Pinedale, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S & J RANCH, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioners, and RIO DEL MAR, INC., Intervenor.	)	Case No. 82-RC-7-F 10 ALRB No. 26

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on October 20, 1982, a representation election was conducted among all agricultural employees of S & J Ranch, Inc. (S & J) on October 22, 1982.[1/] The Tally of Ballots showed the following results:

UFW	220
No Union	60
Unresolved Challenged Ballots	115
Total	395

[1/] At the time of the filing of this Petition for Certification, a strike was in progress among the olive harvesting employees. Therefore, pursuant to section 1156.3 (a)(4) of the Agricultural Labor Relations Act (ALRA or Act) (all section references are to the California Labor Code unless otherwise stated), this election. was conducted promptly after the filing of the Petition for Certification.

S & J timely filed objections to the election, and the following four were set for hearing:

1. Objection No. 1, whether the Fresno Regional Director improperly included employees of Rio Del Mar, Inc., as employees of S & J Ranch, Inc.

2. Objection No. 2, whether the Fresno Regional Director improperly comingled the ballots of employees working for S & J Ranch, Inc., with the ballots of employees working for Rio Del Mar, Inc.

3. Objection No. 3, whether the Fresno Regional Director improperly conducted a 4.8-hour election when employees of S & J Ranch, Inc. were not on strike.

4. Objection No. 18, whether the election was conducted at a time when S & J Ranch, Inc., was not at fifty percent of peak agricultural employment.

A hearing was conducted before investigative hearing examiner (IHE) Kelvin C. Gong who thereafter issued the attached Decision recommending that the Agricultural Labor Relations Board (Board) dismiss the objections filed by S & J and certify the UFW as the exclusive collective bargaining representative of S & J's agricultural employees. S & J timely filed exceptions to the IHE's Decision and a supporting brief. The UFW timely filed a reply brief to S & J exceptions.

Pursuant to the provisions of Labor Code section 114.6, the Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the IHE's Decision

In fight of the exceptions and briefs and *has* decided to affirm the IHE's rulings, findings and conclusions, as modified herein, and to certify the UFW as the exclusive collective bargaining representative of all the agricultural employees of S & J in California.

The parties stipulated at the hearing on this matter that the sole issue presented by S & J's objections is a determination of who is the statutory employer of the olive harvesting employees.

In October 1982, S & J Ranch, Inc., a land management corporation, commissioned Rio Del Mar, Inc. (RDM), a harvesting corporation, to harvest olives on land owned by three clients of S & J. Those clients, Apache Grove Limited 1970, Apache Grove Limited 1971 and Apache Grove Limited 1972 are Minnesota limited partnerships, each having one general partner. In each case, the general partner is Apache Corporation, a Minnesota corporation which owns all of the stock in S & J Ranch, Inc. S & J, a California corporation formed in the 1950s, manages agricultural operations for various land owners, including the AGL 1970-1972 olive groves. S & J also manages land holdings with citrus, fig and nut crops.

At the height of the 1982 olive harvest, approximately 500 employees were employed in the AGL 1970-1972 olive groves. Because of dissatisfaction with the piece rate they were receiving, and the apparent inability or unwillingness of RDM to accommodate their concerns, the olive harvest employees went on strike. RDM thereafter left the olive harvest, which was completed when S & J rehired some 300 of the employees, purchased or leased equipment and supervised the picking.

S & J asserts that RDM was a custom harvester, and,

Under the Act, must be considered the employer of the olive harvest employees. RDM admits fulfilling only the definition of a labor contractor. Therefore, RDM asserts that it is statutorily ineligible to be declared an employing entity.

Section 1140.4(c) of the Act provides:

> The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

Labor Code section 1682 provides in relevant part:

> (b) 'Farm labor contractor' designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons.
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> . . . . . .
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> (e) 'Fee' shall mean (1) the difference between the amount received by a labor contractor and the amount paid out by him to persons employed to render personal services to, for or under the direction of a third person; (2) any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him, and the amount paid out by him, for or in connection with the rendering of services.

