

Bud Antle, Inc. d/b/a Bud of California, Employer-Petitioner and General Teamsters, Warehousemen & Helpers Union, Local 890, affiliated with International Brotherhood of Teamsters, AFL-CIO, Union-Petitioner. Cases 32-UC-288 and 32-UC-290

August 26, 1993

ORDER GRANTING AND DECISION ON
REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The Employer's and the Union's requests for review of the Regional Director's March 11, 1993 Decision and Order in the above cases are granted. On review, however, for the reasons set forth below, we affirm the Regional Director's dismissal of both parties' unit clarification petitions.

This is another unit clarification proceeding involving the same parties and employees as in a prior proceeding, Case 32-UC-263. In that case, the Employer, Bud Antle, Inc. d/b/a Bud of California, petitioned to exclude all nonagricultural employees from a unit which had been certified by the California Agricultural Labor Relations Board (ALRB).¹ In effect, the Employer sought a determination from the Board as to which of its employees in its harvest and salad operations were not actually agricultural laborers and should therefore be excluded from the ALRB certified unit.

In a decision dated June 24, 1991, the Regional Director granted the Employer's petition and clarified the ALRB certified unit to exclude all employees except cutters and employees in the Employer's transplanting operations (who the Regional Director found were clearly agricultural in the primary sense).² In so finding, the Regional Director rejected the Union's argument that the Employer was a "farmer" because its

¹ The ALRB certification read as follows: All agricultural employees of Bud Antle, Inc.; excluding employees of all vacuum cooler plants and Salinas plastic container manufacturing plant employees and excluding those employees employed exclusively out of the State of California.

² Sec. 3(f) of the FLSA provides:

"Agriculture" includes farming in all its branches . . . 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.

Under this definition, "agriculture" has both a primary and a secondary meaning. The primary meaning refers to actual farming operations, i.e., those functions normally associated with farming such as cultivation, tilling, growing, and harvesting of agricultural commodities. The secondary meaning includes any practices which are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. *Camsco Produce Co.*, 297 NLRB 905, 906 (1990) (citing *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949)).

contractual arrangements with its growers made them virtually indistinguishable from each other, citing U.S. Department of Labor (DOL) regulations under the Fair Labor Standards Act (FLSA) and prior Board decisions.

Thereafter, the Union filed a request for review of the Regional Director's decision, contending that the Employer's petition was untimely since the subject employees were covered by an existing contract which was effective until September 1992. By order dated January 6, 1992, the Board granted the Union's request for review. However, while agreeing with the Union that the petition was untimely, the Board nevertheless affirmed the Regional Director's substantive determination inasmuch as the Union had not contested it, and therefore merely deferred the clarification's effectiveness until the contract's expiration.

Thereafter, the Union filed a motion for reconsideration of the Board's Order, contending, inter alia, that the Board had erred in assuming that the Union had not contested the Regional Director's substantive determination. By order dated February 27, 1992, the Board denied the Union's motion for reconsideration as lacking in merit.

The instant proceeding involves two new unit clarification petitions, one filed by the Employer and one by the Union. We address each below.

Union's Petition (Case 32-UC-290). The Union's petition, filed October 19, 1992, is essentially another motion for reconsideration, arguing that the Board should reconsider its decision in Case 32-UC-263 on the ground that the ALRB subsequently issued a decision on September 16, 1992 finding, contrary to the Board, that the Employer and its contract growers are a single-integrated enterprise under the Board's four factor single-employer analysis, and that all of the employees in the certified unit are therefore exempt agricultural laborers.

The Regional Director dismissed the Union's petition on the ground that the Union had the opportunity but failed to make its substantive argument to the Board in the prior UC proceeding, and the mere fact that the ALRB subsequently issued a decision conflicting with the Board's decision in that proceeding is not a "changed circumstance" which would warrant entertaining a repetitive UC petition on the issue.

