STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GIUMARRA VINEYARDS CORPORATION, Respondent, UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 75-RC-38-F 75-CE-51-F 76-CE-39-F 76-CE-39-1-F DECISION AND ORDER 3 ALRB No. 21

The Board has received discovery motions filed by the respondents in a number of unfair labor practice proceedings[1/] requesting pre-hearing disclosure of (1) the names and addresses of witnesses and persons with exculpatory evidence, (2) copies of all exculpatory evidence, (3) statements of witnesses and persons with knowledge of the incidents in question and/or with exculpatory evidence, (4) investigative reports prepared by the general counsel and charging party, (5) documents and writings, particularly those proposed to be offered into evidence, (6) a description of real evidence relevant to the charges filed and

[1/]Respondents include employers E. & J. Gallo Winery, case numbers 75-CE-l-F, 75-CE-22-F, 75-CE-27-F, 75-CE-76-F; Tenneco Farming Co., case numbers 75-CE-42-F; 75-CE-12-R; Giumarra Vineyards Corp., case numbers 75-CE-51-F, 75-RC-38-F, 76-CE-39-F, 76-CE-39-1-F; Charley Brown and Henry Moreno, case numbers 76-CE-34-I(R), 76-CE-35-1(R); Richard Bagdassarian, case numbers 77-CE-7-C, 77-CE-7-1-C, 77-CE-10-C; Jack or Marion Radovich, case number 76-CE-22-F; and a labor organization, Western Conference of Teamsters, case number 75-CL-l-F. Although we render a single opinion on the discovery motions, the pending unfair labor practice cases have not, of course, been consolidated for hearing.

(7) other tangible evidence in the possession of the general counsel, such as photographic evidence. Additionally, several respondents have requested subpoenas for the purpose of deposing Board personnel, including the executive secretary and representatives of the general counsel, for the purpose of discovering additional evidence in the Board's possession. Respondents have also proposed to utilize interrogatories for this purpose.

Both the general counsel and the charging party have filed memoranda in opposition to the discovery motions. The general counsel is willing to provide some, but not all, of the requested material, while the charging party urges the Board to deny pre-trial discovery entirely. Because of the importance of the issues presented, the Board granted continuances of scheduled hearings in a number of pending cases in order to consider together the various motions, as well as the memoranda filed in support thereof and opposition thereto.[2/] As specifically set forth below, the Board has determined that the discovery motions be granted in part and denied in part.

We agree with the general counsel that the Board must preserve as confidential the identity of workers assisting this agency in the investigation and litigation of unfair labor practices The names and statements of workers who are complainants, proposed witnesses, or who give information to the ALRB is information

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[2/]Because of the absence of discovery procedures under the ALRA, the issues raised here would normally arise in the context of a petition to revoke a subpoena. In light of this decision, it will be unnecessary to require the parties to re-litigate the issues before the Board in another procedural context. Rather, we will decide the issues on the merits in the present decision and order.

which respondents may not receive in advance of trial. Nor are the respondents entitled to pre-trial discovery of investigative reports containing the identity of workers or the information given by them. These same confidentiality considerations do not, however, apply to the names and statements of nonemployee witnesses, nor to exculpatory evidence, nor to documentary and other tangible evidence insofar as they do not reveal the identity or statements of workers. Conscious of our responsibility to promote fair hearings, we will accord discovery of such information to respondents in the manner set forth below.

Respondents claim a constitutional right to pre-trial discovery in administrative proceedings. It is well-established, however, that pre-trial discovery is not required as a matter of due process in NLRB proceedings or administrative proceedings existing under California law. NLRB v. Valley Mold, 530 F.2d 693, 695 (6th Cir. 1975), 91 LRRM 2478, 2480; D'Youville Manor v. NLRB, 526 F.2d 3, 7 (1st Cir. 1975), 90 LRRM 3100, 3104; Everett v. Gordon, 266 CA 2d 667, 674. Such discovery rights as exist have been created by either the legislature or the courts. The Agricultural Labor Relations Act makes no provision for discovery and, as the parties concede, the ALRB is not governed by the provisions of the Administrative Procedure Act, Gov't Code Section 11507.5, et. seq. See Government Code Section 11501. The APA specifically provides that it shall confer the sole right and exclusive method of discovery for such agencies as are covered by that Act. Respondent's contention that the discovery provisions of the Government Code are a legislative measure of what discovery should be accorded by agencies not governed thereby is without

merit and renders the specific statutory exclusion meaningless,

The Board recognizes and shares the California courts ' "commitment to the wisdom of discovery" in general. Shively v. Stewart, 65 CA 2d 475 at 479 (1966) and recognizes that "the legislature's silence with respect to pre-hearing discovery does not mean . . . that it has rejected discovery." Id. The Shively, supra, case does not, however, require the General Counsel to disclose the identity of complainants, witnesses, informers and their statements in unfair labor practice cases before this agency. Rather, the rationale for the court's decision in Shively, supra, distinguishes that case from unfair labor practice proceedings conducted by the ALRB.