We have frequently dealt with the issue *of* the difference between a "mere" labor contractor (an entity excluded from employer status under section 1140.4(c)) and labor contractors who possess sufficient indicia of employer status to qualify as employers under the ALRA. Our analysis on this matter is akin to the analysis performed by the National Labor Relations Board (NLRB) when determining whether a person is an employee or an independent contractor. See, for example, A. Paladini, Inc. (1967) 168 NLRB 952 [67 LRRM 1022] where the NLRB determined that fishing vessel captains were employees and not independent contractors despite their ability to hire their crew, establish the labor relations on board, select the fishing site, negotiate the price of their catch and establish the share of the profit to be distributed among the crew. The NLRB applied its "right of control" test and found that in light of the economic realities, the company which owned the fishing vessels and hired the captains assumed all the entrepreneurial risks. (See, e.g., Tenneco West, Inc. (1977) 3 ALRB No. 92; Gourmet Harvesting & Packing (1978) 4 ALRB No. 14, and the discussion of the "risk of loss" factor as a relevant consideration therein.)

In the agricultural context, we are governed by a statute that directs that labor contractors be excluded from the employer definition but that the definition of an employer should be broadly interpreted. Accordingly, we are often presented with more than one eligible employing entity. Our analysis then turns from a mechanical application of statutory language to a weighing of policy considerations.

In Rivcom Corporation and Riverbend Farms, Inc. (1979;

5 ALRB No. 55, we determined that Triple M, which provided expensive equipment, and harvested and hauled the crop for Rivcom Corporation and Riverbend Farms as well as set the wages for the harvesting employees, was not the appropriate employer. We based our finding on the facts that Rivcom and Riverbend oversaw the daily operations and instructed the crews as to where and when to harvest and that Riverbend had the substantial, long-term interest in the ongoing operation. In affirming our analysis, the California Supreme Court stated:

> Most significantly, [the Board] determined that Rivcom and Riverbend, rather than Triple M, had 'the substantial long-term interest in the ongoing agricultural operation' which made it appropriate to fix employer responsibilities on them. [Citation.]
>
> We agree. The ALRA expressly excludes both a 'farm labor contractor' and 'any [other] person supplying agricultural workers to an employer' from the otherwise expansive definition of 'agricultural employers' subject to the Act. A farm operator who 'engages' the labor supplier is 'deemed the [statutory] employer for all purposes' of the statute. [Citation.]
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> . . . . . .
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> The Board developed the 'custom harvester' distinction in response to arguments by certain labor suppliers that they were entirely excluded from statutory responsibility as mere labor contractors. No decision holds, however, that a custom harvester is the sole employer of any worker it furnishes. Any such result would undermine the statutory goal of fixing labor relations responsibility directly on farm operators. Thus, any assumption that Triple M acted as a custom harvester at Rivcom Ranch, and was therefore an employer of the workers there, does not preclude a finding that Rivcom and Riverbend, the ranch's operators, were also employers of those workers for purposes of the Act. The Board has reached the correct conclusion. Rivcom Corp. v. ALRB (1983) 34 Cal.3d 743, 768-769 [195 Cal.Rptr. 651, 665-666.] (Emphasis in original.)

In the present matter, our IHE determined, after an exhaustive analysis of the factors we set forth in

Tony Lamanto (1982) 8 ALRB No. 44, that RDM was a mere labor contractor and hence statutorily excluded from coverage under the ALRA. We disagree not with his ultimate conclusion regarding the appropriate employing entity, but with his finding that RDM is a "mere" labor contractor. Rather, we find that RDM is a "labor contractor plus" (see Kotchevar Brothers (1976) 2 ALRB No. 45) and therefore turn to the balancing of policy considerations, asking which entity, S & J or RDM, has "the substantial long-term interest in the ongoing agricultural operation." (Rivcom Corp. v. ALRB, supra, 34 Cal.3d at 768.)

RDM was incorporated in 1982 by Ruben Marin. Prior to incorporation, Marin had been providing harvesting services for six to seven years, primarily in citrus. Marin harvested S & J's olive crop in 1981. For the 1982 olive harvest at S & J Marin provided not only labor but equipment in the form of forklifts, tractors, bin trailers, tractor trailers, trucks for his supervisors, ladder trailers, ladders and field toilets. (RDM's equipment inventory was between $110,000 and $312,000.) RDM provided medical benefits for employees averaging over fifty hours per week and workers compensation insurance.

