

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA,	)	Case No. 2019-CL-005-SAL
	)	2019-CL-006-SAL
	)	2019-CL-007-SAL
	)	2019-CL-008-SAL
Respondent,	)	2020-CL-001-SAL
)	
and	)	ORDER GRANTING THE
	)	UFW'S APPLICATION FOR
	)	SPECIAL PERMISSION TO
	)	APPEAL ADMINISTRATIVE
JOSE FLORES RAMIREZ, et al.,	)	LAW JUDGE'S ORDER;
	)	ORDER AFFIRMING
	)	ADMINISTRATIVE LAW
Charging Parties.	)	JUDGE'S ORDER DENYING
	)	PETITION TO REVOKE
)	
	)	Admin. Order No. 2020-19
)	
	)	(November 20, 2020)
)	

This case is before the Agricultural Labor Relations Board (ALRB or Board) on an application by respondent United Farm Workers of America (UFW) pursuant to Board regulation 20242(b) for special permission to appeal Administrative Law Judge (ALJ) John J. McCarrick's July 2, 2020 order denying its petition to revoke the General Counsel's subpoena duces tecum.¹ The UFW raises numerous objections to the subpoena, including irrelevance, overbreadth, undue burden, and privacy concerns.

For the reasons set forth below, we find that the UFW's irrelevancy,

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

overbreadth, and undue burden objections fail to state grounds which meet the standard to obtain interim review. However, we do find that the UFW's privacy objections state proper grounds for granting review. Upon review of the UFW's privacy objections, we find that they fail to establish that the right to privacy was unlawfully burdened by the subpoena. Accordingly, we AFFIRM the ALJ's order.

BACKGROUND

Between October 2019 and January 2020, five charges were filed with the ALRB's Regional Office in Salinas,² alleging that the charging parties were not referred by the UFW for work at Monterey Mushrooms Watsonville (MMW) in retaliation for their previous protected concerted activity seeking the UFW's decertification at MMW's affiliated company, Monterey Farms, Inc. (MFI).³ The five charging parties allege that, between June and September 2019, they sought work with MMW through the UFW's Salinas hiring hall, but the hiring hall did not dispatch them.

In this pre-complaint investigative stage of the case, the UFW produced certain documents, including hiring hall registration lists with the first six digits of the applicants' phone numbers redacted. Determining that she had not received sufficient

² The General Counsel consolidated the charges into one case.

³ Each of the charging parties except one worked for MFI before MFI terminated them in June 2019. The other charging party worked at UFW-represented Dole Berry North, where he complained about pension administration. In April 2019, MFI informed its workforce it would be closing its operations, and it terminated its employees in June 2019. MFI informed the terminated employees that if they wanted to work for the company's Roseville location (i.e. MMW), they needed to apply for jobs through the UFW's Salinas hiring hall.

documents through the informal discovery process, on May 21, 2020, the General Counsel issued the investigatory subpoena duces tecum at issue in this matter.

On June 5, 2020, the UFW filed a petition to revoke, arguing the charges are meritless and that the subpoena is overbroad, overly burdensome, seeks irrelevant information, and violates its and third parties' privacy rights. The General Counsel opposed the UFW's petition, maintaining the requested documents are relevant to her investigation of the unfair labor practice (ULP) charges and that the UFW had not shown the information requested in the subpoena is overly burdensome, oppressive, or invalid because of any privacy considerations. The ALJ denied the UFW's petition. The ALJ concluded the subpoena requests relevant information with sufficient particularity, and that it is not vague or overbroad.

On July 10, the UFW filed with the Board its application for special permission to appeal the ALJ's order denying its petition to revoke. The UFW raises similar arguments to those it raised in its petition to revoke and adds new burdensomeness claims based upon the current COVID-19 pandemic. The General Counsel filed her opposition to the UFW's application on July 17. The General Counsel argues the Board should deny the application because it does not meet the standard for interlocutory appeal. She argues the UFW's new claims that the Covid-19 pandemic poses an additional burden to the production of documents should be rejected as waived, since they were not previously raised. Even if not waived, the General Counsel argues this claim does not meet the standard to revoke a subpoena.

DISCUSSION

Board regulation section 20242, subdivision (b) provides that rulings and orders of an ALJ are appealable only upon special permission of the Board. A party applying for special permission for an interim appeal “shall set forth its position on the necessity for interim relief and on the merits of the appeal.” (Cal. Code Regs., tit. 8, § 20242, subd. (b).) The application shall be supported by declarations if the facts are in dispute. (*Ibid.*)