Contrary to the Regional Director, we find that the Union's petition may properly be entertained. While a party should not be permitted to file repetitive UC petitions seeking further reconsideration of prior Board jurisdictional determinations in the absence of new facts, in the instant case there is a new fact: a decision by a state board which conflicts with the Board's decision. Such a Federal-state jurisdictional conflict raises concerns which go beyond the immediate interests of the parties and should not go unaddressed simply be-

cause the petitioner failed to request review of the substantive issue in a prior UC proceeding.

Nevertheless, we affirm the Regional Director's dismissal of the Union's petition on the merits. Although we have carefully considered the December 16, 1991 decision of the state administrative law judge and the September 16, 1992 decision of the ALRB affirming it (18 ALRB No. 5), we decline the Union's request that we reconsider our prior determination in Case 32-UC-263 based on the ALRB's decision. As the state administrative law judge acknowledged in his decision, the Board has historically applied a different analysis in these types of cases, following FLSA regulations³ rather than applying the traditional single-employer analysis; has consistently found in prior cases (e.g., *Norton & McElroy Produce*, 133 NLRB 104 (1961); *Victor Ryckenbosch, Inc.*, 189 NLRB 40 (1971); *H. M. Flowers, Inc.*, 227 NLRB 1183 (1977); *Green Giant Co.*, 223 NLRB 377 (1976); and *Employer Members of Grower-Shipper Vegetables Assn.*, 230 NLRB 1011 (1977)), that contract growers are in fact independent under that analysis; and the Supreme Court in *Bayside Enterprises v. NLRB*, 429 U.S. 298, 301-302 (1977), appeared to uphold the Board's policy in this regard, citing with approval *Norton & McElroy*, supra, a case which is factually very close to the instant case. See judge's decision at 63-69.⁴

Given these circumstances, we decline to now reverse our established policy simply because the ALRB does not agree with it. Although it is true, as the state administrative law judge noted (judge's decision at 64 fn. 54), that the Board in *Camsco*, supra, recently refused to follow FLSA regulations in adopting a test for determining a related issue under the agricultural exemption, it noted in doing so that it was thereby extending the provisions of the Act to the employees, and that this was consistent with Congress' intent in choosing the definition of "agriculture" which was apparently perceived to permit more extensive coverage of employees by the Act. See 297 NLRB at 908 fn.

³See 29 CFR § 780.131 ("As a general rule, a farmer performs his farming operations on land owned, leased, or controlled by him and devoted to his own use. The mere fact, therefore, that an employer harvests a growing crop, even under a partnership agreement pursuant to which he provides credit, advisory or other services, is not generally considered to be sufficient to qualify the employer so engaged as a "farmer.") and sec. 780.132 ("Where crops are grown under contract with a person who provides a market, contributes counsel and advice, makes advances and otherwise assists the grower who actually produces the crop, it is the grower and not the person with whom he contracts who is the farmer with respect to that crop.").

⁴In *Norton & McElroy*, the employer maintained a variety of economic arrangements with its growers, including one under which it owned a one-third interest in both the grower and the corporation that owned the grower's land. Similarly, the ALRB found that the Employer here has ownership or leasehold interests in one-fourth to one-third of the land on which the growers farm. See judge's decision at 53.

19. Here, in contrast, the Union is asking that the Board adopt a more restrictive test which would effectively render more employees exempt.

Further, as it is the Board and not the ALRB that has primary jurisdiction over questions involving the status of employees under the Act, we find that it would also be inappropriate to defer to the ALRB on the issue. See *H. M. Flowers*, supra at fn. 2. See also *Correctional Medical Systems*, 299 NLRB 654, 656 (1990).

Finally, even assuming we were to disregard FLSA regulations and apply a single-employer analysis here, it is not clear that we would reach the same result as the ALRB. For example, as the administrative law judge himself acknowledged, while the Board generally gives great weight to the factor of centralized control of labor relations,⁵ "the ALRB appears to be somewhat more flexible in assessing the importance of [that factor]." Judge's decision at 49-50. And in fact the only evidence of centralized control of labor relations cited by the ALRB was the fact that the Employer has given work orders to the growers' labor contractors and sometimes pays the bills from the contractors and other grower costs directly, subject to later reimbursement by the growers. See ALRB decision at 13-14; and judge's decision at 45-47 and 52-53.