In light of the testimony of S & J's harvesting superintendent Don Anderson regarding the equipment utilized in the olive harvest, we are not prepared to classify RDM's inventory as non-specialized and noncostly. (See, e.g., Jordan Brothers Ranch (1983) 9 ALRB No. 41.) Rather, we believe that, in the appropriate circumstances, not here present, RDM might qualify as an employer under the Act. (See, e.g., Jack Stowell, Jr. (1977) 3 ALRB No. 93,

Corona College Heights Orange £• Lemon Association (1979) 5 ALRB No. 15.)

However, we are convinced that S & J has the substantial, long-term interest in the olive operations at issue here. Through its corporate relationship with the land owners of the olive groves; its responsibility for the planting, irrigating, pruning and maintaining of the olive groves; its responsibility for negotiating the price and quality control of the olive harvest with the canneries; its post-strike completion of the harvest and its acquisition of equipment to perform those harvesting responsibilities, S & J, and not RDM, is the appropriate statutory employer of the olive harvesting employees. Any entrepreneurial discretion exercised by RDM was of a limited nature. RDM bore little, if any, of the risk involved in the quality of the harvest.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of S & J Ranch, Inc. in the State of California for purposes of collective bargaining as defined in section 1155.2(a) concerning employees' wages, hours and terms and conditions of employment.

Dated: June 1, 1984

ALFRED H. SONG, Chairman

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

S & J Ranch, Inc. (UFW)

10 ALRB No. 26
Case No. 82-RC-7-F

IHE DECISION

Under strike conditions, an election was held among the agricultural employees of S & J Ranch, Inc., a land management company. The tally showed the United Farm Workers of America, AFL-CIO was selected as the exclusive representative. S & J objected to the election on the grounds that the striking olive harvest employees were actually employed by Rio Del Mar, Inc., an asserted custom harvester.

The IHE recommended certifying the results of the election based on his conclusion that Rio Del Mar, Inc. was solely a labor contractor, providing nonspecialized equipment and labor to S & J for a fee. He therefore found that Rio Del Mar was statutorily excluded from coverage under the ALRA and S & J was the employer of the olive harvesting employees.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the IHE as modified and certified the results of the election. The Board concluded that Rio Del Mar, Inc. was more than a "mere" labor contractor primarily due to the specialized equipment provided and economic relationship between S & J and Rio Del Mar. The Board, relying partially on Rivcom Corp. v. ALRB (1983) 34 Cal.3d 743, 768-769, then concluded that S & J had the substantial long-term interest in the ongoing agricultural operation and was therefore the more appropriate entity for employer status of the olive harvesters.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

S & J RANCH, INC.,

Employer,

RIO DEL MAR, INC.,

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,

Petitioner.

Case No. 82-RC-7-F

DECISION OF INVESTIGATIVE
HEARING EXAMINER

Howard A. Sagaser, Jory, Peterson & Sagaser
for the Employer

Thomas E. Campagne, Campagne & Giovocchini
for Rio Del Mar, Inc.

Ned Dunphy for the Petitioner

DECISION

STATEMENT OF THE CASE

KELVIN C. GONG, Investigative Hearing Examiner: This case was heard by me on March 28, 29, 30, 31 and April 5, 6, 7, 1983, in Fresno, California.[1/]

On October 20, 1982, the United Farm Workers of America, AFL-CIO (UFW, or Petitioner) filed a petition for certification

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1/In addition, telephone conference calls were conducted on April 28 and May 3, 1983.

to become the exclusive bargaining representative of the employees of S & J Ranch, Inc. (S & J or Employer) and Rio Del Mar, Inc. (RDM), as joint employers. The employees in question were on strike and a 4.8-hour election was conducted on October 22, 1982, pursuant to Labor Code section 1156.3. The tally of ballots showed the following results:

UFW	220
No Union	60
Challenges	115
Total	395

Employer timely filed objections to the election and the following issues were set for investigative hearing:

1. Whether the Fresno Regional Director improperly included Rio Del Mar, Inc. workers in the bargaining unit on the basis that they were employees of S & J Ranch, Inc.