In *Premiere Raspberries, LLC* (2012) 38 ALRB No. 11, the Board established the standard parties must meet to obtain interim appeal of interlocutory rulings. The Board will only entertain such appeals if they cannot be addressed effectively through exceptions filed to an ALJ’s decision pursuant to Board regulation section 20282 or 20370, subsection (j). (*Id.* at pp. 2-3.) Since then, we have granted interim review in cases involving privilege, privacy rights, and mootness issues when waiting for the exceptions phase would have caused irreversible harm. (*King City Nursery, LLC*. (Jan. 9, 2020) ALRB Admin. Order No. 2020-01-P, p. 4; *Gerawan Farming, Inc.* (Nov. 8, 2016) ALRB Admin. Order No. 2016-13, p. 5; *Ace Tomato Company, Inc.* (Mar. 21, 2013) ALRB Admin. Order No. 2013-18, p. 2; *Bud Antle, Inc.* (Jan. 25, 2013) ALRB Admin. Order No. 2013-04, pp. 2-3.) We have noted the need to strike the proper balance between judicial efficiency and providing an avenue for review of rulings that would otherwise be effectively immunized from appeal. However, interlocutory review is the exception rather than the rule, and “[j]udges, including the Board’s ALJs, can best exercise their responsibility to issue rulings of law left to their

discretion if the Board does not repeatedly intervene to second-guess their prejudgment rulings.” (*Premiere Raspberries, LLC, supra*, 38 ALRB No. 11, p. 7, citing *Mohawk Industries v. Carpenter* (2009) 558 U.S. 100, 106-107.)

We grant the UFW’s application for interim review only with respect to its privacy objections, which we address below. The UFW’s relevance and overbreadth objections do not satisfy our interlocutory appeal standard, as they can be effectively addressed in the exceptions phase of the proceedings. The UFW will have ample opportunity to raise such objections at a later date if a complaint issues, including at hearing if such evidence is offered for admission. Any adverse evidentiary rulings then could be raised in exceptions to the ALJ’s decision, if necessary.

The UFW also raises an undue burden objection. While undue burden may in limited circumstances warrant interlocutory review, this type of claim must be substantiated by concrete evidence to show “the quantum of work required” to respond to the subpoena. (*W. Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417.) The respondent must further show that responding to the subpoena would “seriously disrupt its normal business operations.” (*NLRB v. Carolina Food Processors* (4th Cir. 1996) 81 F.3d 507, 513.) Here, the UFW has not made the requisite showing to meet the interlocutory review standard by providing statements from UFW officers or employees with personal knowledge attesting to “the quantum of work required,” for example providing the number of staff members and hours of work required to respond to the subpoena. Similarly, UFW has not shown how responding to the subpoena would

“seriously disrupt its normal business operations.”⁴

The UFW also argues that the COVID-19 pandemic has created conditions which make it difficult to comply with the subpoena. The UFW did not raise any objection on this basis in its petition to revoke before the ALJ, despite the fact the COVID-19 pandemic was fully underway at the time it was served with the General Counsel’s subpoena and when it filed its petition to revoke it. This objection now is waived. (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, p. 6.) Even assuming the objection was not waived, we still would deny it. While the current pandemic has placed considerable burdens on our society, the mere fact the COVID-19 pandemic exists does not excuse the UFW — or any party in a ULP proceeding — from responding to a subpoena absent specific evidence that it cannot comply. Even if the current pandemic has temporarily impacted the ability of a party to respond to a subpoena, that would not excuse it from complying altogether. Furthermore, the General Counsel requested these records nearly six months prior to the onset of the pandemic in its October 25, 2019 meet and confer letter, giving the UFW ostensibly ample time to

⁴ In this case, counsel for the UFW argued in her brief that production of the records demanded in the subpoena would be overly burdensome to respondent. Such averments by counsel in a legal brief are not evidence and are not entitled to any weight. (*Rincon Pacific, LLC* (2020) 46 ALRB No. 4, p. 8, fn. 7, p. 25, fn. 14.) Importantly, the UFW did not include any declarations by persons with knowledge sufficient to support such claims. (*South Lakes Dairy Farms* (2013) 39 ALRB No. 2, p. 10 [“motions filed before the Board in which facts not in the record are alleged should be accompanied by a declaration filed under penalty of perjury by a person with personal knowledge of those facts”]; *Gerawan Farming, Inc.* (June 9, 2017) ALRB Admin. Order No. 2017-06, p. 6.)

produce such records. The parties may work with each other, with the ALJ's intervention if necessary, to stipulate a schedule to comply with the subpoena and address any substantiated difficulties posed by the pandemic. Accordingly, the UFW's undue burden objections do not meet the interim review standard.

I. The UFW's Privacy Objection to the Production of Unredacted Hiring Hall Lists with Applicant Phone Numbers Is Without Merit.

In *King City Nursery, LLC, supra*, ALRB Admin. Order No 2020-01-P, the Board considered and rejected a similar privacy objection as in this case to a pre-compliant investigative subpoena seeking employee telephone numbers. The Board held the General Counsel is entitled to this kind of information under Labor Code section 1151, subdivision (a), and the subpoena is well within the proper scope of her investigation of the ULP charge. (*Id.* at pp. 8-9.) We noted that "identification of potential witnesses and their contact information 'is a routine and essential part of pretrial discovery.'" (*Id.* at p. 8, citing *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249-1250.)