In Shively, supra, two physicians brought action to compel issuance of a subpoena duces tecum to obtain depositions and documents from the State Board of Medical Examiners prior to disciplinary hearings in which they were accused of performing illegal abortions. The thrust of Shively, supra, was the quasi-criminal nature of the disciplinary proceedings, and the court's corresponding conclusion that a criminal law analogy was appropriate The Shively Court reasoned that (1) the disciplinary proceeding is punitive in character, and may lead to the remedy of prohibiting the accused from practicing his profession, (2) the doctors involved are charged with crimes and should therefore be accorded the same opportunity as criminal defendants to prepare a defense, (3) the Medical Board prosecutes the proceedings and has broad investigatory powers, (4) the agency acts as investigator, prosecutor, and judge, which concentration of functions warrants

procedural safeguards, (5) as the full Board assembles to hear charges, judicial economy counsels that full preparation be promoted in order to avoid needless continuances.

Analysis of the nature of unfair labor practice proceedings establishes that they do not contain the elements Of the "criminal law analogy" which was appropriate to the disciplinary proceedings before the California court in Shively, supra. Most significantly, unfair labor practice proceedings are simply not punitive in character, but remedial. The remedial, as opposed to punitive, nature of such proceedings is not a mere semantic distinction, but a concept going to the heart of this agency's function and purpose and basic to the Agricultural Labor Relations Act. An unfair labor practice proceeding is a legal creation found only in our Act and other collective-bargaining statutes modeled after the National Labor Relations Act. This Board, like the NLRB in the industrial context, has been delegated the task of promoting collective bargaining between labor and management, a task which requires us to strike and continually maintain a delicate power balance between the two. The Act's prohibition of unfair labor practices, and the Board's power to remedy their effects, is a necessary tool utilized to effectuate the Act's basic purpose: the promotion of collective bargaining. Unlike the doctors in Shively, supra, who were charged with committing criminal abortions, respondents in unfair labor practice proceedings are seldom charged with conduct constituting a crime or prohibited by any statute save the ALRA. Unlike disciplinary or licensing proceedings, with their severe sanctions,

an unfair labor practice proceeding is intended not to punish the wrongdoer, but to make whole the wronged. As the Supreme Court has stated with reference to the NLRB:

> The (NLRA) is essentially remedial. "It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in violation of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Republic Steel Corp., v. NLRB, 7 LRRM 287, 289, 311 U.S. 7.

Because the unfair labor practice provisions of the ALRA are substantially similar to those of the NLRA, the Court's reasoning applies with equal force to proceedings under our Act.

Also, the ALRB does not possess the kind of investigative powers which licensing boards possess. This Board may not initiate complaint proceedings sua sponte, but only pursuant to the filing of a charge with the agency. Labor Code Section 1160.2. This procedure is in marked contrast to that of the Board of Medical Examiners, which in the course of its review of medical practice may go so far as to employ persons to pose as patients for investigatory purposes. Moreover, unlike the Board of Medical Examiners, this agency, like the NLRB, has been designed to provide for a separation of the prosecutorial and adjudicative functions, in a manner nearly unique to administrative agencies. Hence the separate divisions of the General Counsel and the Board. Finally, the judicial expediency rationale noted by the Shively court is inapplicable to hearings held by this agency, because the Board does not ordinarily "assemble to hear the charges," but has delegated that responsibility to its administrative law officers.

Significantly, unlike disciplinary proceedings of other agencies, in which the party prosecuted risks losing his livelihood, in unfair labor practice proceedings it is the employee-witness's ability to earn a living which may be jeopardized by such disclosure as respondents here seek. The basis of our decision to limit discovery is the necessity of avoiding a real danger to the effectiveness of the Act itself, namely, the possibility of intimidation of employee-witnesses. Given the similarity of purpose and functions of this agency and the NLRB, it should be apparent that the experience of that agency alone is truly analogous to the situation confronting this Board.

Certainly, this Board cannot ignore the economic realities of the employment relationship. As the Seventh Circuit has observed

> Statements made during an investigation by employees to Board agents may and often do reveal an employee's and his co-workers' attitudes and activities in relation to a union and their employer. If an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement, a circumstance complicating a determination of the actual facts in a labor dispute. There is, therefore, strong reason to maintain the confidentiality of employee statements. NLRB v. National Survey Services, Inc., (7th Cir. 1960) 301 F.2d 199, 206.

