Produce Magic, Inc. *and* United Farmworkers of America, AFL–CIO. Case 32–RM–696

August 16, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered the Union's request for review of the Regional Director's Decision and Order, pertinent portions of which are attached.[1] The request for review is denied, as it raises no substantial issues warranting review.[2]

In denying review, the Board notes that the Regional Director found that the cutter-packers, who perform both agricultural and nonagricultural work, were employees within the meaning of the Act because they perform a ''regular'' amount of nonagricultural work, and are covered by the Act with respect to that portion of their work that is nonagricultural. However, the Board stated in *Camsco Produce Co.*, 297 NLRB 905, 908 fn. 18 (1990), that where employees perform both primary agricultural and nonagricultural work, the proper focus is whether the nonagricultural work is ''substantial.'' In the instant case, it is undisputed that the cutter-packers spend 50 percent of their time performing nonagricultural work—an amount that is ''substantial.''

Accordingly, we affirm the Regional Director's findings, as well as his dismissal of the petition as failing to raise a question concerning representation.

[1] The only issue on review is whether the Regional Director erred in finding that the Employer's employees are not agricultural laborers, but rather, are statutory employees within the meaning of Sec. 2(3) of the Act (except to the extent they spend time performing cutter work).

[2] In denying review, the Board has considered the amici curiae briefs submitted by the California Agriculture Labor Relations Board, General Teamsters Local 690, and Bud Antle, Inc., d/b/a Bud of California, as well as the motion for administrative notice submitted by the California Agriculture Labor Relations Board, and the various responses filed.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND ORDER

The Business of the Employer

The Employer is a California corporation which had its inception in 1984. It is a ''custom harvesting'' company which has business arrangements with three different companies: Fresh Choice Produce, Inc.; Merrill Farms; and Fresh Express. The formal name of Fresh Express appears from the record evidence to be Fresh Co., the name on a contract which was introduced into evidence and which formed the basis for all subsequent examination by counsel for both parties. Each year the Employer enters into a new contract with these entities. These contracts encompass the harvesting of lettuce by the Employer, including romaine, red leaf, green leaf, butter, and radicchio. Also harvested are endive, escarole, and bok choy Napa.

Under the contractual arrangement with Merrill Farms, the Employer agrees to grow, harvest, pack, and haul the crop to Merrill Farms' cooler. Merrill Farms has obligated itself to be the shipper, responsible for shipping the product from the cooler and has the right to market the crop under any label, whether its own or others.

Fresh Choice also has the right under its contract with the Employer to market the Employer's crops and performs all the work of receiving, icing, cooling, storing, loading, distributing, and selling the crops.

Thus, under its agreement with Fresh Choice, the Employer is identified as, and has the rights and obligations of, the ''Grower.'' The Employer, however, has arranged with Major Farms, Pryor Farms, Silva Farms, and S&S Farms to do the actual growing/cultivation under the terms of a ''joint deal.'' Under the written agreements with these latter entities, the Employer advances some of the growing costs for the growing and possesses an ownership interest in the crop based on the percentage it contributes to the overall growing costs. Onto this the Employer assesses a packing charge which is deducted from the total selling price. This agreement involves approximately 1000 acres.

Under the Employer's ''Farming Marketing'' agreement with Merrill Farms, the Employer is identified as the ''Grower'' but also retains Major Farms and Guidotti Brothers to perform the actual growing/cultivation. The same financial arrangements apply as in the Fresh Choice situation. Approximately 300 acres are involved.

The Employer itself grows no crops and owns no real property in California.

The foregoing arrangements are contrasted with the Employer's harvesting/grower agreement with Fresh Co. The Employer is retained to harvest, pack, and haul lettuce grown by Fresh Co. The growing/cultivation under this latter agreement is itself performed, parenthetically, by Bruce Church. The Employer does not advance growing costs to Bruce Church. The Employer is compensated by Fresh Co. based on a price per carton or container. The Employer advances no money for the harvesting operations at Fresh Co. Approximately 350 acres are harvested under this agreement.

Thus, approximately 1300 of the 1650 total acres harvested—about 79 percent—involves lettuce grown under the ''joint deal'' arrangements. The Employer has no ownership interest in the lettuce grown on the remaining 350 acres.

Although the record does not specify their nature, the record reveals that the Employer has ''operations'' in the State of Arizona from late November to late March in the Yuma area. From late March to late November, the Employer performs harvest operations in the Monterey County area as described above.

The Harvesting Operations of the Employer

The United Farmworkers' ALKB petition seeks ''all field employees.'' The record here reveals that the Employer employs 60–70 cutter-packers, 8–10 closers, 10–12 loaders, and 4 water persons. Cutter-packers spend 50 percent of their time as cutters who sever the growing crop from the ground and the other 50 percent as packers. Supervision of the field

crew is accomplished by the harvesting foreman and the driver-stitchers.

The function of the cutter is to sever the vegetable heads from the ground, trim the heads, and arrange them in rows. The packer then packs the heads in a cardboard carton. In some operations, the heads are placed directly into the carton, while in others, they are first placed in plastic bags. The packer may pull off a leaf from the head with his hands and discard it; he does not use a knife. The closer then staples the carton, in the event the carton utilized requires this; if the carton does not require staples, the packer merely closes the carton. The loader takes the closed cartons and loads them onto a truck bed.