2. Whether the Fresno Regional Director improperly comingled the ballots of employees working for S & J Ranch, Inc. with the ballots of Rio Del Mar, Inc. workers.

3. Whether the Fresno Regional Director improperly conducted a 48-hour election when employees of S & J Ranch, Inc. were not on strike.

4. Whether the election was conducted at a time when S & J Ranch, Inc. was not at 50% of peak agricultural employment.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments presented by the parties, I make the following findings of fact and conclusions of law.

JURISDICTION

The parties stipulated to the Board's jurisdiction in this matter. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code section 1140.4(c) and that the UFW is a labor organization within the meaning of Labor Code section 1140.4(f).

FACTUAL BACKGROUND

The facts of the present case were largely uncontested.

S & J Ranch, Inc.

S & J came into existence in the early 1950's. It was started by the Sumpfs, an old Fresno-area family, and Rodger Jensen, who had worked in land management since he left the armed services after World War II. S & J has been in the land management business for over 20 years.

In 1970, the Sumpfs sold all their property and the owners of S & J sold all their interest in the company to Apache Grove Land, Limited, (AGL), a Minnesota partnership. At approximately the same time, S & J formally incorporated under the laws of California. Since 1979, S & J, a subsidiary of AGL, has contracted as a land management company with the parent entity without interruption. S & J is presently in the seventh year of a ten-year contract with Apache Grove Land, 1970. (EX. No. 17.)

The officers and board of directors of S & J are: Raymond Plank, Chairperson; Rodger Jensen, President; and Beatrice Houston, Secretary. Both Plank and Houston serve in identical capacities with the parent organization, AGL. (TR: V, pp. 1-2.)

Therefore, the two entities share common officers and board members.

S & J is engaged in farm management of citrus, figs, olives and nuts for approximately twenty landowners. (TR: V, p. 7.) Exhibit No. 17, which was executed on June 30, 1976, between S & J and Apache Grove Land 1970, Limited is an example of the care and management agreements entered into by S & J.[2/] The agreement essentially provides that S & J will operate, manage, and maintain the property of the landowner, including the furnishing of irrigation, energy, fertilizer, pest control, field management, frost protection, harvesting of crops, pruning of crops, application of fertilizer, and the making of capital improvements and their maintenance.

Rio Del Mar, Inc.

Rio Del Mar, Inc. (RDM) was formed on March 31, 1982, and formally incorporated in 1982 under the laws of California. RDM is wholely owned by Ruben Marin, and the officers of the corporation are Ruben Marin, President; his wife Margie Marin, Vice-President; and Ann Contreras, Secretary.

Interrelationship Between S & J and RDM/Ruben Marin

S & J began harvesting olives for its client-landowners in approximately 1970. Up until the 1980 harvest, S & J's olive production was small. In 1980, the harvest increased to 2500 -2800 tons. (TR: III, p. 118.) Except for the years 1979, 1981,

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2/Apache Grove Land 1970, was one of three entities which owned the land on which the olives were grown. It is a partnership having AGL as one of the partners.

and 1982. S & J has directly hired employees and conducted the olive harvest. (TR: III, p. 116.) In 1979, 1981, and 1982, other entities conducted the harvest and hired the workers.

In 1979, S & J hired Ruben Marin to help harvest one of S & J's olive orchards. (TR: V, p. 80.) In 1981, S & J hired Marin to oversee the entire olive harvest. When Marin started, he did not have any crews; however, 5 & J was able to turn over to Marin 200 to 250 job applications it had collected. Marin testified that he was told to hire his crews from those applications. (TR: II, p. 48.) In the 1981 S & J olive harvest, Marin provided labor, supervision of labor, and harvest equipment, i.e., forklifts, bin trailers and tractors.