The NLRB remains opposed to pre-trial discovery in unfair labor practice proceedings and this policy continues to be upheld by the Federal courts. The Federal courts have repeatedly supported the NLRB's policy of preserving the confidentiality of evidence gathered in unfair labor practice investigations in order to lessen the likelihood of retaliation against complainants and to protect

potential witnesses.[3/] Even the Fifth Circuit, which is noted for requiring discovery in NLRB proceedings, has recently refused to deny enforcement of a Board order in the absence of a showing of actual prejudice. NLRB v. Rex Disposables (5th Cir. 1974) 494 F.2d 588, 86 LRRM 2495.

The possibility of intimidation of witnesses is even greater in an industry characterized by seasonal and temporary employment than in the industrial context in which the NLRB operates, Also, our Act accords to agricultural workers rights and protections which are newly created and the existence of which many employees have yet to be advised. We distinguish here between actual retaliation against witnesses and their reluctance either to come forward, or to cooperate fully, because of their fear of retaliation, however justified or unjustified such fear may be. The function of our Act requires the full cooperation of employees, and there is no doubt that the revelation of employees statements and identities would retard our investigations of unfair labor practices. Harvey's Wagon Wheel v. NLRB, 93 LRRM 3068, 3070 (9th Cir. 1976). Additionally, the prospect of another unfair labor practice charge to correct any retaliation as might occur is inadequate to remedy the dangers discussed above. There is the possibility that intimidation will

[3/]10th Cir. NLRB v. Leprino Cheese Co., 424 F.2d 184 (1970); 9th Cir. NLRB v. Globe Wireless, 193 F.2d 748, (1951); 7th Cir. NLRB v. Vapor Blast Mfg. Co., 287 F.2C[5] 402 (1961); 6th Cir. NLRB v. Valley Mold Company, Inc. , 530 F.2d 693 (1976); 4th Cir. Inter type Co. v. NLRB, 401 F. 2d 41 (1968); 3rd Cir. Roger J. Au & Son v. NLRB, 538 F.2d 80 (1976); 2nd Cir. NLRB v. Interboro Contractors, 432 F.2d 854 cert, denied 402 U.S. 915 (1970); 1st Cir. D'Youville Manor, Lowell Mass, v. NLRB 526 F.2d 3 (1975).

prove more effective than our own remedial power. It should be noted that our concern for protecting the confidentiality of the identity and statements of "employees" does not end when their employment relationship with a specific respondent terminates. Rather, we believe that the inhibitory effect noted by the Ninth Circuit in Harvey's Wagon Wheel, supra, would function with regard to any and all employees whose primary source of income is derived from agricultural employment generally. We therefore decline to adopt any distinction between ex-employees and presently employed employees of a given respondent.

In accordance with the principles discussed above, we will require (1) that complaints be drafted with specificity and bills of particulars be granted to remedy deficiencies, (2) advance disclosure of the names of outside expert witnesses, (3) that issues and positions of the parties be set forth at a pre-trial conference to be held no later than the first day of the hearing, (4) an exchange of documentary evidence, preferably in advance thereof but no later than at a pre-trial conference, so long as such disclosure does not involve the identification of individual employees, and (5) that in back-pay proceedings, full disclosure be available of information tending to verify, contradict, or further clarify the materials in

the files of the General Counsel.[5/]

Conscious of our duty to promote fair hearings, we will additionally require pre-trial disclosure of (1) names and statements of non-employee witnesses and (2) evidence which is clearly

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[5/]The above five requirements are recommended by the Chairman's Task Force of the NLRB, 93 LRRM 242, 247. Chairman Brown concurs in the granting of discovery only of these items.

and purely exculpatory. Evidence from a worker who will give testimony at the hearing that is also incriminatory will not be disclosed prior to the hearing. The General Counsel is hereby ordered to comply with the specificity and clarification requirements and also to disclose to respondents the materials as listed above.

The requests for names and statements of workers, and pre-trial investigative reports containing the identity of workers or information given by them, are hereby denied.

The requests for lists of specific documents and witnesses to be used at trial, insofar as such information is protected by the attorney work product privilege, are hereby denied.

In light of the conclusions reached by the Board in this decision, the requests for subpoenas for the purpose of deposing Board personnel, and similar requests for interrogatories, are hereby denied. Such subpoenas are available only for the limited purpose of according respondents an opportunity to make a showing of particularized need for information sought in advance of trial. Shively, supra. Everett v. Gordon, 266 CA 2d 667. As we have specifically designated the information to be accorded to respondents upon request, and the information which will not be made available to respondents in any event, no purpose for the depositions remains. Dated: March 4, 1977

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Robert B. Hutchinson, Member

Ronald L. Ruiz, Member