

In the Matter of AMERICAN FRUIT GROWERS, INCORPORATED, EMPLOYER
and AMERICAN FEDERATION OF LABOR, PETITIONER

Case No. 10-R-2537.—Decided January 29, 1948

Maguire, Voorhis & Wells, by Mr. R. F. Maguire, of Orlando, Fla.,
for the Employer.

Mr. Phil B. Wells, of Orlando, Fla., for the Petitioner.

DECISION
AND
DIRECTION OF ELECTION

Upon a petition duly filed, hearing in this case was held at Ft. Pierce, Florida, on April 29, 1947, before Oscar Geltman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

At the hearing, and in its brief, the Employer moved to dismiss the petition on the ground that the truck drivers herein involved are agricultural laborers, and the Board is therefore without jurisdiction to proceed in this case. For the reasons set forth in Section III, *infra*, the motion is hereby denied. The Employer's request for oral argument is hereby denied, inasmuch as the record and briefs, in our opinion, adequately present the issues and positions of the parties.

Upon the entire record in the case, the National Labor Relations Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

American Fruit Growers, Inc., a Delaware corporation, having its principal place of business at Los Angeles, California, is engaged in the packing, distribution, and sale of fresh fruit and vegetables belonging to various growers. The Employer maintains, in addition to other plants in Florida, Texas, and California, a fruit packing plant at Ft. Pierce, Florida, where it is engaged in the packing and

marketing of citrus fruits. Only the plant at Ft. Pierce, Florida, is involved in these proceedings.

During the year 1946, the Employer purchased for its Ft. Pierce plant raw materials consisting principally of crates and containers, amounting in value to more than \$25,000, at least 15 percent of which was purchased outside the State of Florida. During the same period, the Employer shipped citrus produce valued in excess of \$250,000, at least 75 percent of which represented shipments to points outside the State of Florida.

The Employer admits, and we find, that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATION INVOLVED

The Petitioner is a labor organization claiming to represent employees of the Employer.¹

III. THE QUESTION CONCERNING REPRESENTATION

The Employer refuses to recognize the Petitioner as the exclusive bargaining representative of its grove truck drivers, contending (1) that grove truck drivers are employees of fruit growers and not employees of the Employer herein; and (2) that grove truck drivers are "agricultural laborers" within the meaning of the National Labor Relations Act and the purview of the limitation attached to the Board's appropriation,² and urging that the Board is therefore without jurisdiction to conduct an investigation upon the instant petition.

¹ A majority of the Board is of the opinion that the American Federation of Labor, while not a national or international labor organization within the meaning of Section 9 (f), (g), and (h) of the Act, is in this case a labor organization within the meaning of Section 2 (5) of the Act because its purpose here is to deal with the Employer concerning the wages, hours, and working conditions of the employees of the Employer. Board Member Gray is of the opinion that the American Federation of Labor is a national labor organization as well as a labor organization for the purposes of this case. See opinions in *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11; *Matter of S. W. Evans & Son*, 75 N. L. R. B. 811.

² Section 2 (3) of the National Labor Relations Act provides that "the term 'employee' . . . shall not include any individual employed as an agricultural laborer . . ."

National Labor Relations Board Appropriation Act, 1948, Public Law 165, Ch. 210, 80th Cong., 1st Sess., approved July 8, 1947, now operative, contains the following proviso:

. . . no part of the funds appropriated in this title shall be available to organize or assist in organizing agricultural laborers, or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in Section 2 (3) of the Act of July 5, 1935 (49 Stat. 450) [National Labor Relations Act] and as defined in Section 3 (f) of the Act of June 25, 1938 (52 Stat. 1060) [Fair Labor Standards Act of 1938].

The same limitation was appended to the Appropriation Act operative at the time of the hearing in this case in April 1947.

Section 3 (f) of the Fair Labor Standards Act of 1938, insofar as it is applicable to the instant case, reads as follows:

The Employer is principally engaged in packaging and marketing citrus fruits for fruit growers at a fixed charge. For some fruit growers, however, the Employer also conducts the fruit harvesting operations. In the course of such harvesting, it hires all necessary employees, such as (a) harvest hands, who pick the fruit from the trees and place it in boxes, (b) goat truck drivers,³ who drive small vehicles in the orchard, collect boxed fruit from those sections of the groves too narrow for regular trucks to enter, and assemble such boxes at the road for regular truck pick-up, and (c) grove truck drivers, who drive the trucks containing the boxes of fruit from the orchard to the Employer's packing house. These grove truck drivers are the persons directly concerned in this proceeding.

