

Bodine Produce Company and Local 78-B United Packinghouse Workers of America (AFL-CIO), Petitioner. *Case No. 28-RC-1132. June 26, 1964*

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act,¹ a hearing was held before Hearing Officer J. W. Cherry. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the NLRA.

2. Petitioner seeks to represent the employees who pack and handle melons at the Employer's packing shed.

The Employer, owner of 2,700 acres of land on which it grows vegetables and fruits, including melons, operates two packing sheds² in Phoenix, Arizona, one for carrots and mixed vegetables, and the other for melons which are packed during a season running from early June to late July.³ In 1962 the Employer had total sales of \$2½ million to \$2¾ million, \$450,000 of which resulted from the sale of melons grown on about 350 acres of the land owned by the Employer. In previous years the Employer also processed and packed melons grown on 50 to 100 acres of leased land.

The melons are harvested by picking crews of unskilled employees. They are then transported by the Employer's drivers to the melon packing shed which is located in the city of Phoenix, a distance of 5 to 10 miles from the place of harvest. The shed has a valuation of \$40,000 to \$50,000, and contains machinery and equipment with a replacement value of \$5,000 to \$10,000. The employees at the melon packing shed number 40 to 50 at the peak of the season. They are skilled employees who are paid the going area piece rates contained in the Petitioner's 1962 master contract with a group of about 60 other employers represented by Shippers' Labor Committees in Blythe and Imperial and San Joaquin Valleys, California, and in Yuma Valley, Arizona.⁴ The basic classifications of melon shed employees are pack-

¹ Herein called NLRA.

² The Employer does not process its citrus fruits which are handled for it by the Arizona Citrus Association.

³ During other seasons some of the melon employees pack other crops for the Employer.

⁴ The contract unit, which covers vegetable and melon packinghouse employees, was certified by the Board in 1950 and 1955 (*Employer Members of Imperial Valley, et al.*, 92 NLRB 533, and *Grower-Shipper Vegetable Association of Central California, et al.*, 112 NLRB 807). In neither of these cases was the "agricultural labor" issue raised with respect to any of the employees in the unit certified therein.

ers, sorters, and loaders, with employees in the first category receiving as much as \$6 to \$7 per hour.⁵

At its packing shed, the Employer packs for shipment to markets melons which it grows on its own land or an land which it leases. It does not handle or process melons belonging to or coming from any other grower.

The melon shed employees perform the following operations: The melons are dumped into bins, go from there to a conveyor belt, and are elevated to a sorting table. They are then sorted, waxed, crated, and chlorinated in a food machinery processor. Next, they go to a belt where they are identified with decals, and loaded either into railroad cars or trucks located at the adjoining railroad siding or truck loading dock.

The melon packing shed employees are separately supervised and are on a separate payroll from the Employer's field agricultural employees. There is never any interchange of workers between the packing shed and the field.

The Employer contends that the Board may not assert jurisdiction over the melon packers herein because they are "agricultural laborers" within the meaning of Section 2(3) of NLRA and Section 3(f) of the Fair Labor Standards Act, herein called FLSA. The Petitioner, on the other hand, relying on *Imperial Garden Growers*⁶ wherein the Board found melon packing workers to be nonagricultural employees, asserts that the mere fact that melon packing employees process only the Employer's own produce is not enough to bring the Employer's melon packing operations within the agricultural exemption. The Petitioner also states that its contracts during the past 20 years with the multiemployer group consisting of the majority of melon packers in Arizona and California have brought about a stable relationship in the entire melon packing industry in this part of the country which would be jeopardized by a finding that the melon packing employees herein are agricultural laborers.

Section 2(3) of the NLRA excludes from the definition of the term "employees" "any individual employed as an agricultural laborer." Annually, since July 1946, Congress has added to the Board's appropriation a rider which in effect directs the Board to be guided by the definition set forth in Section 3(f) of FLSA in determining whether an employee is an agricultural laborer within the meaning of Section

⁵ According to its sales manager, the Employer at some time in the past had a separate collective-bargaining agreement with the Petitioner covering the Employer's melon packing operations. The sales manager also testified that there was "some possibility" that the agreement was still in effect at the time of the hearing. However, no contract was urged as a bar to this proceeding.

⁶ 91 NLRB 1034.

