

BACKGROUND

The UFW has been certified as the bargaining representative of the agricultural employees of Wonderful through the MSP process pursuant to Labor Code section 1156.37. Wonderful has filed objections to the certification, and the parties have been engaged in a protracted hearing on those objections. Gutierrez was an agricultural employee of Wonderful at the time of the certification and has appeared as a witness in the hearing. She is represented by attorney W. James Young of the National Right to Work Legal Defense Fund.

The UFW served the subpoena on Gutierrez on March 24, 2025. The subpoena sought communications between Gutierrez, including her counsel, and: 1) Wonderful; 2) Wonderful's labor consultant, Raul Calvo; and 3) workers who testified in the MSP case. Pursuant to Board regulation 20250, subdivision (f), Gutierrez filed a petition to revoke the subpoena with the IHE arguing, among other things, that the subpoena was procedurally defective, overboard, unduly burdensome, and sought information protected by attorney-client privilege or the attorney work product doctrine. The IHE issued an interim order limiting the subpoena, denying in part Gutierrez' objections, and directing Gutierrez to file a privilege log to support her privilege and work product objections.

After Gutierrez filed her privilege log, UFW sought production of all the documents identified on the log. On June 23, 2025, the IHE issued a supplemental order on Gutierrez' privilege and work product claims. The IHE sustained Gutierrez' work product objections as to documents created by Young and found that, although these

documents were transmitted to Wonderful, under the joint defense doctrine, confidentiality was not waived. The IHE also further limited the subpoena to the extent that it sought communications that were not relevant to the objections hearing. However, with respect to records created by Wonderful's attorneys and sent to Young, the IHE found that Young lacked standing to assert work product protection over such documents. Accordingly, the IHE ordered Gutierrez to produce those documents. The IHE also ordered Gutierrez to produce communications with labor consultant Calvo, as she had not objected to the disclosure of those communications on privilege or work product grounds.

Gutierrez subsequently informed the UFW that she refused to comply with the IHE's order and would not produce any further documents absent a court order. Accordingly, on July 31, 2025, the UFW filed a request with the IHE, pursuant to Board regulation 20250, subdivision (k), asking the IHE to recommend to the Board that the subpoena be judicially enforced. Under Board regulation 20250, subdivision (k), Gutierrez was entitled to file a response to the UFW's enforcement request, but did not do so.

The objections hearing has now concluded pending the outcome of the UFW's effort to enforce the subpoena. Although briefing is scheduled to close on October 17, 2025, the IHE stated that he would reopen the record, in the event that the subpoena enforcement results in additional relevant evidence, provided that such reopening does not unduly delay the issuance of a decision in the case.

DISCUSSION

Labor Code section 1151, subdivision (a) authorizes the Board to issue subpoenas requiring the testimony of witnesses or the production of evidence in ALRB proceedings upon the request of any party to such proceedings. A subpoenaed person may assert objections to the subpoena by filing a petition to revoke. (Lab. Code, § 1151, subd. (a); Board reg. 20250, subd. (f); 20370, subd. (m).)¹ Objections not raised in a petition to revoke are waived. (*King City Nursery, LLC*, (Jan 9, 2020) ALRB Admin. Order No. 2020-01-P at p. 11 [party that failed to assert privacy objection in petition to revoke to subpoena waived that objection].) The IHE may revoke a subpoena in whole or in part on grounds set forth in the Board's regulations. (Board reg. 20250, subd. (h).)

Where a subpoenaed person refuses to comply with a subpoena, the Board may seek judicial enforcement of the subpoena. (Lab. Code, § 1151, subd. (b); and see also Board reg. 20250, subd. (k) [the Board may apply to an appropriate superior court for an order requiring such person to appear and produce evidence and give testimony regarding the matter under investigation or in question].) In the course of a hearing, a subpoenaing party may seek enforcement of a subpoena by filing a request with the hearing officer.² (Board reg. 20250, subd. (k).) If the hearing officer deems the request appropriate, the officer shall recommend that the Board seek enforcement of the subpoena. (*Ibid.*)

¹ Board regulation 20370, subdivision (m) makes the subpoena procedures set forth in 20250 applicable to subpoenas issued in representation cases.