Prior to the start of the 1982 olive harvest, S & J was informed by different olive canneries that, if S & J were to do the olive harvest itself, it would cost approximately five to six cents per pound. (TR: IV, pp. 84-85.) With that information, S & J solicited estimates from various harvest operators including Ruben Marin. Vice-President in charge of production Ron Lopes, Ranch Manager Charley Rose, and Harvest Superintendent Don Anderson represented S & J in contract negotiations with RDM. S & J drew up "negotiation notes" (Ex. No. 21) based on past expenses and the harvesting estimate given by the olive processors. For $161.00 per ton, RDM agreed to provide labor, supervision of the labor, and equipment,[3/] and to supervise the

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3/The equipment consisted of four or five forklifts, six tractors six bin trailers, six toilets, ladders, and buckets. These figures were provided in a December 29, 1982, declaration Ruben Marin filed in response to interrogatories from the ALRB's Executive Secretary.

harvest up to the loading of the olives on trucks to be taken to the olive processors. Based on the $161.00 per ton price, workers received $1.10 per bucket picked. RDM received $16.80 per ton for commission, $10.00 for field supervision and equipment rental, and $24.20 for taxes and accounting. (See Ex. No. 21.) Marin attempted to raise the per ton price; however, S & J held firm, informing Marin that there were other harvest operators who would work for less.

S & J Contracts with Olive Processors

S & J contracted with two olive processors, Bell Carter and Early California. Copies of the contracts were admitted into evidence as Exhibit Nos. 15 and 16. the orchards managed by S & J are divided into different "fields" which are assigned numbers for identification purposes.[4/] S & J alone decided which field an olive processor would receive contract rights to. (TR: VII, pp. 29-30.)

The orchards in question produced three different types of olives: Manzanillo, Ascolano, and Sevillano. The processors paid S & J's clients based on the type, size, and quality of the olives. (TR: III, p. 95; V, pp. 89, 93.) However, S & J paid RDM a flat per ton rate regardless of the size, quality or type of olive. (TR: V, p. 91.)

Events leading Up to the Strike/After the Strike

During contract negotiations between Marin and S & J, Marin informed the land management company that the workers

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4/For example, Bell Carter contracted to purchase the olives grown in Field No. 6-2 and the east half of No. 4-3.

might not be satisfied with their wages. Marin testified that Anderson assured him that if the workers were unhappy, S & J and RDM could renegotiate the contract price. (TR: II, pp. 64, 66.) When the workers began complaining, Marin attempted to speak with Anderson, but *he* was unavailable due to medical reasons. Marin ended up discussing the matter with Ron Lopes, who refused to renegotiate the contract and suggested that Marin move the crews to different fields where the picking might be better. (TR: II, p. 68.)

When the move to the other fields did not pacify the workers, Marin again met with Lopes, and S & J agreed to raise the contract price to $176.00 per ton. Based on the renegotiation, Marin offered the workers $1.25 per bucket, but the workers refused the offer.[5/] Marin then offered another five cents per bucket out of his own profit. That offer was also refused. (TR: II, p. 101; VII, pp. 15-16.)

Since neither the change in fields nor the offered wage increases alleviated the worker dissatisfaction, the employees went on strike on October 20. There was a dispute over whether Marin/RDM quit or was fired by S & J. Regardless of the resolution of that dispute, it is clear that Marin left S & J's employ. On October 20, the UFW filed a petition for certification naming S & J and RDM as joint employers. the ALRB Delano Regional Director determined that RDM was a labor contractor and not a custom harvester, and the election was held with S & J as the named employer.

5/The 51.25 per bucket price corresponds with the $176.00 per ton fee S & J proposed in the "negotiation notes." Ex. No. 21.

After the election, the UFW and S & J bargained over rehiring the strikers. Three hundred workers were hired to pick olives. A majority of those hired were from the original group of strikers. (TR: V, p. 113.) With those employees S & J assumed total responsibility for the 1982 olive harvest. (TR: V, p. 113.)

OBJECTIONS AND ANALYSIS

Labor Code section 1156.3(c) provides in pertinent part, "Unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." Therefore, the burden of proof is placed on the party seeking to set the election aside. See Patterson Farms (1982) 8 ALRB No. 57 and TMY Farms (1976) 2 ALRB No. 58.

Although four objections were set for hearing, the parties stipulated that the primary issue was whether RDM was a custom harvester and the more stable employer for bargaining purposes. Therefore, the resolution of the remaining objections is dependent upon my finding concerning RDM's status as a custom harvester or labor contractor. (TR: I, pp. 3-4.)