2(3) of NLRA. The Board has frequently stated that it considers it its duty to follow, whenever possible, the interpretation of Section 3(f) adopted by the Department of Labor, the agency which is charged with the responsibility for and has the experience of administering the FLSA.⁷

Section 3(f) reads, in pertinent part, as follows:

. . . agriculture includes farming in all its branches and among other things includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. [Emphasis supplied.]

As the melon packing employees herein are not engaged in direct farming operations such as are included in Section 3(f)'s "primary" definition of "agriculture," the question in the instant case is whether they are engaged in activities included in the "secondary" definition.⁸ In order to come within this definition the operation must be performed either by a farmer or on a farm as an incident to or in conjunction with the farming operations.

We have been administratively advised by the Department of Labor that the melon packing shed employees herein may qualify as agricultural laborers under Section 3(f) of FLSA. According to the Labor Department, "it has been [its] position that where a farmer operates a packinghouse located off the farm, as in the instant case, and the farmer's own employees there engage in packing only his products for market, such operations by the farmer are within the 3(f) definition if performed as an incident to or in conjunction with his 'farming operations.'"⁹ In this connection, the Labor Department refers to Section 780.147 of its latest Interpretative Bulletin, dated 1963,¹⁰ which contains language to this effect. The Labor Department also refers to Section 780.153 of the Bulletin which states that generally a practice performed in connection with the farming operation is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operation involved, and does not amount to an independent business.

⁷ See *Imperial Garden Growers*, *supra*; *The Sweetlake Land and Oil Company, Inc.*, 138 NLRB 155; *Monterey County Building & Construction Trades Council (Vito J. La Torre, an Individual)*, 142 NLRB 139.

⁸ *Farmers Reservoir & Irrigation Company v. McComb, Wage and Hour Administrator*, 337 U.S. 755, 762.

⁹ See *Wirtz v. Jackson & Perkins Company*, 312 F. 2d 48 (C.A. 2) (1963), wherein the court held that the agriculture exemption in Section 3(f) of FLSA was applicable to processing work done by storage employees in Newark, New York, on rose bushes and other nursery stock which came from the farms of the employer's subsidiaries in New Jersey, California, and Indiana.

¹⁰ 29 CFR Part 780.

Section 780.157 of the Bulletin, covering special factors relating to practices performed on farm products, also provides:

In determining whether a practice performed on agricultural . . . commodities is incident to or in conjunction with the farming operations of a farmer or a farm, it is also necessary to consider the type of product resulting from the practice—as whether the raw or natural state of the commodity has been changed. Such a change may be a strong indication that the practice is not within the exemption. (*Mitchell v. Budd*, 350 U.S. 473);¹¹ the view was expressed in the legislative debates on [FLSA] that it marks the dividing line between processing as an agricultural function and processing as a manufacturing operation (*Maneja v. Waiialua*, 349 U.S. 254, 260, citing Cong. Rec. 7659–7660, 7877–7879).¹² Consideration should also be given to the value added to the product as a result of the practice and whether a sales organization is maintained for the disposal of the product [Footnotes supplied.]

Section 780.154 of the Bulletin, which is entitled, “The Relationship Is Determined by Consideration of All Relevant Factors,” states:

The character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all the relevant facts and circumstances The result will not depend on any . . . isolated factors or tests Rather, the total situation will control. (*Maneja v. Waiialua*, 349 U.S. 254 . . .) . . . the general relationship, if any, of the practice to farming as evidenced by common understanding, competitive factors, and the prevalence of its performance by farmers . . . should be considered. Other factors to be considered . . . include the size of the operations and respective sums invested in land, buildings and equipment . . . the amount of payroll for each type of work, the number of employees and the amount of time they spend in each of the activities, the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations, the amount of revenue derived from each activity, the degree of industrialization involved, and the degree of separation established between the activities. . . .

¹¹ The Supreme Court held in that case that the processing of tobacco changed and improved the leaf in many ways and turned it into an industrial product.

