

**H-M Flowers, Inc., Employer-Petitioner, and United Farm Workers of America, AFL-CIO. Case 21-RM-1733**

January 17, 1977

**DECISION AND ORDER**

BY CHAIRMAN MURPHY AND MEMBERS  
FANNING AND JENKINS

Pursuant to a petition filed on January 8, 1976, by the Employer under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Paul D. Flemm. Thereafter, the Regional Director for Region 21 transferred this proceeding to the National Labor Relations Board for decision, pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8, as amended. The Employer and the Union each filed briefs in support of their respective contentions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

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

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.<sup>1</sup>
3. A question affecting commerce concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act does not exist for the following reasons:

The Employer filed the instant petition seeking an election in a unit of "all employees" but excluding "professional, supervisory, office clerical employees and guards as defined in the Act" on the basis of the

Union's representational claims. The Employer asserted that its employees are statutory employees under Section 2(3) of the Act. The Union contended that the employees in question are exempted agricultural laborers and therefore the petition fails to raise a question of representation affecting commerce within the meaning of the Act. In addition, the Union claimed that the Board should defer to the California Agricultural Labor Board on all questions concerning the status of these disputed workers.<sup>2</sup> In any event, the Union stated that it would not participate in a Board-conducted election.<sup>3</sup>

H-M Flowers, Inc., is a corporation which commenced business in January 1965, and since August 1972 has been wholly owned by Robert Hall, who is also president of the Company. Robert Hall also owns 50 percent of Encinitas Floral Company, 88 percent of Robert R. Hall, Inc., and 100 percent of Manatee Company, and serves as president of all three companies.<sup>4</sup>

H-M Flowers, Inc., is in the business of packing, shipping, and wholesaling cut flowers, but, as it does not own any flowers in the field, its employees neither plant nor grow flowers. Nor has the Employer contracted with any other producer to grow flowers for it. The packing shed is open year-round and there are no significant shifts in the employee complement. The employees of H-M Flowers, Inc., do not interchange with employees of any other business. In compensating its employees, the Employer has followed the guidelines of the Fair Labor Standards Acts, thereby regarding them as nonagricultural employees. Approximately 99 percent of the cut flowers handled by the Employer are shipped by the various individual growers to the packing shed. Employees of the Employer pick up flowers only in emergencies caused by adverse weather or for a special order.

The Employer handles flowers for Robert R. Hall, Inc., which have been either grown by that Company or purchased from other growers to be sold as that Company's flowers. In some instances, the Employer will purchase flowers from Robert R. Hall, Inc., to be

Board has primary jurisdiction over questions involving the status of employees under the Act.

<sup>3</sup> The Union also contends that the Board lacks jurisdiction to entertain the Employer's petition since the Union does not claim to represent statutory employees nor would it participate in an election ordered by the Board among such employees. We find this argument to be patently without merit since the Union's representational claims have raised questions concerning the status of employees under the Act, regardless of the intentions of the Union once that status of the employees has been resolved. In such circumstances, the Board has jurisdiction over such issues as well as a statutory obligation to determine the status of the employees.

<sup>4</sup> For the purposes of our decision herein, we find that the four companies in which Robert Hall has an ownership interest are separate independent businesses, and therefore any agricultural work which may be engaged in by the employees of the other three companies cannot be attributed to H-M Flowers, Inc.

<sup>1</sup> The United Farm Workers of America declined to enter into a stipulation, agreed to by the Employer, that it was a labor organization within the meaning of the Act because it maintains that it does not represent employees within the meaning of the Act. However, the Union, by its counsel, conceded that it does exist for the purpose of representing other employees with respect to wages, hours, and working conditions. Thus, the labor organization involved claims to represent certain employees of the Employer, but denies that they are employees within the meaning of the Act.