Labor Code section 1140.4(c) specifically excludes farm labor contractors from the definition of an agricultural employer and provides that the agricultural workers supplied by a labor contractor be deemed to be employees of the employer engaging the labor contractor. A labor contractor essentially provides labor for a fee. Labor Code section 1682(b). However, the mere fact that a person holds him/herself out as a Labor contractor will not bar the Board from finding him/her to be an agricultural employer where the services provided by that

Person to the grower in question exceed those normally performed by a labor contractor. Kotchevar Brothers (1976) 2 ALRB No. 45.

There does not appear to be a consistent pattern nor set formula for determining whether an agricultural entity is a labor contractor or custom harvester. In cases where the agricultural enterprise which provides labor also provides "something more as well" the Board will review the whole activities of that entity and the grower in order to determine which has the more significant attributes of an employer. Kotchevar Brothers, supra.

In determining whether an entity is a labor contractor or custom harvester, the Board has engaged in a full inquiry into *every* factor that bears upon the labor contractor/custom harvester distinction with the ultimate goal of determining which entity will promote the most stable and effective labor relations. Tony Lomanto (1982) 8 ALRB No. 44, citing San Justo Farms (1981) 7 ALRB No. 29. The inquiry should include, but not be limited to, the following:

1. Who exercises managerial control over the various farming operations? Who has day-to-day responsibility?

2. Who decides what to plant, when to irrigate or harvest, which fields to work on?

3. Who is responsible for performing the farming operations?

4. Who provides the labor? Does the provider also supervise the labor?

5. Does someone provide equipment of a costly or specialized nature?

6. Who is responsible for hauling the crop to be processed or marketed?

7. Who owns or leases the land?

8. On what basis are any contractors compensated and who bears the risk of crop loss?

9. Do the parties have any financial or business relationships with each other, outside of the relationship at issue in the case? What form of business organization is each party to the case?

10. How do the parties view themselves, i.e., does the grower/landowner consider the contractor a custom harvester? If other growers enter into similar arangements with the contractor, what are their views?

11. How long has each party been entering into arrangements of the kind at issue in the case? What is each party's investment in that line of business and how easily could that investment be liquidated?

12. What continuity of employment relationship exists between any of the parties and the agricultural employees involved in the case. e.g., did harvest employees also work before or after the harvest for one of the parties?

13. Ultimately, who is the "employer" for collective bargaining purposes and what is the correct legal status of each of the parties?

Tony Lomanto, supra, p. 6.

The threshold issue is whether RDM provided "something more as well" than the normal services provided by a labor contractor. In the present case, RDM provided labor, supervision of that labor, bookkeeping services, and equipment for the 1982 olive harvest. The hiring, firing, disciplining, general supervision of labor, and the bookkeeping, do not exceed those duties

normally provided by labor contractors. Jordon Farms (1983) 9 ALRB No. 41, citing Labor Code section 1682 and Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 323. However, RDM also provided equipment in the form of forklifts, tractors, trailers, and toilets, as well as possibly having had a primary employer relationship with the employees. (See discussion below.) Based on the providing of equipment and the question of primary relationship with the employees, an examination of RDM's "whole activity" is needed.

> Who exercises managerial control over the various farming operations? Who has day-today responsibility?
>
> Who decides what to plant, when to irrigate or harvest, which fields to work on?
>
> Who is responsible for performing the farming operations?

S & J has managerial control over the various farming operations pursuant to its contracts with the landowners. (Ex. No. 17.) The decisions of what to plant and when to irrigate are not within the duties of RDM. S & J is responsible for irrigation. Any decisions on what to plant are made by AGL, the parent company of S & J. (See Ex. No. 17.)

All final decisions as to which fields to start work on were made by Don Anderson and the two olive processors. (TR: V, p. 111.) When olive processor representatives came out to the fields, they normally sought out Don Anderson, Fritz Helzer, or other S & J management. (TR: V, p. 108.) Although Anderson asserted that Marin had input into decision-making, he could not recall any incident in the 1982 olive harvest where Marin

actually participated in making any decisions. In addition, Anderson testified that, if there were any disagreements between himself and Marin, he and not Marin would have final authority as to which fields to work on. (TR: V, p. 112.)