¹² The Supreme Court held in *Waiialua* that employees in a milling operation which transformed sugar from its raw and natural state were not agricultural employees within the meaning of Section 3(f) of FLSA. The Supreme Court, however, also found in the same case that railroad workers, who transported farming implements, field workers, and sugar cane on the plantation, were agricultural employees

The foregoing criteria set forth in the Bulletin support the Labor Department's opinion that the Employer's melon packing shed operations are performed as an incident to or in conjunction with the Employer's farming operation. Thus, the melons packed were grown by the Employer on its land, there was no change in the form of the product, and the purpose of the packing operation was to prepare the product for market and delivery to carriers for transportation.¹³ Although the Employer employs a separate labor force to work in its packing shed and follows the wage scale paid by other packers in the area, we, like the Supreme Court in the *Waialua* case, attach substantial weight to the fact that the operations performed at the packing shed result in no significant change in the melons themselves, which leave the packing shed in practically the same raw or natural state as when they are received from the field.¹⁴ As the Court held in *Dofflemeyer Bros.*, the language of Section 3(f) of FLSA leaves little doubt that the preparation for market is a necessary function that is an incident to and is properly to be considered a practice in conjunction with an employer's farming operation. In a series of cases since the Court's decision in *Dofflemeyer Bros.*, the Board has also taken the position that an important determining factor is whether the employer confines its packing operations to its own produce, as does the Employer in the instant case.¹⁵

We are unable to agree with our dissenting colleagues that congressional intent as reflected by the legislative history of the annual rider suggests a finding opposite to the one we reach here. While the 1946 debates on the rider show a concern by some Senators that packing shed employees "have the greatest possible protection under the National Labor Relations Act,"¹⁶ the inescapable fact remains that the rider as finally adopted directed the Board to follow the definition of agriculture contained in Section 3(f) of FLSA. Moreover, unlike our dissenting colleagues, we do not conclude that the Board's decision in *Imperial Garden Growers* compels us to find in this case that the

¹³ See *Dofflemeyer Bros. v. N.L.R.B.*, 206 F. 2d 813 (C.A. 9), wherein the court found on the basis of similar factors that grape packing shed employees were agricultural laborers.

¹⁴ Cf. *Oxford Royal Mushroom Products, Inc.*, 139 NLRB 1015, wherein the Board took jurisdiction over employees who canned mushrooms.

¹⁵ See *B. F. Maurer, an individual, doing business under the name and style of John C. Maurer & Sons*, 127 NLRB 1459, and *K. Malofy & Son and Ray Hart*, 107 NLRB 943, wherein the Board in finding packing shed employees agricultural relied in part on the fact that the employees packed the employer's own produce. Cf. *Oxford Royal Mushrooms Products, supra*; *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82; and *Cochran Co., Inc.*, 112 NLRB 1400, 1406, wherein the Board found that employees who packed or processed products which were not grown by the employer were nonagricultural employees.

¹⁶ See Senator Pepper's statement in Cong. Rec., Senate, July 20, 1946, p. 9519. Senator Pepper referred to *North Whittier Heights Citrus Association v. N.L.R.B.*, 109 F. 2d 76 (C.A. 9), wherein the court concluded that the agricultural exemption ceased as soon as the fruit was delivered by the growers to the Association for processing, grading, and marketing. In contrast to the foregoing situation, the Employer in the instant case packed its own produce in preparation for market.

melon packing shed is operated as a separate commercial enterprise apart from the Employer's farming operation. In the *Imperial Garden Growers* case, the Board placed substantial reliance on what it then understood to be the interpretation placed on Section 3(f) by the FLSA Administrator, stating, as earlier indicated, that it considered it proper administrative policy to give great weight to the Labor Department's construction of that section. The Board in succeeding cases has continued to adhere to that administrative policy. And we do so also in the instant case. Relying in large measure upon the Labor Department's current administrative advice, but guided also by the judicial construction given Section 3(f) of the FLSA, all as noted above, we are led to our conclusion herein, to wit: that the melon packers in question are agricultural laborers as they are employed to carry out functions in conjunction with and incidental to farming operations, more specifically, the preparation for market of melons grown by the Employer.¹⁷

Accordingly, as no question affecting commerce exists concerning the representation of "employees" of the Employer within the meaning of Section 9(c) (1) of the Act, we shall dismiss the petition herein.

[The Board dismissed the petition.]

MEMBERS FANNING and BROWN, dissenting:

We cannot agree that the melon packing employees herein involved are agricultural laborers.