During the harvesting season, from October or November to May or June, the Employer requires the services of five grove truck drivers.⁴ They are hired by the Employer's field superintendent,⁵ who, together with the Employer's field foreman, gives them their orders and supervises their work. Paid with the Employer's checks, they drive trucks owned by the Employer. They report daily for work at the Employer's packing house where they punch the time clock used by the employer's packing house employees at the beginning and end of each day.⁶ They convey empty fruit containers from the packing house to the groves where fruit is being harvested. The nearest grove serviced by the Employer is about $3\frac{1}{2}$ miles from the packing house; the furthest is approximately 35 miles away. The time spent by grove truck drivers in transit and at the groves varies considerably. After the boxes have been filled with fruit and loaded on the trucks by the harvest hands,⁷ the grove truck drivers bring the trucks back to the Employer's packing house. Upon their return to the plant, the drivers spend an hour or more at the packing house, unloading the fruit and moving it to the designated location where each grower's fruit is being

"Agriculture" includes farming in all its branches and among other things includes . . . the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practices . . . performed by a farmer or on a farm, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

³ The Petitioner concedes that goat truck drivers are agricultural laborers, and does not seek to represent them.

⁴ Although the record reveals that there is a substantial turn-over in grove truck drivers, three drivers who worked for the Employer during the past season had been employed during previous seasons.

⁵ The field superintendent is hired by, and is responsible to, the manager of the packing house.

⁶ The harvesting crew and goat truck drivers do not report for work at the Employer's packing house

⁷ The grove truck drivers do not ordinarily load their trucks, but, on occasion, they assist the loaders.

stored prior to packing. Grove truck drivers work from 9 to 11 hours per day, averaging four round trips.

In support of its contention that the fruit growers are the employers of the grove truck drivers, the Employer points to the fact that when the Employer performs the harvesting operations at their request, it does so at actual cost. The Employer alleges that when it markets the produce of the growers, it comes into possession of monies belonging to the growers, and that when it pays the grove truck drivers it merely acts as disbursing agent for the growers. The record, however, does not indicate that the funds of the growers are earmarked while in the possession of the Employer. The grower simply has a credit to its account on the Employer's books, and this account is debited to the extent that the Employer has incurred expenses in rendering services to the grower.

The Employer contends that the grower is actually in charge of the harvesting operations, including the work of the grove truck drivers. Although the individual growers select the time for the harvesting of particular crops, they exercise no direct control over any of the drivers. A driver may haul produce from the groves of as many as 25 growers in 1 week.

The record further discloses that, during the past season, grove truck drivers performed certain trucking operations for the Employer which were not chargeable to any grower. Although these operations were relatively insignificant in quantity, the fact that they were clearly performed for the Employer itself, as distinguished from any of the growers, tends to negative the Employer's contention that the grove truck drivers are in fact employees of the growers.

As the Employer hires the grove truck drivers, fixes their rates of pay and their hours and conditions of employment, and itself pays their wages, we are satisfied that the grove truck drivers concerned herein are, in fact, employees of the Employer within the meaning of the Act.⁸

It is also clear from the record that the functions of the grove truck drivers are of a non-agricultural nature. The mere fact that these employees are engaged in handling agricultural products does not of itself classify them as "agricultural laborers."⁹ The administrative

⁸ Cf. *Matter of Gulchrest Timber Co.*, 73 N. L. R. B. 1197; *Matter of Atlantic Company*, 71 N. L. R. B. 442; *Matter of Louis Pizitz Dry Goods Company*, 71 N. L. R. B. 579; *Matter of Fischer Lumber Co.*, 62 N. L. R. B. 543; *Matter of Idaho Potato Growers, Inc.*, 48 N. L. R. B. 1084, enf'd 144 F. (2d) 295 (C. C. A. 9), cert. denied 323 U. S. 769.

