STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BUD ANTLE, INC., dba BUD OF CALIFORNIA, INC., and DOLE FRESH VEGETABLES, INC., Respondents, and TEAMSTERS UNION LOCAL NO. 890, Charging Party.	)	Case Nos. 2012-CE-056-SAL 2013-CE-001-SAL ORDER DENYING RESPONDENTS' APPLICATION FOR SPECIAL PERMISSION TO APPEAL THE ORDER GRANTING IN PART PETITIONS TO REVOKE SUBPOENAS DUCES TECUM AND DENYING THE REMAINDER; AND ORDER DENYING PETITIONS TO REVOKE SUBPOENAS AD TESTIFICANDUM [8 Cal. Code Regs., § 20242(b)] Admin. Order No. 2015-10

On June 25, 2015, the Respondents timely filed with the Agricultural Labor Relations Board (ALRB or Board) "Respondents' Request for Special Permission to Appeal the Order Granting in Part Petitions to Revoke Subpoenas Duces Tecum and Denying the Remainder; and Order Denying Petitions to Revoke Subpoenas Ad Testificandum" (Request). The Request seeks to appeal the June 18, 2015, order of the Administrative Law Judge granting in part and denying in part Respondents' petitions to revoke the subpoenas duces tecum served on them by the General Counsel of the Agricultural Labor Relations Board (General Counsel). Said order also denied Respondents' petitions to revoke the

General Counsel's subpoenas ad testificandum for two persons[1]. The General Counsel timely filed an opposition (Opposition) to the Request on July 8, 2015.

We find that the Respondents' Request has failed to state sufficient legal reason why interim relief is necessary as required by the Board regulations (Cal. Code Regs. tit. 8, § 20242, subd. (b).); therefore, we DENY their Request for the reasons discussed below.

BACKGROUND

On November 18, 2014, the General Counsel served Respondents with two subpoenas duces tecum, as well as with subpoenas ad testificandum for two persons. These subpoenas were served as part of the General Counsel's investigation of charges 2015-CE-056-SAL and 2013-CE-001 SAL, which were filed against Respondents on August 6, 2012, and January 4, 2013, respectively. On December 2, 2014, Respondents filed petitions to revoke all the subpoenas with the Executive Secretary of the Board. On December 4, 2014, the General Counsel requested leave to respond to the petitions. On December 9, 2014, the General Counsel issued a complaint involving both charges, to wit, the above-captioned matter. The complaint alleged, inter alia, that Respondents were a single employer. Respondents denied this in their answer to the complaint, filed on December 22, 2014.

[1] Section 20242(b) of the Board's regulations allows an appeal to be taken within five (5) days of the order. (Cal. Code Regs., tit. 8, § 20242, subd. (b); see also Cal. Code Regs, tit. 8, § 20170.)

On April 15, 2015, an Administrative Law Judge (ALJ) for the Board granted the General Counsel's request for leave to respond to the petitions. On April 21, 2015, the Executive Secretary extended the General Counsel's deadline to respond to April 28, 2015, and assigned a different ALJ to rule on the petitions. The General Counsel timely filed an opposition to the petitions. On May 22, 2015, the ALJ requested further briefing from the parties on the viability of the subpoenas. On May 27, 2015, the General Counsel consolidated both charges into a single case (the above-captioned matter) for purposes of hearing, currently scheduled for October 1, 2015.

Respondents submitted their response brief on May 29, 2015, and the General Counsel submitted her supplemental brief on June 5, 2015. On June 18, 2015, the ALJ issued an order (Order) granting the petition to revoke the subpoenas duces tecum in part. However, of the 208 requests in the subpoenas duces tecum, the petition to revoke was granted as to only five of them, with three other requests modified, with orders to Respondents to provide the information sought, consistent with such modification. The ALJ denied the petition to revoke all the remaining requests in the subpoenas duces tecum, and denied the petition to revoke the subpoenas ad testificandum in its entirety. The Order further directed Respondents to provide all remaining information and documents sought by the subpoenas duces tecum, and also to make the persons named in the subpoenas ad testificandum available for interview by the General Counsel.

