

Mario Saikhon, Inc., Employer-Petitioner and Fresh Fruit & Vegetable Workers Union, Local P-78-B, affiliated with the United Food & Commercial Workers Union, AFL-CIO, CLC and United Farm Workers of America, AFL-CIO. Cases 21-RM-2274 and 21-RM-2276

27 March 1986

**DECISION ON REVIEW AND ORDER
REMANDING PROCEEDING**

**BY CHAIRMAN DOTSON AND MEMBERS
DENNIS AND STEPHENS**

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held on 21 December 1983 and 18 January 1984 in the above-captioned proceeding. In a Decision and Order dated 2 March 1984 the Acting Regional Director for Region 21 concluded that the petitioned-for employees are exempt from coverage by the Act because they are "agricultural laborers" within the meaning of Section 2(3) and he dismissed the petitions. Thereupon, in accordance with Section 102.67 of the Board's Rules, the Employer/Petitioner filed a timely request for review of the Acting Regional Director's decision. By telegraphic order dated 23 May 1984, the Board granted review of the Acting Regional Director's determination that the Board lacks jurisdiction over the disputed employees. All parties to this proceeding filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and makes the following findings.

The Employer is a California corporation which grows, harvests, packs, and ships broccoli, cantaloupes, and other agricultural commodities grown in the Imperial Valley of California. In addition to harvesting and packing its own broccoli and cantaloupes, the Employer harvests and packs broccoli and cantaloupes grown by other farmers on property it does not own. The Employer has a "joint deal" with some of these farmers and merely does the packing for others. In the three most recent broccoli-growing seasons and the four most recent cantaloupe-growing seasons the Employer performed over 50 percent of its cantaloupe and broccoli harvesting and packing for other growers. Prior to late 1983, the Employer transported harvested broccoli and cantaloupes to an off-the-field packing shed in Holtville, California, where the cantaloupes were culled, sorted by size, and packed, and the broccoli were culled, secured in bunches, and packed. In late 1983 the Employer

stopped packing broccoli and cantaloupes in the packing shed and began performing these operations out in the growing fields on field packing machines.

The Employer has a contract with Local P-78-B of the Fresh Fruit and Vegetable Workers which recognizes Local P-78-B as the exclusive bargaining representative of its packinghouse and lettuce-vacuum-cooler employees. The parties stipulated that Local P-78-B is a labor organization within the meaning of the Act. The United Farm Workers of America, AFL-CIO (UFW) has been certified under the California Agricultural Labor Relations Act as the exclusive bargaining representative for all of the Employer's agricultural employees, excluding off-the-farm packing shed and vacuum-cooler plant employees. Both Unions sought recognition from the Employer as bargaining representative of the employees who operate and work on the field packing machines. In response, the Employer filed the instant RM petitions: one for the cantaloupe field packing operation and one for the broccoli field packing operation.¹

When broccoli and cantaloupes were packed in the shed, the Employer's employees would "cut" the broccoli and "pick" the cantaloupes in the field and put them in the back of a slow-moving truck or onto a conveyor belt that deposited them in a trailer drawn slowly by a tractor. The Employer's drivers then hauled the produce from the field to the shed and emptied it into a large "dumper." The dumper automatically fed the produce onto a conveyor belt. On the broccoli line, "bunchers" gathered loose broccoli into bunches of one of two standard sizes and inserted each bunch into a machine that snapped a rubberband around it and trimmed the stems. The bunchers put the bunched broccoli on another conveyor belt from which it was taken by "packers" who packed the bunches in cardboard cartons according to size. The packers rested the cartons being packed next to the conveyor belt on waist-high packing stands. Nearby, "make-up" employees assembled the cardboard cartons on a hot melt glue machine and put them within reach of the packers. The packers put the packed cartons on another conveyor where they were filled with ice by "icers" and then sealed by a "closer." The closer's primary responsibility was to watch a stapling machine that automatically sealed the cartons. If a seal did not hold, the closer would

¹ The cantaloupe petition seeks an election among field processing employees engaged in packing, closing, loading, and box making for cantaloupes, machine operators, and trailer pullers.

