

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**SMITH'S FOOD & DRUG CENTERS, INC.  
d/b/a FRY'S FOOD STORES**

and

**KAREN MEDLEY**

**Case 28-CA-22836**

and

**KIMBERLY STEWART**

**Case 28-CA-22837**

and

**ELAINE BROWN**

**Case 28-CA-22838**

and

**SHIRLEY JONES**

**Case 28-CA-22840**

and

**SALOOMEH HARDY**

**Case 28-CA-22858**

and

**JANETTE FUENTES**

**Case 28-CA-22871**

and

**TOMMY FUENTES**

**Case 28-CA-22872**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION LOCAL 99**

and

**KIMBERLY STEWART**

**Case 28-CB-7045**

and

**Case 28-CB-7047**

**ELAINE BROWN**

**and**

**Case 28-CB-7048**

**KAREN MEDLEY**

**and**

**Case 28-CB-7049**

**SHIRLEY JONES**

**and**

**Case 28-CB-7058**

**SALOOMEH HARDY**

**and**

**Case 28-CB-7062**

**JANETTE FUENTES**

**and**

**Case 28-CB-7063**

**TOMMY FUENTES**

### **ORDER**

The Acting General Counsel (AGC) filed a request for special permission to appeal Administrative Law Judge William G. Kocol's ruling granting the Respondent Union's motion to dismiss certain allegations in the instant complaint. The AGC's request is granted. In his request for special permission to appeal, the AGC's arguments indicate that he seeks to pursue a theory of violation that has not previously been considered by the Board. The AGC should be afforded an opportunity to develop a record to support his theory in this case. Therefore, we find that it was premature for the judge to dismiss those portions of the complaint at this stage of the litigation. Accordingly, the judge's ruling is reversed, the dismissed complaint allegations are reinstated, and this matter is remanded to the administrative law judge for further appropriate action.

The AGC also requested special permission to appeal the judge's determination to defer to the compliance stage consideration of the Union's petition to revoke portions of a subpoena seeking documents regarding a class of similarly situated but as-yet-unidentified employees. This request is also granted. The subpoena seeks information relevant to the complaint allegations and the Respondents have failed to establish any legal basis for revoking or deferring the subpoena. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1008 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513–514 (4th Cir. 1996). Accordingly, the Union's petition to revoke is denied and the Union is ordered to produce the documents at issue. If, after examining the documents produced pursuant to the subpoena, the AGC moves for their admission into the record, at that time the judge may determine whether the documents should be admitted into evidence, based on appropriate factors such as weighing the probative value of the documents against whether the documents are duplicative or would overburden the record.

Dated, Washington, D.C., October 18, 2010

MARK GASTON PEARCE, MEMBER

BRIAN E. HAYES, MEMBER

MEMBER BECKER, dissenting.

I would not grant special permission to appeal. The rulings at issue are interlocutory in nature and each is subject to review after a final decision by the judge pursuant to the filing of exceptions. Indeed, Section 102.26 of our Rules expressly contemplates that form of review by making clear that rulings on motions, including

motions to revoke subpoenas (upon request of the aggrieved party), shall become a part of the record and “shall be considered by the Board in reviewing the record if exceptions to the ruling or order is included in the statement of exceptions filed with the Board pursuant to section 102.46.” Furthermore, Section 102.46(a) expressly provides that exceptions to a judge’s final decision may address “any other part of the . . . proceedings (including rulings upon all motions. . .).” Judges, on many occasions, change their minds about interlocutory rulings as the parties’ arguments are sharpened during trial and the introduction of evidence further clarifies the issues in dispute. Thus, the issues the General Counsel seeks to put before us now may be resolved before the judge issues a final decision. More importantly, the General Counsel does not argue that the rulings he seeks to challenge via a special appeal will not be subject to review on exceptions. There is nothing “special” about these interlocutory rulings and thus I would not grant special permission to appeal.

Dated, Washington, D.C., October 18, 2010

CRAIG BECKER,

MEMBER