STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: GEORGE AMARAL RANCHES, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, and RAUL LAZARO SANTIAGO, Charging Parties.	)	Case Nos. 2013-CE-019-SAL 2013-CE-020-SAL 2013-CE-023-SAL 2013-CE-024-SAL 2013-CE-025-SAL 2013-CE-029-SAL 2014-CE-026-SAL 2014-CE-027-SAL 2015-CE-013-SAL 2015-CE-014-SAL ORDER DENYING CHARGING PARTY'S APPLICATION FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE ORDERS Admin. Order No. 2015-15 (November 17, 2015)

On October 26, 2015, the Charging Party, United Farm Workers of America (UFW or Charging Party), filed with the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) an application for special permission (Application) to appeal two orders made by an Administrative Law Judge (ALJ) of the Board in the above-captioned matter dated October 19 and 22, 2015, respectively. On October 27, 2015, the Executive Secretary granted the General Counsel and the Respondent, George Amaral Ranches, Inc. (Respondent or Amaral), until October 30, 2015, to respond to the Application. The General Counsel and the Respondent both timely filed such responses.

We find that the UFW's Application has failed to state sufficient legal reason why interim relief is necessary as required by the Board's regulations[1] (Cal. Code Regs., tit. 8, § 20242, subd. (b).); therefore, we DENY the Application for the reasons discussed below.

BACKGROUND

This case arises out of multiple unfair labor practice charges filed by the UFW against Respondent in March and April of 2013. These charges were consolidated into a single complaint on May 27, 2015. On October 12, 2015, a prehearing conference was held in this matter. At the conference, the General Counsel stated his intent to file an amended complaint in the matter, and that the amended complaint would allege that Respondent refused to engage in effects bargaining (i.e., Respondent did not give the UFW an opportunity to bargain over the effects caused by certain of Respondent's business practices, decisions, and transactions). This differed from the original complaint, which additionally alleged that Respondent refused to engage in decision bargaining (i.e., bargaining over Respondent's business decisions).

The UFW stated at the conference that it intended to present evidence regarding Respondent's alleged failure to engage in decision bargaining, regardless of the amended complaint. The ALJ requested briefing from both the UFW and the General Counsel on the issue. The amended complaint was filed on October 14,

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

2015. The UFW's brief was filed that same day. The General Counsel's reply brief was filed on October 15, 2015.

On October 19, 2015, the ALJ issued an order barring the UFW from introducing evidence concerning decision bargaining. On October 22, 2015, the ALJ issued an order granting Respondent's petition to revoke a subpoena duces tecum from the UFW in this matter, stating that the subpoena sought evidence which had been precluded from litigation by the October 19, 2015 order. The UFW's Application seeks special permission to appeal the ALJ's orders of October 19 and October 22, 2015.

In both its October 14, 2015 brief to the ALJ and in the Application, the UFW argued that failure to permit the introduction of evidence regarding decision bargaining would result in the Board lacking sufficient information to fashion an appropriate remedy in this matter. The UFW further argued in both documents that precedent demonstrates that a charging party may offer a broader theory of an unfair labor practice violation than the one put forth by the general counsel, and may seek different remedies as well.

The General Counsel's October 15, 2015 brief to the ALJ and October 30, 2015, response to the Application argued that the UFW impermissibly seeks to argue an entirely different legal theory than alleged in the First Amended Complaint – a theory which is not supported by any facts contained therein. The General Counsel's pleadings also distinguish the precedents relied upon by the UFW – to wit, that although a charging party may introduce evidence regarding a remedy not

contemplated by the general counsel, the remedy must still relate to a violation actually alleged in the complaint.

Respondent's October 30, 2015 opposition to the Application argued that the Application failed to meet the Board's standards for such appeals, and that the Application, if granted, would lead to introduction of evidence irrelevant to the allegations in the First Amended Complaint.

DISCUSSION

Section 20242, subdivision (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, subdivision (b), that could not be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370, subdivision (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 orders of October 19 and October 22, 2015, denying the UFW permission to introduce evidence on the subject of decision bargaining, were evidentiary rulings. As noted in *Premiere Raspberries*, an appeal of an evidentiary ruling is not a collateral order subject to interlocutory review. (*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.) Federal law provides for interlocutory review in a civil case when a district judge certifies that the order at issue involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (28 U.S.C. § 1292(b).) In this case, the ALJ's orders do not involve a controlling question of law, and an immediate appeal of the orders would not materially advance the ultimate termination of the litigation.

Moreover, the UFW has not met the threshold requirement of establishing the necessity of interim relief as required by Regulation 20242, subdivision (b). The UFW argues that if it is not allowed to introduce evidence regarding decision bargaining, the Board will not be able to determine an appropriate remedy in this matter. The UFW did not provide any explanation as to why this could not be done during the compliance phase of this litigation. The argument further fails for the reasons discussed below.

The UFW cites *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, in support of its contention that it should be allowed to present evidence meant to assist the Board in fashioning a remedy. In that case, the UFW moved to amend a complaint to include a bargaining order remedy, and also moved to allow the introduction of evidence regarding authorization cards, which related to the appropriateness of such a remedy. (*Id.* at p. 233.) The complaint did not specifically request such a remedy, nor did it allege that the UFW had an authorization card majority. (*Ibid.*) The ALJ denied the motion, but on application, the Board allowed

the introduction of such evidence, although the motion to amend the complaint was denied. (*Ibid.*) The California Supreme Court upheld the Board's actions, reasoning that evidence the UFW sought to introduce was permissible to assist the Board in determining a proper remedy because the UFW's proposed bargaining order remedy ultimately related to the facts and the charges alleged by the general counsel in the complaint. (*Id.* at pp. 233-234.) By contrast, in the instant case, the UFW seeks to introduce argument regarding decision bargaining, which does not relate to the facts and charges in the First Amended Complaint regarding effects bargaining.

