

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRI-FANUCCHI FARMS,) Case No. 2013-CE-008-VIS
) 2013-CE-014-VIS
 Respondent,) (40 ALRB No. 4)
)
 and) ORDER DENYING REQUESTS FOR
) SPECIAL PERMISSION TO APPEAL
 UNITED FARM WORKERS OF) ADMINISTRATIVE LAW JUDGE
 AMERICA,) ORDER ALLOWING RESPONDENT
) COUNSEL TO TESTIFY AS EXPERT
 Charging Party.)
)
) Admin. Order No. 2023-03
)
) (April 7, 2023)
)
 _____)

On March 14, 2023, the Regional Director of the Visalia Region (Region) of the Agricultural Labor Relations Board (ALRB or Board) and charging party United Farm Workers of America (UFW) filed requests for special permission to appeal (requests to appeal) to the Board in this compliance matter involving respondent Tri-Fanucchi Farms (Tri-Fanucchi). In the requests to appeal, the Region and the UFW (collectively the moving parties) challenge an order of Administrative Law Judge Hermine Honavar-Rule (the ALJ) allowing Tri-Fanucchi’s lead counsel, Howard A. Sagaser (Sagaser), to testify as an expert witness in this matter.

Pursuant to the Board’s final order in this matter, Tri-Fanucchi has been ordered to pay bargaining makewhole as a remedy for its unlawful refusal to bargain with the UFW as the certified bargaining representative of its employees. (See *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.) The ALJ has bifurcated the hearing so that the first

phase of the hearing deals only with the makewhole methodology. The Region contends that there are no comparable contracts upon which to base the calculation of makewhole and that a “contract averaging” method should be used. Tri-Fanucchi disputes this and claims that there are comparable contracts that should be used.

Sagaser sought to appear as an expert witness to testify on the subject of comparable contracts. The Region and the UFW objected, arguing that Sagaser would be biased as a witness, and that his testimony would essentially constitute legal argument that should be reserved for briefing. They also argued that Sagaser should not be permitted to testify because his testimony concerning the contracts and/or operations of third-party growers whom he previously represented would cause the disclosure of those parties’ privileged information without their consent, particularly on cross-examination. After confirming that Tri-Fanucchi had given its informed consent to Sagaser’s appearance as an expert witness and understood the privilege-waiver issues inherent in such a decision, the ALJ ruled that Tri-Fanucchi could call Sagaser as a witness limited to his “opinion of which local growers have contracts comparable to Tri-Fanucchi and why the contracts are comparable when applying the specific criteria of J.R. Norton.”¹

In the requests to appeal, the moving parties argue that the ALJ’s order permitting Sagaser to testify as an expert was substantively and procedurally incorrect, including because the moving parties were denied the opportunity to conduct voir dire examination, Sagaser would be biased as a witness, his testimony would have little or no probative value, and his testimony would constitute impermissible opinion testimony on a legal issue. They also reiterate the arguments made to the ALJ concerning the possibility

¹ *J.R. Norton Co., Inc.* (1984) 10 ALRB No. 42, p. 11.

that the privileged information of non-party growers would be disclosed.

As the Board recently noted with respect to a separate request to appeal in this case regarding another issue, the Board has adhered to a high standard when deciding whether to grant interlocutory review of an ALJ's procedural or evidentiary rulings. (See *Tri-Fanucchi Farms* (March 23, 2023) ALRB Admin. Order No. 2023-01.) This standard is consistent with the "final judgment" doctrine applied by most appellate bodies and recognizes that "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* (2012) 38 ALRB No. 11, p. 7.) The standard adopted by the Board "limit[s] Board review of interlocutory rulings sought pursuant to Regulation 20242(b) to those that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j) . . ." (*Id.* At p. 11.)² This standard was intended to "strike the proper balance between judicial efficiency and providing an avenue of review of rulings that would otherwise be effectively unreviewable on appeal." (*Ibid.*)