Respondents filed the instant Request on June 25, 2015, and the General Counsel timely filed an opposition (Opposition) to the Request on July 8, 2015, in which the Charging Party, Teamsters Union Local No. 890 (Teamsters), joined. Respondents argue that compliance with the Order would potentially cause harm that could not be remedied through the exceptions process after hearing; that the subpoenas are overbroad, burdensome, and irrelevant; that compliance with the Order would force Respondents to reveal sensitive business and trade secret information, as well as compel production of information in violation of the privacy rights of Respondents' employees; that the subpoenas exceed the General Counsel's investigatory powers; that the subpoenas should not now be enforced, as the matter has proceeded to the prosecution stage, as opposed to the investigation phase; and that the parties have already agreed to settle the dispute.

The General Counsel's Opposition argues that Respondents' Request is an impermissible interlocutory appeal; that Respondents' have failed to provide any significant factual or legal justification for their objections to the subpoenas, and have failed to meet their burden of proof; that Respondents have untimely introduced new information and arguments in the Request; that the subpoenas are enforceable even after the filing of the complaint in this matter; that Respondents' privacy and trade secret objections fail to pass muster; and that the settlement agreement between the parties is irrelevant and outside the scope of the current inquiry.

DISCUSSION

The Order Requiring Compliance with the Subpoenas Was a Collateral Order Subject to Interlocutory Review

Section 20242 subsection (b) of the Board's regulations provides that rulings and orders of an ALJ are only appealable upon special permission of the Board. In *Premiere Raspberries* (2012) 38 ALRB No. 11, the Board stated that it would only hear interim appeals of interlocutory rulings pursuant to Regulation 20242 subsection (b) that could not be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j). *Premiere Raspberries* spoke to striking the proper balance between judicial efficiency and providing an avenue for review of rulings that would otherwise be effectively immunized from appeal.

The ALJ's order in this matter compelling compliance with the subpoenas is a collateral order subject to interlocutory review. An order requiring compliance with an administrative subpoena is appealable as a final order in a special proceeding such as an investigation by a state agency, and the constitutionality of such a subpoena is a matter of law to be reviewed de novo. (*Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal.App.4th 477, 484-485.) Thus, although Respondents' Request is not barred *per se* by the *Premiere Raspberries* standard, we find no merit in the arguments set forth in the Respondent's Request. We further find that the ALJ's order was correct, and affirm it in its entirety, for the reasons discussed below.

The ALJ properly applied the reasoning in *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, in concluding that the General Counsel's issuance of a complaint in this matter did not affect the validity of the subpoenas. In *Arnett*, the California Supreme Court ruled that an investigative subpoena from the Medical Board of California for the records of a hospital's peer review committee had to be complied with, despite a provision in the Evidence Code immunizing such records from discovery. (*Id*. at p. 6.) The Court reasoned that since the Medical Board had the power, under Government Code section 11182 to inspect records and subpoena them in any inquiry of investigation, and since the Medical Board's purpose was the protection of the public, the limitation on discovery did not apply. (*Id.* at pp. 7-18.) The Court explained that discovery is "the formal exchange of evidentiary information and materials between parties to a pending action" and its meaning did not apply to "a subpoena issued, as here, by an administrative agency for purely investigative purposes." (*Id.* at pp. 19-24.)

Further bolstering the ALJ's reasoning are the provisions of Government Code section 11182 which are strikingly similar to those of section 1151 of the Agricultural Labor Relations Act (ALRA or Act).[2] Section 1151 authorizes the Board or its agents to access and copy, at all reasonable times, via subpoena, any evidence that relates to any matter under investigation. Nothing in the Act serves

[2] The ALRA is codified at Labor Code section 1140, et seq. All further statutory citations are to the Labor Code unless otherwise indicated.

to revoke such authorization after the issuance of a complaint. Furthermore, pursuant to section 1140.2 of the Act, the Board exists for the protection of the rights of agricultural employees - analogous to the purpose of the Medical Board in *Arnett.* Thus, the same analysis applies in this matter.