The cutter-packers normally work in a ''trio,'' consisting of two cutters and one packer. The Employer has 4 crews varying in size from 15 to 30. When bagging is required, the packer performs the bagging operation in which the packer either ''single bags'' each head of lettuce or bags six heads of lettuce into one bag. In such circumstances, the trio may consist of two persons bagging and only one doing the cutting.

Under normal operations, the cutter works about 10–15 feet from the packer, the object being to pack the product as soon as possible after it is cut.

Usually, if the cartons require stapling, two closers are assigned to a crew. Approximately 25 percent of the cartons used by the Employer require stapling. Under such operations, the closer works 10–15 feet from the cutter-packers. The cartons are delivered to the field unassembled and are removed from the truck and distributed in the field by the driver-stitcher, the cutter packer, or the closer. The cartons are assembled in the field by the cutter, packer, or closer. Loaders pick up the packed carton in the field and load it onto a truck or stack the cartons so that they can be loaded more easily onto a truck.

Lettuce packed directly into a carton is termed a ''naked pack.'' When lettuce is bagged in what the Employer terms a ''special operation,'' ''sleeving'' is accomplished by means of one member of a trio wearing a harness or ''sleeve'' into which the severed and trimmed lettuce is placed and bagged by another member. Sometimes, cutters decide to come back and ''sleeve'' the lettuce. In that event, the third person puts the ''bagged lettuce'' into the carton. The actual configuration is predicated on what the crew determines will result in the greatest packing efficiency, because the crew is paid by the carton. The water person, who is not directly involved in this arrangement, is paid by the hour. This person sprinkles the lettuce before and after it is packed in the carton, utilizing a portable water tank. Sleeving and naked pack operations may be done at the same time on the same field. Cutter-packers and closers generally earn less than loaders.

The Employer is licensed as a labor contractor with the U.S. Department of Labor, pursuant to the provisions of the Agricultural Worker Protection Act, as well as by the State of California.

Analysis and Conclusions

Section 2(3) of the Act excludes from the definition of ''employee'' any individual employed as an agricultural laborer. Since 1947, Congress has added an annual rider to the Board's appropriation measure directing it to apply the definition of agriculture set forth in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (FLSA), in determining whether an individual is an agricultural laborer. The Board's policy is to be guided in this regard by the interpretation of Section 3(f) of the FLSA adopted by the Department of Labor.

Section 3(f) provides in relevant part:

> ''Agriculture'' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practice . . . 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.

In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762–763 (1949), the Supreme Court set forth two distinct branches of this definition:

> 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 listed as being included in the 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, incidently to or in conjunction with ''such'' farming operations.

Relying on the Department of Labor regulation (29 CFR § 780.141) interpreting the phrase ''such farming operations'' from Section 3(f) of the FLSA, the Board has determined that the handling of crops does not constitute agriculture within the broader secondary meaning of that term if any amount of the crops regularly handled by the workers in question are grown by a grower other than the entity by whom they are employed. *Camsco Produce Co*., 297 NLRB 905, 908 (1990). The record in the instant proceeding reveals that the Employer does not cultivate any crops but instead provides harvesting and other services either to a grower or pursuant to ''joint deals.'' In as much as the lettuce handled by the workers in issue here is not grown by the Employer, I find that the handling of that lettuce does not constitute secondary agriculture.

Given the above finding, the workers in question constitute agricultural laborers only if their functions constitute some form of primary agriculture—such as ''harvesting'' lettuce. In this regard, the Department of Labor defines ''harvesting'' within the meaning of Section 3(f) of the Fair Labor Standard Act, as follows:

> The term ''harvesting'' . . . includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position . . . . ''Harvesting'' does not extend to operations subsequent to or unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession . . . while transportation to a concentration point on the farm may be included, ''har-

> vesting'' never extends to transportation or other operations off the farm. [29 CFR §§ 780.118(a) and (b).]

As observed by the Board in *Mario Saikhon, Inc*., 278 NLRB 1289, 1291 (1986), in determining whether a worker is engaged in primary agriculture, it is necessary to focus on the nature of the work, and not the identity and purpose of the employer.

In *Mario Saikhon*, supra, 278 NLRB at 1291–1292, the Board held that persons who trimmed, sorted, culled, bunched, packed, and closed cartons of broccoli and cantaloupes in the fields, performing the same tasks that are performed in commercial packing sheds off of the farm, were not engaged in primary agriculture solely by virtue of the fact that they performed their functions in the open air in the field itself in close proximity to the employees who actually severed the crop from the ground and in one continuous operation with the picking or cutting function. Noting that ''harvesting'' can extend to activities performed in the field in connection with transporting severed crops to a central collection point (citing *Allied Mills*, 96 NLRB 369 (1951)), the Board held that the field packing operation did not constitute such an activity. Thus, the Board concluded that although the individuals who severed the crop from the ground were engaged in primary agriculture—that is, ''harvesting'' those engaged in the subsequent trimming, sorting, culling, bunching, packing, and carton closing operation were not. Similarly, in *Employer Members of Grower-Shipper Vegetable Assn.*, 230 NLRB 1011 (1977), the Board found that various drivers, stitchers, and folders involved in a ''naked pack'' field operation were statutory employees.