⁹ See *Matter of San Fernando Heights Lemon Association*, 72 N. L. R. B. 372; *Matter of West Side Cooperative Creamery Association*, 69 N. L. R. B. 546; *Matter of Maui Pineapple Company*, 60 N. L. R. B. 401; *Matter of Pepee Sugar Company*, 59 N. L. R. B. 1532; *Matter of Idaho Potato Growers, Inc.*, 48 N. L. R. B. 1084, 1093-1094.

regulations of governmental agencies and the decisions of the Courts interpreting the "agricultural labor" exemption in various statutes, including the National Labor Relations Act, make it clear that there is a differentiation between those engaged in industrial activities connected with the processing and marketing of agricultural products, and those who are engaged in work incidental to ordinary farming operations.¹⁰ As to the status of workers such as those here involved, the decisions of the Courts interpreting the Agricultural exemptions in the Fair Labor Standards Act of 1938, indicate that they are not engaged in "agriculture" as defined in Section 3 (f) of that Act, as the employer "is not a grower," and its packing facilities are not located "on a farm."¹¹ As previously indicated, under the Rider in its current appropriation act, the Board is required to follow the definition of "agricultural laborers" set forth in the Fair Labor Standards Act of 1938. We find that the grove truck drivers employed by the Employer are not "agricultural laborers" and that they are therefore entitled to the benefits of the Act.¹²

We find that a question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The Petitioner seeks a unit of all truck drivers employed by the Employer at its Ft. Pierce packing house, excluding goat truck drivers, clerical and office workers, packing house employees other than truck drivers, all agricultural workers, managerial employees, and supervisors. The Petitioner would include, and the Employer would exclude, a packer-truck driver. The Employer otherwise takes no position as to the scope of the unit.

¹⁰ See Wage and Hour Administrator's Interpretative Bulletin No 14, "Exemption of Agriculture; and on the exemptions for Processing Agricultural Commodities," p. 10; Ruling by Bureau of Internal Revenue, Em. T-Mimeograph Coll. No 6219, December 31, 1947, relating to the status for federal employment tax purposes of services performed in the commercial handling of fruits and vegetables; *Fosgate v. United States*, 125 F. (2d) 775 (C. C. A. 5); *Miller v. Burger*, 161 F. (2d) 992 (C. C. A. 9); *N. L. R. B. v. Edinburg Citrus Association*, 147 F. (2d) 353 (C. C. A. 5), rev'g on other grounds, 57 N. L. R. B. 1084, *Idaho Potato Growers v. N. L. R. B.*, 144 F. (2d) 295 (C. C. A. 9), enf'g 48 N. L. R. B. 1084, cert. denied 323 U. S. 769; *North Whittier Heights Citrus Association v. N. L. R. B.*, 109 F. (2d) 76 (C. C. A. 9), enf'g 10 N. L. R. B. 1269, cert. denied 310 U. S. 632; reh. denied 311 U. S. 724.

¹¹ *Walling v. Peacock Corporation*, 58 F. Supp. 880; *Walling v. McCracken County Peach Growers Association*, 50 F. Supp. 900; *Lenroot v. Hazlehurst Mercantile Co.*, 59 F. Supp. 595, 599-600; *Lenroot v. Kemp*, 59 F. Supp. 605, 609, rev'd on other grounds, 153 F. (2d) 153.

¹² Existing law on the subject of agricultural laborers was not changed by the enactment of the Labor Management Relations Act of 1947. *Matter of Wenatchee-Wenoka Growers Association*, 75 N. L. R. B. 197.

The packer-truck driver is a packing house employee who spends about half of his time in the packing house as a general utility employee. The remainder of his time is spent driving a truck loaded with packed produce from the Employer's plant to a ship landing.¹³ This employee works different hours and under separate supervision from the grove truck drivers, and may receive a different rate of pay. His duties do not bring him into contact with grove truck drivers, and his work is essentially different from theirs. On rainy days, grove truck drivers do not work, whereas the packer-driver works in the packing house. We are of the opinion that the interests of the packer-driver are more closely related to those of the packing house workers than to those of grove truck drivers.¹⁴ We shall, therefore, exclude him from the unit herein found appropriate.

We find that all grove truck drivers employed at the Employer's Ft. Pierce, Florida, plant, but excluding the packer-truck driver, goat truck drivers, clerical and office workers, all packing house employees other than truck drivers, all agricultural workers, all managerial employees and all supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with American Fruit Growers, Incorporated, Ft. Pierce, Florida, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Tenth Region, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, to determine whether or not they desire to be represented by the American Federation of Labor, for the purposes of collective bargaining.

¹³ Since January 1947, the Employer has been shipping some of its packed produce by ship.

¹⁴ On March 28, 1947, in Case No 10-R-2469, the Board certified the Petitioner as exclusive bargaining representative of the Employer's packing house employees, excluding truck drivers. At the time of the instant hearing, contract negotiations with respect to these employees were in progress between the Employer and the Petitioner.