The ALJ Correctly Ruled That Respondents' Must Comply With the Subpoenas Despite the Issuance of a Complaint

Ample precedent supports the conclusion that administrative subpoenas survive the issuance of a complaint. In *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.* (D.C. Cir. 1993) 5 F.3d 1508, the Court of Appeals held that since the federal statute authorizing the Resolution Trust Corp. (RTC) to investigate matters under its jurisdiction did not contemplate the termination of such authority upon the commencement of civil proceedings, investigative subpoenas could be enforced after the filing of a civil complaint. (*Id.* at pp. 1517-1518.) Thus, Respondents' contention that the subpoenas did not survive the issuance of the complaint in this matter is rejected.

The ALJ Correctly Determined That the Subpoenas Seek Relevant Information

We agree with the ALJ's conclusion that the information sought by the subpoenas in this matter is relevant to the proceedings. The ALJ properly applied the reasoning of *NLRB v. American Medical Response, Inc.* (2d Cir. 2006) 438 F.3d 288, in this analysis. In that case, the National Labor Relations Board (NLRB) issued two subpoenas in connection with the investigation of alleged unfair labor practices at employer's facility in Connecticut. (*Id.* at p. 190.) The

first subpoena sought documents related to the Connecticut facility, and the second related to employer's non-union facilities nationwide. (*Id.*) Employer objected to the second subpoena on relevance grounds. (*Id.*) The Court of Appeals upheld the second subpoena, reasoning that since the documents for the nationwide facilities involved conduct similar to the alleged unfair labor practices in Connecticut, they might well concern matters closely related to the Connecticut case, and become the subject of the NLRB's complaint. (*Id.* at pp. 194-195.)

The ALJ correctly found that the subpoenas in this matter relate to a matter or question under investigation – to wit, allegations that Respondents constitute a single employer. The ALJ further held, properly, that pursuant to the rationale of *NLRB v. Fant Milling Co.* (1959) 360 U.S. 301, the General Counsel's investigation need not be limited to the strict confines of the charges. In *Fant Milling*, a union filed a charge against the employer for refusal to bargain, and the NLRB, after two months of investigation, refused to issue a complaint. (*Id.* at pp. 302-303.) Several months later, the NLRB withdrew its dismissal of the charge and decided to continue the investigation, filing a complaint shortly thereafter. (*Id.* at pp. 303-304.) The NLRB ultimately found the employer in violation of the NLRA due to its unilateral grant of a wage increase, though said increase took place after the original charge and was not mentioned in any amended charge, though it was a subject in the complaint. (*Id.* at pp. 304-305.) The Court of Appeals for the Fifth Circuit refused to enforce the NLRB's petition for

enforcement, holding that a charge must show facts indicating an unfair labor practice, and such facts must be predicated on actions already taken, and that a complaint must faithfully reflect the facts as presented in the charge. (*Id.* at pp. 305-306.)

The United States Supreme Court reversed, holding that a charge filed with the NLRB is not measured by the standards applicable to private lawsuits, as "its purpose is merely to set in motion the machinery of an inquiry." (*Id.* at p. 307.) The High Court further reasoned that the NLRB was created to "advance the public interest in eliminating obstruction to interstate commerce" and thus had to be "left free to make full inquiry under its broad investigative power in order properly to discharge the duty of protecting public rights....There can be no justification for confining such an inquiry to the precise particularizations of a charge." (*Id.* at pp. 307-308.) The Court concluded that the NLRB "is not precluded from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending." (*Id.* at p. 309.) We agree with the ALJ's conclusion that the subpoenas are valid, and that the General Counsel's investigation is not limited to the theories set forth in the original charges in this matter.

The ALJ Properly Rejected Respondents' Contention That the Subpoenas Are Overbroad and Unduly Burdensome

With respect to Respondents' contention that the subpoenas are overbroad and burdensome, the ALJ properly rejected the same, in part for the same reasons

outlined above in the discussion of relevance. The ALJ further reasoned, correctly, that under the holding of *United States v. Morton Salt Co.* (1950) 338 U.S. 632, the subpoenas could not be considered overbroad or burdensome, as governmental inquiry into corporate affairs is reasonable "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." (*Id.* at p. 652.) We agree with the ALJ's finding that the information sought by the subpoenas in this matter comports with this standard.