In the instant case, the record establishes that the workers in question take unassembled cartons from a stack loaded on a truck and distribute them in rows in the field. Boxes are either snapped or stapled shut after being packed. Lettuce which has been severed from the ground is watered by water persons both before and after it is packed in cartons. Packed and closed cartons are loaded onto a truck which is driven through the field. In accord with the decisions in *Mario Saikhon*, supra, and *Grower-Shipper*, supra, I find that the work of loaders, water persons, staplers, and drivers plainly does not constitute primary agriculture.

This leaves for determination the status of cutter-packers. The act of severing the lettuce from the ground plainly is ''harvesting'' and, therefore, those who perform this work are agricultural laborers while they are doing so. The videotape introduced into evidence reveals that the cutter both severs the lettuce and trims off any excess from the bottom. This work accounts for 50 percent of each cutter-packer's workday. The remainder of each cutter-packer's day is spent in the packing function. Approximately 25 percent of packing is comprised of ''sleeving,'' wherein the packer wraps the lettuce head before inserting the head into a carton. Such work, I find, is analogous to traditional packing operations which, as in *Mario Saikhon*, supra, and *Grower-Shippers*, supra, is performed in the field but, nevertheless, does not constitute primary agriculture.

The record establishes that approximately 75 percent of the Employer's packing operation is comprised of ''naked pack'' operations, wherein the packer may have occasion to ''trim'' by hand excess or dead leaves before inserting the lettuce heads directly into the carton. This trimming and packing function is precisely the kind of activity which the Board found did not constitute primary agriculture in *Mario Saikhon*, supra, and *Grower-Shipper*, supra, and I so find here.

On brief, United Farmworkers argues that harvesting and packing is a single operation. Citing *Allied Mills*, 96 NLRB 369 (1951), United Farmworkers contends that the Employer's field packing operation is analogous to gathering the lettuce to a concentration point attendant to reducing the lettuce to a state of possession. However, I find that the packing operation is in the nature of activity subsequent to, and unconnected with, the actual process of serving the crop. See *Mario Saikhon*, supra, and *Grower-Shipper*, supra.

The Farmworkers further contend that, because the cutter-packer members of the trios alternately perform both cutting and packing work, the work of the trio should be treated like work accomplished as a single, cohesive unit engaged in harvesting work. In this regard, I find that the Board's decision in *Olaa Sugar Co*., 118 NLRB 1442 (1957), is dispositive. There, the Board set forth the following rule regarding its jurisdiction over employees who perform both agricultural and nonagricultural work (118 NLRB at 1443):

> We now announce the rule that employees who perform any regular amount of non-agricultural work are covered by the Act with respect to that portion of the work which is non-agricultural.

Accord: *Mario Saikhon*, supra, 278 NLRB at 1292.

Thus, to the extent that cutter-packers perform work other than severing crops from the ground, I find that they are employees within the meaning of the Act while performing such functions.

Finally, United Farmworkers raises a policy question about whether the Board, in construing the term agricultural laborers,'' should construe that term narrowly, so as to afford the maximum degree of coverage under the Act, or broadly, so as to minimize the Board's intrusion on the jurisdiction of state agencies such as the California Agricultural Labor Relations Board. First, as discussed by the Board in its decision in *Camsco Produce Co*., supra, 297 NLRB at 908–909 fn. 19, it appears from the legislative history that Congress intended that the term ''agricultural laborer'' be narrowly construed by the Board because, in choosing between a proposed rider which would have defined that term broadly, as in the Social Security Act Amendments of 1939, and the present definition, Congress, after heated debate and sharp conflict, chose the latter. Thus, consistent with Congressional policy, the Board has construed the exemption as including all primary agricultural practices but only those secondary agricultural practices which are performed by a farmer simply in order to prepare its own products for market. To the extent that modern agricultural business practices have departed from this ''traditional model,'' and the farmer no longer prepares its own products for market, it was the intent of Congress to extend coverage of the Act to individuals engaged in activities other than primary agriculture. *Camsco Produce Co*., supra, 297 NLRB at 908.

Finally, in enacting the Act, it was the intention of Congress to implement a uniform national labor policy which would confer the same rights and benefits and impose the same duties and obligations on all employees and employers

affecting commerce throughout these United States. Although Section 10(a) of the Act empowers the Board to cede jurisdiction to state agencies in certain circumstances, the Board has not seen fit to cede jurisdiction to the California Agricultural Labor Relations Board and, I find, to do so would do violence to the Congressional policy of maintaining a uniform national labor policy.

ORDER

With the exception of the time spent performing cutter work, which constitutes ''harvesting,'' I find that the Employer's employees are not agricultural laborers and, therefore, fall within the definition of employees in Section 2(3) of the Act. Accordingly, inasmuch as United Farmworkers makes no claim to represent any statutory employees, the petition here is dismissed as failing to raise a question concerning representation.