The UFW attempts to distinguish this case from *King City Nursery* by drawing a distinction between identified and unidentified witnesses. It argues the Board in that case upheld the request for employee telephone numbers because the General Counsel already had identified the witnesses and needed the information to contact them. It asserts the General Counsel in the instant case has not identified any specific potential witnesses. Our rejection of the employer's privacy objection did not turn on whether the witnesses had been identified. Rather, the Board reasoned the General Counsel must have

access to this kind of information to conduct a proper investigation. (Lab. Code, § 1151, subd. (a).)

Accordingly, we reject the UFW's privacy objection to the production of unredacted hiring hall registration lists with workers' full telephone numbers.

II. The Request for the UFW's Hiring Hall Phone Records Does Not Pose a Privacy Violation.

The UFW raises a similar privacy objection to the disclosure of incoming and outgoing telephone records for its Salinas hiring hall phone number or any number used to contact workers. However, Labor Code section 1151, subdivision (a) provides that the General Counsel "shall at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." The General Counsel has broad investigatory authority, with its subpoena powers "limited only by the requirement that the information sought be relevant to the inquiry." (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, p. 5, quoting *Link v. NLRB* (4th Cir. 1964) 330 F.2d 437, 440.)

Request Number 12 seeks phone records for all incoming and outgoing calls for the UFW's hiring hall telephone number and outgoing calls for any telephone number used by the UFW to call workers related to employment at MMW from April 11, 2019, to the present. The UFW argues this request invades its own and third parties' privacy rights, since applicants and non-applicants alike call this number "at all times of the day."

In *King City Nursery, LLC*, the Board upheld the request for employee

telephone numbers so that the General Counsel could contact potential witnesses to assist in her investigation. (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, p. 9.) We held that such a request is “a routine and essential part of discovery.” (*Id.* at p. 8, citing *Puerto, supra*, 158 Cal.App.4th at pp. 1249-1250.) In the instant case, the General Counsel’s request for records of phone calls to and from the respondent’s business phone number falls squarely into the category of information that is the proper subject of a subpoena. As in *King City Nursery*, this information would further the General Counsel’s investigation by allowing her to reach potential witnesses. It is also reasonable that the General Counsel would need access to this information to create an evidentiary pattern of the UFW’s hiring practices, evaluate how the UFW dispatched workers, and whether it discriminated against the charging parties. In addition, this information is reasonably likely to assist the General Counsel in evaluating the UFW’s potential defenses, including its defense that it called the charging parties about available positions, but they did not answer or return the calls. This is the type of information the General Counsel may access under her broad investigatory powers. (Lab. Code, § 1151, subd. (a); *King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, pp. 9-10.)

Here, we are dealing with telephone numbers of potential witnesses.

While “personal,” such information is not the type of information which is deemed highly sensitive or confidential. (*Puerto, supra*, 158 Cal.App.4th at pp. 1253-1254; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 37.) As we found in *King City Nursery*, a request for telephone numbers to assist in contacting potential witnesses

“is a basic request and does not pose any serious transgression of the employees’ privacy interests.” (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, p. 10; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 544 [in wage and hour class action, holding that disclosure of potential witnesses’ and class members’ contact information is “the default” and “is within the proper scope of discovery, an essential first step to prosecution of any representative action”]; *Puerto, supra*, 158 Cal.App.4th at p. 1253.) Courts have found employee information much more personal and sensitive in nature than telephone numbers to be subject to the General Counsel’s investigative subpoena powers. (*Carolina Food Processors, supra*, 81 F.3d at p. 513 [upholding pre-complaint investigatory subpoena seeking employee payroll records, W-4s, and I-9s]; *NLRB v. G.H.R. Energy Corp.* (5th Cir. 1982) 707 F.2d 110, 114 [employee personnel records, as well as other company financial records].)⁵

Finally, the UFW contends the General Counsel’s subpoena is defective because the General Counsel failed to provide notice to the employees pursuant to Code of Civil Procedure section 1985.6 that their employment records were being sought from the UFW. We rejected an identical argument in *King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, p. 9, fn. 4. Labor Code section 1151, subdivision (a) clearly grants the General Counsel access to the records of a respondent under investigation and makes no reference to such noticing obligations. We find this legislative silence telling, especially in light of the fact the Board’s investigations into

⁵ As in *Caroline Food Processors, supra*, 81 F.3d at p. 513, the UFW may redact “extraneous information” not responsive to the General Counsel’s requests.

alleged unfair labor practices in many cases undoubtedly will involve accessing or review of “employment records.”

Accordingly, we affirm the ALJ’s rejection of the UFW’s privacy objection to the production of its Salinas hiring hall phone records.

ORDER

For all the foregoing reasons, the Board GRANTS the UFW’s application for special permission to appeal the ALJ’s order denying its petition to revoke to consider its privacy objections but DENIES it on the merits.

DATED: November 20, 2020

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member