Further support for this conclusion is provided by the case of *NLRB v. G. H. R. Energy Corp.* (5th Cir. 1982) 707 F.2d 110. In that case, the NLRB served two companies with subpoenas duces tecum and subpoenas ad testificandum regarding various alleged unfair labor practices, including (significantly, for our purposes) an allegation that the two companies constituted a single employer. (*Id.* at p. 111.) The companies refused to comply with the subpoenas, and the Court of Appeals for the Fifth Circuit affirmed a district court order enforcing them. (*Id.* at pp. 111-113.) The Court reasoned that the information sought, including personnel records for all employees who had worked for both companies, recent financial reports for both companies, information on intercompany loans, etc., were properly tailored to the exigencies of the case. (*Id.* at p. 114.) The Court further held that "the mere fact that compliance with the subpoenas may require the production of thousands of documents is also insufficient to establish

burdensomeness." (*Id.*) The current matter bears a remarkable similarity to the facts of *G. H. R. Energy Corp.*, and we reach a similar conclusion.

The ALJ Correctly Rejected Respondents' Arguments Based on Third Party Privacy Claims

The ALJ properly rejected Respondents' claims that the subpoenas violated the privacy rights of its employees, as the assertions in this regard were so bare as to make it impossible to determine whose rights were being asserted. Thus, Respondents' contention that the subpoenas violate its employees' right to privacy is rejected.

Respondents' Claims That the Subpoenas Require the Disclosure of Protected Trade Secret Information Were Waived Because Those Claims Were Not Asserted Before the ALJ

With respect to Respondents' claim in the Request that disclosure of the information sought by the subpoenas will compel it to reveal sensitive business and trade secret information, the ALJ made no finding on such contention – for it was not raised in Respondents' original petitions to revoke the subpoenas, nor was it raised in Respondents' additional briefing on May 29, 2015. Therefore, such contention is waived, and will not be heard, as it was raised for the first time in the Request. See *Paterson-Leitch Co., Inc. v. Mass. Municipal Wholesale Elec. Co.* (1st Cir. 1988), 840 F.2d 985, 991 ("We hold categorically that an unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate.").

This conclusion is further supported by *ALRB v. Richard A. Glass Co.* (1985) 175 Cal.App.3d 703, where the employer's assertion that information sought by subpoena duces tecum would violate its trade secrets and damage its business was rejected, as the employer's claims were mere conclusions unsupported by factual data, and the employer had not met its burden to show why a trade secret, if one existed, should be protected, or why a protective order would not remedy the situation. (*Id.* at pp. 714-715.) This parallels the instant case, as Respondents have made the same failures as the employer in *Glass*.

The Parties' Settlement Agreement Does Not Preclude Enforcement of the Subpoenas

Finally, Respondents' claim that the parties have already agreed to settle this dispute fails. A September 2013 agreement relates to grievances filed in 2010 by the Teamsters, who claimed that Respondent violated the Collective Bargaining Agreement by discontinuing operations in Yuma, AZ. As part of settling those grievances, the Teamsters agreed to withdraw the ALRB charges in 2012-CE-056-SAL and 2013-CE-001-SAL alleging misconduct in California. The General Counsel is not bound by any such agreement, as, per section 1149 of the Act, it has final authority, on behalf of the Board, to investigate charges and to issue and prosecute complaints. The Board exists, as does the NLRB, for the vindication of public, and not private, rights. *Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726, 736. Respondents' contention in this regard is thus rejected.

CONCLUSION

PLEASE TAKE NOTICE THAT the Respondents' Request for special permission to appeal the ALJ's order is DENIED. Respondents are hereby ordered to furnish the General Counsel with the documents and information sought by the subpoenas duces tecum, as modified by the ALJ's order of June 18, 2015, within 15 days of this Order. In accordance with the ALJ's order, the Respondents are further directed to make Danny Urbano and Liborio Rodriguez available for interview by an agent of the General Counsel's Office within 10 days after the documents and information have been provided.

Dated: July 16, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member