<sup>2</sup> In its brief, the Union reported that on October 8, 1975, an election had been conducted among the employees of four companies, including H-M Flowers, Inc., under the direction of the California Agricultural Labor Board. Objections of the companies to the election, won by the Union, are still pending before the state board. Thus, the Union contended that the only appropriate procedure for deciding the status of the employees of H-M Flowers is a unit clarification proceeding before the California Labor Board. We find the Union's contention to be without merit and accordingly shall not defer to the California Labor Board, as the National Labor Relations

wholesaled under the H-M Flower label. The Employer also packages, ships, and sells flowers under its label which have been grown and harvested by Manatee Company. H-M Flowers, Inc., has nothing to do with the growing, packing, shipping, and selling of the potted plants from Encinitas Floral Company, the other company in which Robert Hall is involved, as employees of Encinitas Floral do all such work. In addition, the Employer packages and wholesales cut flowers which have been purchased from wholly unrelated companies. In fact, the record indicates that at least half of the flowers processed by the Employer have been grown by or purchased from the unrelated growers.

A primary question in this proceeding is whether or not the employees of H-M Flowers, Inc., are employees within the meaning of the Act. Section 2(3) of the Act excludes from the definition of the term "employees" any employee employed as an agricultural laborer. Since 1947 the appropriation acts for the Board have regularly carried a rider which provides that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act, 29 U.S.C.A. §203(b), which 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 . . . commodit[y] . . . 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.]

Commenting on that definition in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949), the Supreme Court said:

As can be readily seen, this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are

<sup>5</sup> See *Karl's Farm Dairy, Inc.*, 223 NLRB 211 (1976); *Colchester Egg Farms, Inc.*, 214 NLRB 327 (1974); *Mikami Brothers*, 188 NLRB 522 (1971); *The Garrn Company*, 148 NLRB 1499 (1964)

<sup>6</sup> In arriving at this conclusion, we have given full effect to the U.S. Department of Labor regulations interpreting sec. 3(f) of the Fair Labor Standards Act (29 U.S.C.A. 203(f)). Although we recognize that the Fifth, Eighth, and Ninth Circuit Courts of Appeals have refused to accept the Department of Labor's interpretation of sec. 3(f) of the FLSA, we believe that sound Government policy requires that we refrain from interpreting this legislation in a manner inconsistent with the expressed views of the Agency charged with the responsibility for administering that act. We also believe that, by following such a policy, we are giving full effect to the direction by Congress that we define the term "agricultural laborer" in accordance with sec. 3(f) of the FLSA.

<sup>7</sup> The Union has specifically disclaimed interest in representing any

listed as being included in this primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with "such" farming operations. [Emphasis supplied.]

In that same decision, the Supreme Court also stated:

Although not relevant here, there is the additional requirement that the practices be incidental to "such" farming. Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. *Such processing is, therefore, not within the definition of agriculture. Bowie v. Gonzalez* [1 Cir., 1941], 117 F.2d 11 (1941). [Emphasis supplied.]

In giving effect to this definition of agricultural work, the Board has determined that where an employer does not confine its packing operations to its own produce the employer is not involved in agricultural work.<sup>5</sup>

On the basis of the record before us, we find that the Employer's employees are "employees" within the meaning of the statute rather than exempt agricultural laborers, for the Employer does not plant, grow, or harvest its own products, and more than half of the flowers packaged and shipped by the Employer have been grown by enterprises in which the Employer has no ownership or other business interest.<sup>6</sup>

However, inasmuch as the Union stated it would not participate in any Board-conducted election as it does not seek to represent employees within the meaning of the Act, we find it has abandoned its right to represent these employees and has waived any obligation the Employer may have had to recognize it as the bargaining representative of such employees.<sup>7</sup> In the absence of a claim by the Union to represent

employees who are within the coverage of the National Labor Relations Act. At the hearing, the Union moved to dismiss the Employer's petition on the ground, *inter alia*, that the Union would not participate in an election conducted by the Board for employees who are covered by the Act. In its posthearing brief to the Board, the Union reiterated that

If some of the employees of H-M Flowers are within the coverage of the NLRA, then the UFW makes no claim to represent them. If all of the employees are within the coverage of the NLRA, then the UFW makes no claim to represent any of them. At the hearing, the UFW specifically disclaimed any interest in representing any employees of H-M Flowers who are within the coverage of the NLRA.

In view of this clear and unequivocal disclaimer of interest by the Union, we find that further proceedings are unwarranted

such employees once the Board has determined that they are employees within the meaning of the Act, a question concerning representation does not exist. Accordingly, we shall dismiss the petition.

**ORDER**

It is hereby ordered that the petition be, and it hereby is, dismissed.