The Employer maintains a plant in which there is a substantial investment in buildings and equipment and in which it conducts an extensive packing operation that is removed from the Employer's farm and located in the city of Phoenix next to a railroad siding. In its packing shed the Employer employs a separately supervised labor force which performs no functions in connection with the planting, cultivating, or harvesting of crops, and which is paid in accordance with the wage scale used by other packers in the area for their packing shed employees. The processing of the melons by skilled employees involves a mechanical movement of melons which undergo a series of operations such as sorting, waxing, chlorination, and identification with decals that improve and preserve the melons and turn them into industrial products that are more readily marketable.¹⁸

¹⁷ In view of the judicial construction noted above, and particularly the decision of the Supreme Court in *Maneja v. Waiialua*, *supra*, we hereby overrule *Imperial Garden Growers*, *supra*, and the cases based thereon, to the extent that they are inconsistent with our finding that the melon employees herein are agricultural laborers.

The status as agricultural laborers or statutory employees of the melon packing employees of other employers, covered by the Petitioner's 1962 master contract, is not before us and we express no opinion herein on that issue.

¹⁸ See *Mitchell v. Budd*, *supra*, at pages 481-482.

As stated in the majority opinion, Congress has annually added a rider to the Board's appropriations providing that no part of the appropriations "shall be . . . used [by the Board] concerning bargaining units composed of agricultural laborers . . . as defined in Section 3(f) of FLSA." It is clear from the debates that preceded the adoption of the rider that Congress fully intended to keep packing shed and processing employees within the Board's jurisdiction. Senator Pepper, for example, stated,¹⁹ "I desire it to be made clear that I want, and I hope the Record will so show, these [packing shed] workers to have the largest possible protection under the National Labor Relations Act . . . I believe, fundamentally, that a worker who is working in a packing house or in a canning factory is an industrial worker. . . ." ²⁰ Similarly, Senator Ferguson stated ²¹ that "the [packing shed] employees . . . are not ordinary agricultural laborers. They work in the packing sheds just as other laborers work in plants and factories. I am of the opinion that we should not deprive them of their rights under the . . . Act." Senator Murdock quoted ²² with approval the following description of packing plants made by the Chairman of the Social Security Board: "The inside of a typical packing house is a place of conveyor belts and machinery. There is little to distinguish these plants from ordinary factories, except for the product handled, for the work is virtually identical." Senator LaFollette referred ²³ to the investigation of the Civil Liberties Committee in California concerning strikes among the packing shed employees and asserted that the removal of the protection of the NLRA over packing shed employees would be "moving in the direction of returning to chaotic and bitter controversies."

Although the Board had, prior to the rider, directed elections among packing shed employees, the Board thereafter modified this policy and by 1948 ceased to assert jurisdiction over packing shed employees except when they engaged in packing produce not grown by their own employer, or where the processing materially changed the produce to enhance its market value. As a result, on September 30, 1949, Senator Hayden of Arizona wrote ²⁴ to the Labor Department expressing concern regarding the decisions of the Board refusing to take jurisdiction over workers employed in fresh fruit and vegetable packing sheds on

¹⁹ Cong. Rec., Senate, July 20, 1946, p. 9515.

²⁰ Senator Pepper also stated that the rider would leave undisturbed *North Whittier Heights Citrus Association v. N.L.R.B.*, 109 F. 2d 76 (C.A. 9), wherein the court held that packinghouse workers were "industrial laborers and are entitled and do now enjoy the protection of the" NLRA. See Cong. Rec., Senate, July 12, 1946, p. 8742.

²¹ Cong. Rec., Senate, July 12, 1946, p. 8736.

²² Cong. Rec., Senate, July 12, 1946, p. 8737.

²³ Cong. Rec., Senate, July 12, 1946, p. 8736.

²⁴ See Labor Relations Reporter (Wages and Hours Section), vol. 25, No. 3, November 14, 1949.

the ground that the workers were employed in agriculture as defined in FLSA. The Department's Solicitor on October 3, 1949, replied in part as follows:

In some instances, the operator of a fruit and vegetable packing house may also be engaged in farming operations and may pack only the fruit and vegetables which he himself grows. Whether in such a situation, the packing house operations are included in the definition of agriculture cannot be categorically stated. . . .