² Hearings in unfair labor practice cases are presided over by administrative law judges (ALJ) while hearings in representation cases are presided over by investigative hearing examiners (IHE). This order will refer to ALJs and IHEs generically as hearing officers.

In evaluating an enforcement recommendation, the Board applies the same analysis that it would apply had the request been filed with the Board in the first instance: “whether the enforcement of such subpoena or notice would be inconsistent with law or the policies of the Act.” (Board regulation 20250, subd. (k).) In applying this standard, the Board considers whether the subpoena “was regularly issued and the records sought are relevant to the administrative inquiry and identified with sufficient particularity.” (*St Supery, Inc.* (Sept. 28, 2022) ALRB Admin. Order No. 2022-05-P, p. 6.)

The Subpoena Was Regularly Issued

Gutierrez did not file a response to the subpoena enforcement request.³

Nevertheless, it is appropriate for the Board to undertake its own independent review of the validity of the Subpoena. In the proceedings below, the IHE considered whether the subpoena was invalid because the UFW used a pre-printed subpoena form, presumably obtained from the

³ When a party files an enforcement request with the hearing officer, the subpoenaed party has five days to file a response to the enforcement request. (Board reg. 20250, subd. (k).) Neither Gutierrez nor Wonderful filed a response to the UFW’s enforcement request. However, after the IHE considered the UFW’s request and issued his recommendation to the Board, both Gutierrez and Wonderful sought to file “oppositions” to the IHE’s recommendation. They were too late. The Board’s regulations make no provision for the filing of oppositions to a hearing officer’s enforcement recommendation to the Board. Accordingly, these later oppositions have not been considered. The Board notes that Gutierrez presented her objections to the subpoena to the IHE through her petition to revoke. The IHE considered her objections, limited the scope of the subpoena and afforded her the opportunity to file a privilege log, although she had not timely filed one as the Board’s regulations require. After Gutierrez belatedly filed her privilege log, the IHE allowed additional briefing and further limited the scope of the subpoena and sustained many of Gutierrez’ work product objections. Thus, Gutierrez’ assertion made to the UFW that she was justified in refusing to comply with the subpoena and the IHE’s orders because the Board’s regulations do not authorize non-parties to file special interlocutory appeals with the Board is not well-taken. The Board’s regulations afford subpoenaed non-parties ample opportunity to articulate their position.

ALRB's website, rather than requesting a subpoena from the IHE as contemplated by the Board's regulations. (Board reg. 20250, subd. (a); 20370, subd. (m).) The IHE rejected this argument, finding that the issuance of subpoenas is a purely ministerial act and the use of a Board-issued subpoena rather than an IHE-issued subpoena was of no consequence.

The IHE is correct. The Board's regulations provide that parties wishing to obtain subpoenas in Board cases prior to hearing "request" them from the Board and, during the hearing "request" them from the hearing officer. (Board reg. 20250, subd. (a); 20370, subd. (m).) The issuance of subpoenas pursuant to such "requests" is purely ministerial and neither the Board nor its agents exercise discretion with respect to whether to grant a "request" for a subpoena. (*Lewis v. NLRB* (1958) 357 U.S. 10, 14-15 [Approving National Labor Relations Board's practice of supplying blank subpoenas bearing a facsimile signature for automatic issuance as the National Labor Relations Act makes the issuance of subpoenas mandatory and "[t]he only function remaining is ministerial" and "involved no delegation of any act entailing the exercise of discretion"].)

The procedural error of obtaining the subpoena form from the Board's website, rather than through a request made to the IHE, had no material effect on the rights of any person and did not prejudice Gutierrez in any way. As noted, had the subpoena been requested from the IHE, he would have had no discretion but to perform the ministerial act of issuing it. Gutierrez would have been served with the same subpoena seeking the same documents. (*NLRB ex rel. United Food & Commercial Workers International Union v. Fresh & Easy Neighborhood Market, Inc.*, (9th Cir. 2015) 805 F.3d 1155, 1161-1162 [error in service of subpoena was not grounds for revoking a subpoena absent a showing of prejudice]; *Alexander*

v. Richter (7th Cir. 2018) 756 Fed. Appx. 611, 615 (unpublished) [court clerk’s procedural error in not issuing requested blank subpoena was not grounds for reversal where party failed to show prejudice].)