The broccoli petition seeks an election among field processing employees engaged in trimming, bunching, packing, closing, and loading of broccoli, machine operators, and trailer pullers.

seal the carton with a hand gun. "Set off" employees removed the sealed cartons from the conveyor and stacked them on pallets. "Forklift loaders" then moved the pallets onto a forklift carrier. "Strappers" secured the palletized cartons with plastic straps. Finished pallets were either loaded directly onto a truck or sent to the cold room. Once the produce was iced or cooled, it was taken to market. The cantaloupe line operated in exactly the same way, except that melons are not bunched. Instead, "sorters" would grade, cull, and wax the melons before they reached the packers. The packers sorted the melons into one or more of five standard sizes and packed only melons of the same size in each carton. Bunchers, sorters, and packers were all expected to "cull" unacceptable broccoli and cantaloupes. Employees tossed culled produce onto a "cull belt." There were approximately 75 employees on the cantaloupe line and 60 employees on the broccoli line.

The Employer's field packing machines are long platforms mounted on wheels about 30 inches above the ground. Broccoli-bunching machines and packing stands like those used in the shed are affixed to the platforms. Each field packing machine is assigned one supervisor and a crew of approximately 17 to 20 employees. The crew includes the employees who actually cut the broccoli and pick the cantaloupes. The "cutters" and "pickers" walk through the fields and sever the crop from the ground exactly as before. The field packing machines are slowly drawn through the fields alongside or slightly ahead of the cutters and pickers by tractor. The cutters toss the broccoli onto a shallow, shelf-like bin attached to the packing machine. The pickers either roll the cantaloupes down chutes extending from the sides of the packing machine or place them in a bin on the end of the machine. The produce is then packed by employees standing on the field packing machines.

On a broccoli machine, "buncher/packers" size the broccoli, insert it in the bunching machines, and pack the bunches in cardboard cartons. On a cantaloupe machine, "sorter-packers" grade and sort the melons and pack them in boxes. The packers on the field packing machines toss culls back into the field instead of placing them on a cull belt. An employee riding on the platform or on a nearby truck assembles the boxes by folding them together, rather than using a glueing machine as did the make-up employees in the shed. Sometimes the packers will assemble the boxes themselves. A "closer" places the packed boxes on a skid running along the opposite side of the platform from the packers and seals the boxes with a hand-held staple gun like the one used when necessary by the closer

in the shed. The closer then rolls the sealed boxes down another skid that reaches from the platform into the bed of a truck moving alongside or onto a trailer attached to the packing machine itself. A "loader" lifts the boxes from the skid and stacks them on pallets just as the "set off" employees did in the shed. Generally, two or three employees are assigned to strap the palletized boxes. When a truck or trailer is full of boxed produce, it is taken to the shed. There, the palletized boxes are run through a machine that ices a whole pallet at one time.

Under normal circumstances, packing machine employees do not interchange with cutters. Broccoli packing machine employees may fill in as cutters, however, if a cutter crew is a few employees short or cutting is too slow to maintain work for the usual eight-employee packer crews. Similarly, cantaloupe packers pick cantaloupes on infrequent occasions. The Acting Regional Director found, without contradiction, that "employees who work on the field packing machines trimming, sorting, culling, bunching, packing, and closing, perform essentially the same functions that were performed by the packing shed employees."

Section 2(3) of the Act excludes from the definition of "employee" any individual employed as an agricultural laborer. Since 1947 Congress has added a rider to the annual appropriation act for the Board, in essence directing it to apply the definition of agriculture contained in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C.A. § 203(b) (FLSA), when determining whether an individual is an agricultural laborer. It is the Board's policy to be guided in this regard by the interpretation of Section 3(f) adopted by the Department of Labor. *McAnally Enterprise*, 152 NLRB 526, 529 (1965).

Section 3(f) provides in pertinent part:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and the tillage of the soil, dairying, 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.

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

First, there is the primary meaning. Agriculture includes farming in all its branches. Cer-

tain 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, incidentally to or in conjunction with "such" farming operations.

We agree with the Acting Regional Director's conclusion that the field packing employees are not engaged in agriculture within the broader secondary meaning. As noted, more than half of the Employer's broccoli and cantaloupe harvesting and packing is performed for other growers. Under Board law, employees will not be found exempt agricultural employees under the secondary definition when, as here, a regular or substantial portion of their work effort is directed towards hauling or processing the crops of a grower other than the grower by whom they are employed. *Employer Members of Grower-Shipper Vegetable Assn. of Central California*, 230 NLRB 1011, 1014-1015 (1977). We do not agree, however, with the Acting Regional Director's conclusion that the employees at issue are agricultural laborers within the primary definition because they are engaged in "harvesting."