The UFW also cites *Kaumagraph Corp.* (1994) 313 NLRB 624, in support of its Application. In that case, the charging party sought a restoration and reinstatement remedy in an unfair labor practice matter involving, among other things, the discriminatory relocation of bargaining unit operations from Delaware to Michigan. (*Ibid.)* The general counsel for the National Labor Relations Board (NLRB) did not want to pursue such a remedy, choosing instead to seek only full backpay. (*Ibid.*) The ALJ ruled that the charging party could not introduce evidence in support of the desired restoration and reinstatement remedy. (*Ibid.*) The charging party sought special permission to appeal the ruling, and the NLRB directed the ALJ to permit introduction on the restoration and reinstatement remedy. (*Id.* at p. 625.) *Kaumagraph* differs from the instant matter, however, in that it related solely to fashioning the appropriate remedy – which indeed rests with the Board in this matter, as it did with the NLRB in *Kaumagraph.* However, the charging party in *Kaumagraph* did not seek to introduce evidence incompatible with the facts and

allegations contained in the underlying complaint, which the UFW is attempting to do in this matter. Indeed, the charging party in *Kaumagraph* specifically argued that it sought to introduce evidence on a restoration and reinstatement remedy because such a remedy was appropriate for the unfair labor practices alleged. Thus, the UFW's reliance on *Kaumagraph* is misplaced.

The UFW lastly cites *Air 2, LLC* (2004) 341 NLRB 176, in support of its argument that a charging party may offer a different theory of violation or offer a different remedy than contained in a complaint. However, such reliance is misplaced. In that case, the general counsel alleged that the employer improperly retracted an offer of employment, whereas the charging party argued that the employer refused to hire that person for discriminatory reasons. (*Id.* at p. 188.) The ALJ ruled that there had been no unfair labor practice violation with respect to the person in question, but only considered the general counsel's theory of the case, and not the charging party's. (*Ibid.*) The NLRB affirmed the ALJ's findings.

The cases cited by the General Counsel further demonstrate that the UFW's Application lacks merit. In *Dynamic Energy, Inc.* (2011) 2011 NLRB LEXIS 418, the charging party requested a remedy that would apply the terms of a bargaining agreement (to which the employer was a signatory) on two of the employer's affiliates, based on the charging party's theory that the affiliates were alter egos of the employer, or that the employees of all three entities constituted a single bargaining unit. (*Id.* at p. 127.) The NLRB rejected this contention, holding:

> In making these claims, the Union accepts the inarguable: *none of these claims was alleged--explicitly or implicitly--in any complaint.* Moreover, the General Counsel's allegations are inconsistent with a claim that all three Respondents' employees are part of one unit or all covered by the existing collective-bargaining agreement. This alone disposes of these two bases for the Union's proposed remedy, as *to accept them would be to invade the General Counsel's exclusive prerogative* under Section 3(d) of the Act. (*Id.* at pp. 127-128.) (Emphasis added.)

Finally, the case of *New Breed Leasing Corp.* (1995) 317 NLRB 1011, shows why the UFW's Application must be rejected. In that case, the charging parties argued that the respondent should be found to have joined a certain employer association, and that it was thus part of a multiemployer bargaining unit and should be bound by collective bargaining agreements related thereto. (*Id.* at p. 1019.) However, the general counsel had specifically repudiated these arguments. (*Ibid.*) The NLRB rejected the charging parties' contentions, holding:

> The Charging Parties correctly argue that the Board not the General Counsel is charged with the obligation under the statute to craft appropriate remedies for unfair labor practice violations. This principle, however, is not to be applied so broadly that it swallows the General Counsel's discretion in respect of the issuance of complaints. The decision in *Kaumagraph Corp.* and others of like ilk stand for the proposition that, once a complaint allegation is made by the General Counsel, all appropriate remedies for the violation may be considered, even if the General Counsel does not advance or even opposes a particular remedy. These cases do not challenge the fundamental notion, however, that *if a particular violation of the Act is not alleged by the General Counsel and such a violation is necessary for a particular remedy to be invoked then the General Counsel has, by refusing to allege such a violation, precluded the Board from directing such a remedy.*
>
> ...

> *Put another way, the remedy sought by the Charging Parties presupposes violations of the Act not contained in the complaint and expressly disavowed by the General Counsel.* To hold that a remedy in the instant case should include an order directing Respondent to join or rejoin the PMA as part of a status quo ante remedy for violations of Section 8(a)(5) of the Act implicitly suggests that Respondent should be held to have joined the PMA as a matter of law and its failure to acknowledge that fact and its legal consequences was wrongful. Counsel for the General Counsel expressly indicated at trial that such a contention was not being made. Similarly, to include a make-sign order requiring Respondent to sign the applicable PMA-Union contracts as part of the remedy directed in the case, requires a finding that Respondent wrongfully breached its obligation to sign such an agreement. *Again the General Counsel did not contend Respondent had such an obligation nor include such allegations in the complaint.* (*Id.* at pp. 1019-1020.) (Emphasis added.)

The same rationale applies in the instant case. The UFW seeks to advance a theory of the case and a remedy which are not contained in the First Amended Complaint, and which have been rejected by the General Counsel.

CONCLUSION

PLEASE TAKE NOTICE THAT the Charging Party's Application for special permission to appeal the ALJ's orders is DENIED.

Dated: November 17, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member