I also understand that where an individual operator does confine his packing operations to the products of his own activities as a farmer, such packing operations as performed in this area are not normally performed as a subordinate and established part of the employer's farming operations, but are generally large operations which follow the pattern of the fruit and vegetable packing industry rather than that of farming. Thus, I understand that it is usual to hire separate work forces for the packing operation, rather than to use the ordinary farm laborers, and to pay such workers in accordance with scales established for packing operations in commercial packing houses, rather than at farm labor rates. Where these and other factors indicate that the packing is performed as a distinct and separate enterprise rather than as a subordinate and established part of the employer's own farming operations, the Department of Labor would not consider the activity to be one defined as "agriculture" by Section 3(f) of the Fair Labor Standards Act.

On October 5, 1949, Wage and Hour Administrator, Wm. R. McComb, wrote to NLRB Chairman Paul M. Herzog concerning Section 3(f) of FLSA and stated that the Department had adopted several "objective tests" for determining whether packing house operators were a subordinate and established part of farming. Mr. McComb in this connection repeated the substance of the letter to Senator Hayden and stated that the determination must ultimately rest upon the "complete factual picture."²⁵

The following year the Board in *Imperial Garden Growers*, 91 NLRB 1034, reevaluated its decisions since the adoption of the rider and took into account both the legislative history of the rider and the Labor Department's "objective tests" for applying Section 3(f) of FLSA. The Board then concluded that Congress desired NLRA coverage of fruit and vegetable packing house employees. The Board also stated it wished to follow, whenever possible, the Department's interpretations of Section 3(f) and therefore took into consideration the "complete factual picture." Accordingly, on the basis of such fac-

²⁵ The objective tests were set forth in Interpretative Bulletin No. 14, par. 10, 1949, and are substantially the same as those stated in Section 780.154 of the current Bulletin.

tors as investment in packing shed, degree of industrialization, separate work force, and higher pay scales, the Board concluded in *Imperial Garden Growers* that the melon and vegetable packing shed employees therein were not agricultural employees.

In a number of cases since 1950.²⁶ in which the facts were substantially similar to those in *Imperial Garden Growers* and the instant case, the Board has held that fruit and vegetable packing operations constituted a separate commercial enterprise apart from the employer's farming operations and that therefore the employees were not agricultural employees.²⁷ We see no reason at this time for ignoring or departing from (1) congressional intent as to NLRA coverage of packinghouse employees and (2) the Labor Department's own criteria as explicated by the Department's Solicitor and Wage and Hour Administrator in 1949 and as spelled out in Section 780.154 of the Department's current Bulletin. The Labor Department's administrative determination that the melon employees herein are agricultural laborers appears to rely exclusively on the fact that the Employer packs only its own produce. However, we subscribe to the Labor Department's own current Bulletin that "the character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all the relevant facts and circumstances."²⁸ We are unable to find, in applying these criteria in the light of the legislative and judicial background set forth above, that the melon shed workers in this case are within the agricultural exemption of Section 3(f) of FLSA. While we agree with our colleagues that great weight is to be accorded to the Labor Department's opinion for which we have utmost respect, in the final analysis we are charged with responsibility for our own jurisdictional determinations. In the circumstances, therefore, we find that the melon shed workers are employees within the meaning of Section 2(3) of NLRA and we accordingly dissent from our colleagues' refusal to entertain the present action. For the foregoing reasons, we would find that the Board should assert jurisdiction over the melon shed workers herein as "employees" within the meaning of Section 2(3) of NLRA.

²⁶ *Grower-Shipper Vegetable Association of Central California, et al., supra; Albert Rossi, d/b/a Al Rossi Produce Company, 103 NLRB 750; Holme & Seifert and Grower-Shipper Vegetable Association of Central California, 102 NLRB 347, 353; Colorado River Farms, et al., 99 NLRB 160.*

²⁷ That collective bargaining has followed this pattern is evidenced by the fact that the Petitioner's 1962 master contract was made with a group of about 60 other employers in Blythe and Imperial and San Joaquin Valleys, California, and in Yuma Valley, Arizona. In fact, as noted in footnote 5 of the majority opinion, the Employer involved in this proceeding has had, and at the time of the hearing may still have had, a separate agreement with the Petitioner covering the Employer's melon packing operations. We would, indeed, be reluctant to bring about any possible unstabilizing effect on long established bargaining relationships respecting melon packing operations in the area except for the most compelling reasons—reasons which we find totally lacking here.

²⁸ It is noteworthy that the Supreme Court in finding the milling employees in the *Waialua* case to be nonagricultural considered the various criteria set forth by the Labor Department in 1949 and repeated in Section 780.154 of the current Bulletin.