

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 REVERSING
) RECOMMENDATION THAT THE
 UNITED FARM WORKERS OF) BOARD SEEK ENFORCEMENT OF
 AMERICA,) SUBPOENA DUCES TECUM
)
 Charging Party.)
)
) Admin. Order No. 2023-06
)
) (August 11, 2023)
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On June 22, 2023, Administrative Law Judge Hermine Honavar-Rule (the ALJ) issued a recommendation pursuant to Board regulation 20250, subdivision (k) that the Agricultural Labor Relations Board (ALRB or Board) seek judicial enforcement of a subpoena duces tecum requiring production of documents from Baloian Packing Co., Inc. (Baloian) in this compliance case involving respondent Tri-Fanucchi Farms (Tri-Fanucchi) and charging party United Farm Workers of America (UFW).¹

The subpoena at issue (Subpoena or Baloian Subpoena) was prompted by a claim raised by Tri-Fanucchi shortly before the then-scheduled hearing was set to commence that some 3,000 employees listed in the March 15, September 22, and October 28, 2022 compliance specifications were not employees of Tri-Fanucchi but

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

were employees of Baloian. The Baloian Subpoena seeks information relevant to the issue of whether Baloian provided agricultural workers to harvest Tri-Fanucchi commodities as a farm labor contractor, in which case the workers would be deemed to be employees of Tri-Fanucchi, or as a “custom harvester” such that those workers would be deemed employees of Baloian. Such information includes records pertaining to agreements between Tri-Fanucchi and Baloian concerning crops and the risk of loss concerning crops, the provision of crop-harvesting equipment, payment of employees, and common ownership between the companies. A subpoena seeking similar information was also served on Tri-Fanucchi, and Tri-Fanucchi responded by stating with respect to each document category that, with the exception of certain already-provided employee payment information, “the requested documents never existed and are not in the possession, custody or control of [Tri-Fanucchi].”

Baloian filed a petition to revoke the Subpoena served upon it, which was denied by the ALJ.² Baloian does not dispute that, since then, it has not produced any documents in response to the Subpoena. A request for the Board to seek judicial enforcement of the subpoena was filed and, pursuant to Board regulation 20250, subdivision (k), was considered by the ALJ. On June 22, 2023, the ALJ recommended that the Board seek enforcement of the Baloian Subpoena.

In evaluating an ALJ’s recommendation that the Board enforce a subpoena,

² Baloian objects that the ALJ failed to state the rationale for her denial of the petition to revoke, contrary to Board regulation 20250, subdivision (h), which requires the ALJ to provide a “simple statement of the grounds for the ruling.” The ALJ did, however, provide a brief discussion of the issues in her enforcement recommendation. Although the need for efficiency justifies summary rulings in appropriate circumstances, the practice of ALJs stating the rationale for their rulings, aids both the parties and the Board, particularly where such rulings may be the subject of later Board review.

Board regulation 20250, subdivision (k) requires the Board to exercise its judgment concerning whether “the enforcement of such subpoena or notice would be inconsistent with law or the policies of the Act.” In making this determination, the Board has considered whether the subpoena to be enforced “was regularly issued and the records sought are relevant to the administrative inquiry and identified with sufficient particularity” (*ALRB v. Laflin & Laflin* (1979) 89 Cal.App.3d 651, 663-664; *St. Supéry, Inc.* (Sept. 28, 2022) ALRB Admin. Order No. 2022-06-P, p. 6.)

The Baloian Subpoena fails to meet the requirement of being properly issued because it was issued by the General Counsel, rather than the Regional Director. Authority over compliance matters rests with the Board and the processing and litigation of disputed compliance matters is delegated to the regional directors. (Board regs. 20290-20292; *Lily’s Green Garden, Inc.* (May 4, 2023) ALRB Admin. Order No. 2023-04, pp. 1-2; *Ace Tomato Co.* (May 13, 2014) ALRB Admin. Order No. 2014-07, p. 7.) In another compliance case, the Board recently required the refiling of a request for leave to seek judicial enforcement of a Board order where the request was filed by the General Counsel, finding that “it is the Regional Director, rather than the General Counsel, who is the proper party to seek leave to enforce the Board’s order in this matter.” (*Lily’s Green Garden, Inc., supra*, ALRB Admin. Order No. 2023-04, pp. 1-2.)

In this case, the Baloian Subpoena names the General Counsel as the subpoenaing party and the attached supporting documentation states “the General Counsel for the ALRB hereby issues this Subpoena Duces Tecum.” The request to enforce the Subpoena was also filed by the General Counsel. Because it is the Regional Director who is the proper party to subpoena information and request subpoena enforcement in this compliance case, the Board must decline to seek judicial enforcement

of the Baloian Subpoena. Accordingly, the Board reverses the ALJ's recommendation. The Board takes this action without prejudice to considering enforcement of a subsequent subpoena properly served by the Regional Director.³

While the Board must decline to enforce the Baloian Subpoena as not served by the proper party, in order to provide guidance to the parties with respect to future efforts to obtain information via subpoena in compliance cases, we address the regulatory authority under which the Baloian Subpoena was issued. The Subpoena states that it was issued pursuant to Board regulation 20217.⁴ Regulation 20217 authorizes the General Counsel to issue subpoenas "for purposes of investigation" requiring production "by persons at the respondent's place of business" or other location "agreed to by the respondent." In an unfair labor practice case, the investigation stage concludes with the issuance of the complaint. (See Board reg. 20250, subd. (k) [distinguishing between subpoena enforcement requests made in "investigatory stages of the proceedings" versus proceedings "following issuance of a complaint"].) Additionally, the Board's regulations provide that, in compliance proceedings, once the specification issues, "the procedures provided for in sections 20235 through 20298 shall be followed so far as applicable."

