief delineated in the following proposed Order, I have taken into account the failure of the Respondent to establish the unavailability of the information requested, as well as the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the condition among farm workers and in the agricultural industry at large, as set forth in *Tex-Cal Land Management, Inc*. (1977) 3 ALRB No. 14.

On the Basis of the entire record, the findings of fact and conclusion of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended order.

[15] It is worth noting that Dole and its counsel were well aware of their company's involvement with Antle. While Dole was not a necessary party, had it wished to be heard, it would have been a simple matter for it to intervene and present such evidence as it felt relevant. Title 8, California Code of Regulations, sections 20268 and 20269. It chose not to.

ORDER

Pursuant to Labor Code section 1160.3, Respondent But Antle, Inc., its officers agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to provide the Union with the information it requested in Paragraphs as described in paragraphs 5, 6, 8 and 9 of the Amended Complaint, or with any other information relevant to the Union's obligation to administer the collective bargaining agreement or any of its supplements or memoranda of understanding.

(b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed in section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Upon request, make available to the Union the information it requested in Paragraphs as described in paragraphs 5, 6, 8 and 9 of the Amended Complaint and all other information relevant to its obligation to administer the collective bargaining agreement or any of its supplements or memoranda of understanding or necessary to otherwise represent unit employees in an informed manner.

(b) Upon request of the Regional Director, Sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(c) Post copies of the Notice in all appropriate languages at conspicuous places

on Respondents' property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed.

(d) Arrange for a Board agent or representative of Respondents to distribute and read the attached Notice, in all appropriate languages, to its employees then employed in the bargaining unit on company time and property, at the times and places to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly employees to compensate them for lost work time during the reading and the question-and-answer period.

(e) Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all harvest employees employed by Respondents at any time during 2011-2012 harvests occurring after October 2011 and all 2012-2013 harvests, at their last known addresses.

(f) Provide a copy of the Notice to each agricultural employee hired to work for the Respondent during the twelve-month period following the issuance of a final order in this matter.

(g) Notify the Regional Director in writing, within thirty days after the date if issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director

periodically in writing of further actions taken to comply with the terms of this Order.

Dated: May 22, 2013

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JAMES WOLPMAN
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by Teamsters Union, Local 890, International Brotherhood of Teamsters, in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by failing to supply the Union with information to which it was entitled under the Act

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT refuse to provide the Union with information necessary for it to process grievances under the collective bargaining agreement or otherwise necessary to the administration of that agreement or any of its supplements or memoranda of understanding.

WE WILL NOT in any like or related manner, refuse to bargain with the Union over wages, hours or conditions of employment, or interfere with, restrain or coerce employees from exercising their right under the Act

DATED:

BUD ANTLE, INC

By ____

Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.