Although the ALRB also found that there was a lack of arm's-length dealing between the Employer and the growers, the only evidence it cited for this finding was the fact that when the Employer has rented and sold farm equipment to the growers, it has "painlessly" factored the price of that equipment into its contracts with the growers. See ALRB decision at 14-15; and judge's decision at 37-38 and 53-54. It is not clear what the ALRB actually meant by "painlessly," however; its other findings indicate that the Employer does in fact charge such costs to the grower's account, thereby reducing the proceeds which the grower eventually receives. See judge's decision at 46.

Accordingly, for all the foregoing reasons, we affirm the Regional Director's dismissal of the Union's petition.

Employer's petition (Case 32-UC-288). The Employer's petition, filed September 16, 1992, seeks a determination that the Employer's cutters, like its other employees, are nonagricultural laborers, since they also perform noncutting work, and are therefore properly covered by the Act along with the other employees.⁶

⁵ See, e.g., *Gartner-Harf Co.*, 308 NLRB 531 (1992).

⁶In granting review with respect to the Employer's petition, we note that, although the Employer's argument that the cutters should be excluded from the unit as nonagricultural laborers was considered and rejected by the Board in the prior proceeding, the Employer was allowed to present evidence concerning the merits of its position at the instant hearing and no party argues for dismissal of its petition on procedural grounds.

We agree with the Regional Director that the Employer's petition should be dismissed, but do so for the following reasons. In *Camsco*, supra, the Board held that it would return to the rule of *Olaa Sugar Co.*, 118 NLRB 1442 (1957), and apply a regularity test in determining the significance of nonexempt work handled by employees who are engaged in agricultural work in the secondary sense. In so holding, however, the Board specifically noted that a different "substantiality" rule is properly applied in determining whether to assert jurisdiction over employees, such as the cutters here, who are concededly engaged in farming in the primary sense. See 297 NLRB 905, 908 fn. 18 (1990) (citing, e.g., *NLRB v. Kelly Bros. Nurseries*, 341 F.2d 433 (2d Cir. 1965)) (14 percent nonagricultural on year-round basis not enough to bring employees within Act); *Light's Tree Co.*, 194 NLRB 229 (1971) (jurisdiction not asserted where only 10 percent of time spent on nonagricultural work); and *Aquaculture Research*, 215 NLRB 1 (1974) (jurisdiction asserted where work intermixed and nonagricultural work was substantial). See also *Valley Harvest Distributing*, 294 NLRB 1166 fn. 3 (1989) (cutter-trimmers found to be exempt agricultural laborers since they spent the vast majority of their time in primary agriculture and any nonexempt work they performed was not frequent or substantial enough to cause them to lose the exemption). Thus,

contrary to the implication in the Regional Director's decision, the "substantiality" rule rather than the *Olaa Sugar* "regularity" rule is the appropriate rule to apply in assessing the nonagricultural work performed by the cutters.

Nevertheless, applying this rule, we agree with the Regional Director that the Employer's petition should be dismissed. The Regional Director found that the cutters "generally" perform cutting work, but that, "on occasion," depending on a number of circumstances, they also perform other duties—including work of packers, loaders, box closers, and windrowers—and that, depending on a number of circumstances, any cutter on any given day may perform noncutting work from 5 percent to 50 percent of the workday. Although it is difficult to determine how these latter figures would translate on an annual or average basis, it seems clear that the cutters do in fact spend the large majority of their time performing primary agriculture. Indeed, as indicated, the Regional Director characterized the cutters as performing other duties only occasionally. In these circumstances, we conclude that the cutters are agricultural employees entirely exempt from the Act. See *Valley Harvest Distributing*, supra.

Accordingly, for all the foregoing reasons, we affirm the Regional Director's dismissal of the petitions.