STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| ACE TOMATO COMPANY, INC., A California Corporation, DELTA PRE-PACK CO., A California Company, BERENDA RANCH LLC, A Limited Liability Company, CHRISTOPHER G. LAGORIO, An Individual, CHRISTOPHER G. LAGORIO TRUSTS, CREEKSIDE VINEYARDS, INC., A California Corporation, DEAN JANSSEN, An Individual, JANN JANSSEN, An Individual, KATHLEEN LAGORIO JANSSEN, An Individual, KATHLEEN LAGORIO JANSSEN TRUST, K.L.J. LLC, Limited Liability Company, K.L. JANSSEN LIVING TRUST, JANSSEN PROPERTIES, LLC, A Limited Liability Company, JANSSEN & SONS LLC, Limited Liability Company, LAGORIO FARMING CO., INC., A California Corporation, LAGORIO FARMS, LLC, A Limited Liability Company, LAGORIO LEASING CO., A California Company, LAGORIO PROPERTIES LP, A Limited Partnership, ROLLING HILLS VINEYARD LP, A Limited Partnership, QUAIL CREEK VINEYARD, a California Company,<br><br>Respondents,<br><br>And<br><br>UNITED FARM WORKERS OF AMERICA,<br><br>Charging Party. | ) | Case Nos. 93-CE-037-VI<br>(20 ALRB No. 7)<br><br>ORDER DENYING REGIONAL DIRECTOR'S APPLICATION FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTION TO STRIKE WITNESS TESTIMONY<br><br>Admin. Order No. 2015-02<br><br>(February 27, 2015) |

On February 9, 2015, Regional Director Silas Shawver (the Regional Director) filed an application for special permission to file an interim appeal of an oral ruling made by Administrative Law Judge (ALJ) Doug Gallop on February 3, 2015, during the hearing in the above-captioned matter. The Regional Director argues that the ALJ improperly allowed testimony by Ace Tomato Company, Inc.'s (Ace or Employer) witness, Dean Janssen. That testimony, according to the Regional Director, related to the issue of whether the end date of the makewhole period in this case was July 27, 1994 or July 6, 1994.[1]

On February 3, 2015, the Regional Director moved to strike all of Dean Janssen's testimony related to the end date of the makewhole period, arguing that the duration of the makewhole period had already been resolved. ALJ Gallop denied the motion, but

[1] It is noted that the end date of the makewhole period was not litigated or conclusively determined by the Board in *Ace Tomato Company, Inc*. 93-CE-37-VI (20 ALRB No. 7) The Board's decision and order issued on June 14, 1994, and contained a provision that makewhole would be owed for the period beginning June 14, 1993, until the date that Ace commenced good faith bargaining. Thus, the determination of this date was left for the compliance process.

On May 20, 2009, the Visalia Regional Director filed with the Board, a Motion to Close the Ace Tomato matter. Attached as an exhibit to the Motion to Close, was a letter dated March 27, 1996, from Ace's attorney, Spencer Hipp to ALRB Field Examiner Jose Carlos, in which Mr. Hipp stated that the parties had met for their first negotiation meeting on July 27, 1994, in Stockton, California. In administrative orders issued in this matter since May 20, 2009, the Board has noted that the makewhole period in this matter was June 14, 1993 to July 27, 1994, based on the representation made by Mr. Hipp in his 1996 letter to regional office staff. Although the Board has in its past orders considered the end date of makewhole to be July 27, 1994, the Board will not explicitly rule on the matter pending the ALJ's decision and any exceptions filed.

gave the Regional Director leave to re-open the record for a two-week period in the event that the Regional Director could locate witnesses to the initial collective bargaining session between the parties. The two-week period ended on February 18, 2015, and the Regional Director did not file a motion to re-open the record.

In his application, the Regional Director argues that interim relief is appropriate because the ALJ's decision "to allow untimely testimony on a resolved legal issue cannot be effectively remedied through the exceptions process." The exceptions process will not be effective, the Regional Director argues, because investigating Ace's "untimely defense" will lead to delay, and the record before the Board during the exceptions process will be incomplete. The Regional Director argues that the Board will have to remand the matter for additional factual findings and such a remand would "reset the clock on this entire process."

The Regional Director's application is DENIED for the reasons discussed below.

Section 20242, subdivision (b) of the Board's regulations [2] provides that rulings and orders of an ALJ are only appealable upon special permission of the Board. The standard of review for appeals of ALJ rulings during an evidentiary hearing was set forth in *Premiere Raspberries* (2012) 38 ALRB No. 11 (*Premiere*), as limited to issues that could not be resolved pursuant to the exceptions process outlined elsewhere in the Board's regulations. *Premiere* discussed striking the proper balance between judicial

[2] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

efficiency and providing an avenue for review of rulings that would otherwise be effectively immunized from appeal.

The Regional Director's Application does not state any sufficient legal reason why the ALJ's ruling cannot be satisfactorily addressed via the exceptions process. Here, the ALJ's order allowing testimony of a witness is an evidentiary ruling.

As noted in *Premiere*, an interlocutory appeal of an evidentiary ruling is not a collateral order and is effectively reviewable on appeal. (*Premiere Raspberries, supra*, at pp. 8-9.) Also, California Code of Civil Procedure section 904.1 excludes evidentiary rulings from matters that may be appealed. (*Premiere Raspberries, supra*, at p. 9.) On its face, the request to review the order allowing Dean Janssen's testimony does not satisfy the standard set forth in *Premiere.*

Moreover, in denying the Regional Director's motion to strike Janssen's testimony, the ALJ made no final conclusion with respect to the end of makewhole period. An interim appeal from any ruling which is tentative, informal or incomplete is not appropriate. Under federal law, interlocutory appeals from federal district courts are addressed by 28 U.S.C. § 1291. The United States Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp*. (1949) 337 U.S. 541, set forth the standard for assessing the appealability of orders under said statute, holding, at page 546:

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. . . . Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in

> which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

(See also *Barry v. Rodgers* (1956) 141 Cal.App.2d 340 (where plaintiff appealed trial court order granting a motion to dismiss made by certain defendants, the Court of Appeal held that such an order is not appealable); section 904.1 of the California Code of Civil Procedure (limiting appeals in civil matters); *Steen v. Fremont Cemetery Corp*. (1992) 9 Cal.App.4th 1222, 1226, citing *Day v. Papadakis* (1991) 231 Cal.App.3d 503, 507 (Section 904.1 "codifies the so-called 'one final judgment rule,' pursuant to which '[o]nly *final* judgments are appealable ....'" (emphasis in original).

Because we find that the matters that the Regional Director seeks to appeal can be addressed effectively through exceptions, the Regional Director's Application for Special Permission to Appeal is hereby DENIED.

Dated: February 27, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member