The Subpoena Seeks Records that Are Relevant to the Administrative Inquiry and Identified with Sufficient Particularity

The Board finds that the records sought by the subpoena are identified with sufficient particularity. The Board further finds that the records sought, as limited by the IHE’s orders, are relevant to the administrative inquiry. Although the responsive communications were created after the March 1, 2024, Tally of Ballots, the IHE determined that the communications were potentially relevant to issues such as witness credibility and bias, preservation of evidence and compliance with prior orders in the case concerning contact with witnesses and could contain admissions concerning pre-tally conduct. Having overseen the lengthy and complex hearing in this case, the IHE is best positioned to assess the relevance and need for the subpoenaed evidence in the context of the overall case and his evaluation of the issue is entitled to weight. The Board agrees that the information sought in the subpoena meets the standard of relevance. (C.f., *ALRB v. Ruline Nursery Co.* (1981) 115 Cal.App.3d 1005, 1014 [evidence concerning events occurring before the limitations period are admissible to shed light on the character of events occurring within the period, including imputation of improper motive].)⁴

⁴ The IHE also denied Gutierrez’ objection in her petition to revoke alleging undue burden, citing Gutierrez’ prominent role in the campaign to prevent the certification of the UFW and the fact that, even if the documents could have been sought from Wonderful and/or Calvo, it was possible that Wonderful and/or Calvo might have

The Board concludes that the subpoena meets the standard for judicial enforcement.

Enforcement of the Subpoena

Pursuant to Board regulation 20250, subdivision (k), the Board delegates to the General Counsel the authority to seek judicial enforcement of the subpoena on relation of the UFW. Due to the pending briefing deadlines in the objections case, enforcement proceedings should be initiated as soon as feasible. While the ALRB is required to initiate the superior court enforcement action, where the subpoena was issued at the request of a private party, the party who caused the issuance of the subpoena is in the best position to effectively prosecute the enforcement proceedings. Therefore, by bringing this proceeding to enforce the UFW's subpoena, neither the Board nor the General Counsel shall be deemed to have assumed responsibility for the prosecution of the enforcement proceeding before the court. (C.f., 29 C.F.R. § 10231, subd. (d); NLRB Casehandling Manual, Part II (Representation Proceedings) ¶ 11790.1.)

The record in the objections hearing will remain open pending the outcome of judicial enforcement proceedings. (Board reg. 20250, subd. (k).) The Board's Executive Secretary shall be kept updated concerning the status of the enforcement action so the IHE and the Board may evaluate whether and when an enforcement order may be forthcoming.

been unable to locate responsive documents or that they either deliberately or inadvertently previously destroyed responsive documents. The Board notes that, at this stage, the burden on Gutierrez of producing documents that have already been identified and listed in the privilege log should be minimal and does not justify withholding the documents.

Requests for extension or modification of the briefing schedule should be directed to the IHE. Upon the request of a party, or on the IHE's own motion, the IHE may determine whether the record should be closed prior to an enforcement order because further delay would frustrate the policies of the Act. (*Ibid.*) If the IHE does so determine, the IHE shall present a recommendation to the Board accordingly.

ORDER

PLEASE TAKE NOTICE that the recommendation of the Investigative Hearing Examiner that the Board seek judicial enforcement of the United Farm Workers of America's subpoena to Maria Ester Gutierrez, as modified by the orders of the Investigative Hearing Examiner, is APPROVED. The General Counsel is delegated authority to initiate judicial enforcement proceedings on relation of the United Farm Workers of America.

IT IS SO ORDERED.

DATED: August 27, 2025

CINTHIA N. FLORES, Acting Chair

ISADORE HALL, III, Member

BARRY D. BROAD, Member

RALPH LIGHTSTONE, Member