These appeals illustrate the necessity for these principles and why the arguments presented in the requests for review fail to satisfy the Board's standard for interlocutory review. With respect to the moving parties' arguments that they were denied voir dire, and that the ALJ was incorrect to permit Sagaser to testify, such issues can and should be determined initially by the ALJ and it would not be appropriate for the Board to review these issues until the proceeding has concluded and a decision has been

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

rendered.³ (*Premiere Raspberries, LLC, supra*, 38 ALRB No. 11, pp. 8-9 [adopting the general approach of other appellate bodies that “do not hear appeals of interlocutory rulings on evidentiary issues”]; *Gerawan Farming, Inc.* (Jun. 28, 2018) ALRB Admin. Order No. 2018-06 [“an appeal of an evidentiary ruling is not a collateral order subject to interlocutory review”]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1175 [qualification of expert witnesses, including foundational requirements “rests in the sound discretion of the trial court” and such discretion is “necessarily broad”].)

Turning to the issues of privilege raised by the moving parties, the Board has recognized that issues relating to the allegedly improper disclosure of privileged or confidential information cannot generally be addressed effectively through post-decision exceptions because, as the ALJ phrased it, once the information is disclosed, the “bell could not be un-rung.” (*King City Nursery, LLC* (Jan. 9, 2020) ALRB Admin. Order No. 2020-01-P, p. 4.) However, assuming that the moving parties even have standing to invoke the attorney-client privilege as a basis to exclude the testimony of opposing counsel, the Board finds that the requests to appeal on privilege grounds must be denied as premature and speculative.

Sagaser represents that his opinions would not be based upon any privileged materials and contends that the basis of his opinions would be publicly available information and/or information that has been disclosed to third parties and is, therefore, not privileged. To the extent that his testimony would be based upon his experience negotiating contracts on behalf of growers, Tri-Fanucchi contends that such

³ Additionally, with respect to the issue of voir dire, the Board finds the record unclear as to whether the ALJ has, in fact, foreclosed the moving parties’ opportunity to conduct voir dire examination as the hearing was stayed prior to the conclusion of the witness’ testimony to allow for the instant requests to appeal.

information would not be privileged under the holding of *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 32, which states that communications with attorneys acting as labor negotiators are not privileged unless the dominant purpose of the communication was to secure or render legal service or advice.

The moving parties argue that their cross-examination of Sagaser would inevitably lead to questions that would implicate privileged information, but whether this is true is a matter of speculation at this stage. Although the primary responsibility for safeguarding a client's confidential information lies with the attorney (Evid. Code, § 955; Bus. & Prof. Code, § 6068), we note that, in the event the ALJ is presented with a situation in which it appears that the privileged information of an absent privilege holder would be improperly disclosed without the consent of the privilege holder, the ALJ has the authority to prevent such a disclosure. (Evid. Code, § 916; *People v. Vargas* (1975) 53 Cal.App.3d 516, 527; *People v. Atkinson* (1870) 40 Cal. 284, 285 ["On principles of public policy, communications from a client to his attorney, touching the subject matter under investigation are privileged, and will not be allowed to be disclosed by the attorney, even though he be willing to do so"]; but see *Montebello Rose Co., supra*, 119 Cal.App.3d at p. 32.) Furthermore, where an expert witness' testimony is based upon privileged information that cannot be disclosed or where privilege is invoked to improperly cut off legitimate cross-examination, the witness' testimony may be excluded or stricken. (Evid. Code, § 803; *Fox v. Kramer* (2000) 22 Cal.4th 531, 541; *Feld & Sons, Inc.* (1982) 263 NLRB 332, 333, 340.) That said, the Board's adjudicatory process is best served by allowing the ALJ to exercise her discretion in conducting the hearing and allowing her to perform her function of facilitating the orderly introduction of evidence and ruling on evidentiary matters, including properly asserted claims of privilege as they

are actually presented.

The requests for special permission to appeal are DENIED.

DATED: April 7, 2023

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cynthia N. Flores, Member