The Department of Labor defines "harvesting" as used in Section 3(f) of the FLSA as follows:

"Harvesting" . . . includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position. . . . Examples include the cutting of grain, the picking of fruit, the stripping of bluegrass seed, and the digging up of shrubs and trees grown in a nursery. Employees engaged on a plantation in gathering sugarcane as soon as it has been cut, loading it, and transporting it to a concentration point on the farm are engaged in "Harvesting" "Harvesting" does not extend to operations subsequent to and unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession

29 CFR § 780.11 (a) and (b). In determining whether an employee is engaged in primary agriculture, we must consider the nature of the work, and not the identity or purpose of the employer, to be controlling. See *Drummond Coal Co.*, 249 NLRB 1017 (1980). The Board has held that employees who sort and pack produce in an off-the-farm packing shed are not engaged in direct farm-

ing operations of the type enumerated in the primary definition of agriculture. *D'Arrigo Bros. Co.*, 171 NLRB 22, 23 (1968). Accordingly, the question presented by the facts before us is whether these functions become primary when they are performed in the open air in the field itself in close proximity to the employees who actually sever the crop from the ground and in one continuous operation with the picking or cutting function. Upon careful consideration, we conclude that they do not.

It is true, as the UFW points out, that the definition of "harvesting" is not limited to the act of severing the crop from the soil, but can extend to other activities performed in the field in connection with transporting severed crops to a central collection point. The Board has held, in accord with the Labor Department's interpretation, that "harvesting" encompasses the activities of employees who gather and load on trucks crops purchased by their employer already severed and stacked in the farmers' fields. *Allied Mills*, 96 NLRB 369 (1951). We do not, however, conclude that the disputed employees are not agricultural laborers simply because their duties do not entail severing the crop from the soil. Rather, we conclude that the definition of harvesting cannot be stretched to encompass the packing operation now that it is performed in the field because moving it to the field has not changed the nature of the work.

Although packing the cantaloupes and broccoli in the field has eliminated the need for employees to collect the raw crops for transportation to the shed, it has not changed the essential functions of the packing employees. We cannot find by analogy to the gathering of severed crops that the packing operation is now part of the actual process whereby the crops are severed or otherwise reduced to possession. The gathering of crops is a natural extension of severing the crops from the soil and therefore can be reasonably characterized as part of a single process whereby crops are reduced to possession. The culling, sorting by size, bunching, and packing of crops, on the other hand, is an operation demonstrably different in kind and distinct from severing the crops from the soil that achieves more than merely reducing the crops to possession. The packing operation may now be performed in close proximity to and coordination with the cutting and picking employees, but it is no more a part of the cutting and picking operation than it was when performed in the shed. 1

Accordingly, although the field packing operation could be characterized as preparation for market within the secondary definition of agriculture, not applicable here for the reasons stated

above, we conclude that it does not constitute "harvesting" within the primary definition. This conclusion is in accord with our determination in *Rod McLellan Co.*, 172 NLRB 1458, 1460 (1968), that the grading and packing of flowers grown exclusively by the employer fell within the secondary, rather than the primary, definition of agriculture. We further conclude, therefore, that the employees engaged in the field packing operation are employees and not agricultural laborers within the meaning of the Act and that the Board has jurisdiction over them. That some of these employees occasionally fill in as cutters or pickers does not compel a different result. Employees who perform any regular amount of nonagricultural work are covered by the Act with respect to the part of their work that is nonagricultural. *Olaa Sugar Co.*, 118 NLRB 1442 (1957). Accordingly, we shall reinstate the petitions.

Local P-78-B argues that if the employees at issue are found to be employees within the meaning

of the Act, the Board should find that they are covered by the contract between Local P-78-B and the Employer and that the contract bars the Employer's petitions. The Employer contends that the disputed employees are not an accretion to the packinghouse unit covered by the contract. Also, the Employer and Local P-78-B differ slightly on the composition of the appropriate unit should an election be ordered. The Acting Regional Director did not reach these issues because he dismissed the petitions for lack of jurisdiction. We shall therefore remand this case to the Regional Director of Region 21 to resolve these issues and to take any other appropriate action consistent with this Decision and Order.

ORDER

The petitions are reinstated and the case is remanded to the Regional Director for Region 21 for further appropriate proceedings consistent with this decision.