³ We note, however, that Tri-Fanucchi has already responded to a subpoena concerning the existence of a "custom harvester" relationship between itself and Baloian and responded that no responsive documents ever existed. Whether Tri-Fanucchi bases its employee-status claims on a custom harvester theory or some other theory, it may be bound by its subpoena responses. (Board reg. 20262, subd. (c); *Nash de Camp Co.* (2000) 26 ALRB No. 4, pp. 7-8 [ALJs have the authority to impose sanctions for failure to comply with subpoenas and other appropriate discovery requests, including the exclusion of evidence].)

⁴ The Subpoena also states that it was issued "alternatively" pursuant to Board regulation 20250, subdivisions (d) and (e). Those provisions are inapplicable as they set forth a "notice in lieu of subpoena" procedure for obtaining the attendance at a hearing of a party or an officer, director, or supervisor of a party.

Regulation 20217 does not fall within the identified regulations. Finally, the language in regulation 20217 requiring production by persons at the respondent's place of business or other location agreed to by the respondent indicates that such subpoenas are not available to obtain information from a non-party such as Baloian.

While the use of subpoenas under regulation 20217 is limited as discussed above, Board regulation 20250, subdivisions (a) and (b) set forth a broader subpoena process lacking many of those limitations. Regulation 20250 subpoenas may be used by any party, are not limited to obtaining information from respondents, and are not limited to "purposes of investigation." Thus, the proper subpoena for the Region to use to obtain information from Baloian in this matter was a subpoena issued pursuant to regulation 20250.

We note that regulation 20250, subdivision (b) sets forth certain affidavit requirements for subpoenas duces tecum, including the requirement that the affidavit establish good cause for the production of the information sought, state the materiality of the information to the issues in the case, and specify the exact matters or things to be produced. However, these requirements do not prevent regulation 20250 subpoenas from being used, as here, to obtain information concerning a claim or affirmative defense raised by a respondent in the course of a compliance case, including claims raised just before or during the hearing. The affidavit language of regulation 20250 is modeled on the equivalent language of Code of Civil Procedure section 1985 (section 1985), which governs subpoenas in civil cases. Cases interpreting section 1985 have recognized that, when such subpoenas are used for discovery purposes, the affidavit requirements are relaxed, consistent with modern discovery practices, which post-date the enactment of section 1985. (*Pacific Auto. Insurance Co. v. Superior Court* (1969) 273 Cal.App.2d 61,

64-65; *Grannis v. Board of Medical Examiners* (1971) 19 Cal.App.3d 551, 565.) This principle has been applied to administrative subpoenas under the Administrative Procedure Act, which incorporate the same affidavit requirements. (*Shively v. Stewart* (1966) 65 Cal.2d 475, 481; Asimow, Cal. Practice Guide; Administrative Law (The Rutter Group 2022) ¶ 7:181 [level of precision required in affidavits “is not as strict as the statutory language might suggest”].)

This relaxed, discovery-type treatment is consistent with Labor Code section 1151, which grants the Board broad subpoena powers to command “the production of any evidence” in its proceedings. Similarly, under regulation 20262 the Board’s ALJs have broad authority to manage the proceedings before them and with respect to the conduct of hearings, including by granting applications for subpoenas, imposing sanctions for a party’s noncompliance with a subpoena, to call and examine witnesses, and to require the production of evidence. (Reg. 20262, subds. (b), (c), (j).) Section 11 of the National Labor Relations Act (29 U.S.C. § 161), on which Labor Code section 1151 is modeled, likewise has been held to grant the National Labor Relations Board “broad information gathering powers,” including by way of subpoenas in the post-complaint and compliance phases of its proceedings. (*NLRB v. Steinerfilm, Inc.* (1st Cir. 1983) 702 F.2d 14, 15; *NLRB v. North Bay Plumbing* (9th Cir. 1996) 102 F.3d 1005, 1007; *NLRB v. Lewis* (7th Cir. 1962) 310 F.2d 364, 365-367; *NLRB v. Midwest Heating & Air Conditioning, Inc.* (D. Kan. 2008) 2008 U.S. Dist. LEXIS 73218, *21-22; *Brooklyn Manor Corp. v. NLRB* (E.D.N.Y. 1999) 1999 U.S. Dist. LEXIS 16310, *7-12.)

This is not to say that the affidavit requirements of regulation 20250 may be disregarded when the Region uses a subpoena for a discovery purpose. The materials to be produced in response to the subpoena must still be described with sufficient

particularity to “reasonably apprise . . . the custodian of such records, of that which may be desired.” (*Flora Crane Service, Inc. v. Superior Court* (1965) 234 Cal.App.2d 767, 785-787, quoting *Union Trust Co. v. Superior Court* (1938) 11 Cal.2d 449, 458.) The specificity requirement is not met where the subpoenaed matters are described in an overly general or “omnibus” manner. (*Id.* at pp. 786-787; see NLRB Casehandling Manual, Vol. 1, § 11776.)

For the foregoing reasons, we REVERSE the ALJ’s recommendation and decline to seek judicial enforcement of the subpoena duces tecum served on Baloian without prejudice to considering a subsequent application to enforce a subpoena properly served by the Regional Director.

DATED: August 11, 2023

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member