RDM assumed day-to-day responsibility for supervision of the labor provided. However, the ultimate decisions, i.e., when to harvest and where to harvest, were made by S & J and the olive processors. Hence, I find that S & J was responsible for the farming operations.

Who provides the labor? Does the provider also supervise the labor?

Don Anderson testified that he had no input into who RDM should hire or who the foreperson should be. He testified that neither he nor S & J personnel supervised any of RDM's workers. However, he went out into the fields to check the maturity level of the olives, and the size of the fruit, and he checked the progress being made to insure that the olives were shipped out. (TR: IV, p. 103.) At least once during the pre-strike harvest, the harvest was not moving as fast as S & J desired. Anderson denied that he complained to Marin, but stated that he and Marin discussed the problem. After the discussion, the production problems improved. (TR: V, p. 115.)

I find that RDM provided labor and exercised general supervision over the workers in question. However, I do not find this particular factor determinative of the issue at hand. A labor contractor normally provides labor and supervision of those workers.

Does someone provide equipment of a costly or specialized nature?

RDM provided four or five forklifts, six tractors, six bin trailers, six toilets, ladders, and buckets. In Tony Lomanto, supra, 8 ALRB No. 44, the custom harvester provided costly equipment which was primarily suitable for the harvesting of tomatoes. In Kotchevar Brothers, supra, 2 ALRB No. 45, the custom harvester provided 40 pairs of tractors and gondolas plus several forklifts.

Forklifts, tractors, trailers, toilets, ladders, and buckets do not appear to be specialized equipment which would tie RDM to the olive harvest year after year as in the case of Tony Lomanto, supra, which involved expensive tomato harvesting machinery which tied the custom harvester to the tomato harvest. RDM did provide forklifts which were used to lift the bins of olives onto the trucks. However, the forklifts could also be used for any harvest in the loading of the crop onto trucks. (TR. VIII, p. 36.) In Sutti Farms (1982) 8 ALRB No. 63, the Investigative Hearing Examiner found that providing two tractors did not make an entity a custom harvester. The IHE found that the equipment was neither costly nor specialized like the forty pairs of tractors and gondolas the custom harvester provided in Kotchevar Brothers, supra. In the present case, the quantity of equipment RDM provided does not approach that which was provided by the Kotchevar Brothers. Hence, the equipment was not as costly as in the cited case.[6/] Based on the above, I

6/In addition, Kotchevar Brothers assumed total responsibility for hauling the crop to the wineries, thus providing a complete service, unlike the present case where RDM's responsibility ended with the harvest.

conclude that RDM provided equipment, but that it was neither specialized nor costly.

Who is responsible for hauling the crop to be processed or marketed?

Neither entity hauled the crop to the olive processors. Hernandez Trucking, which was hired by S & J, assumed total responsibility for the hauling. RDM's responsibility for the harvest ended when the olives were placed on the trucks. Neither S & J nor RDM have any interest in Hernandez Trucking, and the owners of Hernandez Trucking have no interest in either S & J or RDM. I find that S & J, which arranged for Hernandez Trucking to haul the olives, was responsible for this part of the process.

Who owns or leases the land?

Neither RDM or S & J own the land in question. The land on which the olives were grown is owned by three different partnerships, Apache Grove Land 1970, Apache Grove Land 1971, and Apache Grove Program 1972. The three partnerships have a common general partner, AGL, the sole owner of S & J. S & J has managed the land in question for Apache Groove Land 1970, Apache Grove Land 1971, and Apache Grove Program 1972, since the inception of these entities. (TR: III, p. 73.) Although S & J does not own the land, I find that based on AGL's ownership of the land and its ownership of the land management company, S & J has more of a connection to the land.

On what basis are any contractors compensated and who bears the risk of crop loss?

In Jordon Brothers, supra, the Acting Regional Director found that the risk of profit or loss was determined primarily by the following factors: the type of crop grown, the soil

condition, the effectiveness of the fertilizer, irrigation, the ability to control weeds and insects, and the demands and manipulations of the market. Essentially, the listed factors involve decisions which may impact the success of the crop and the ability to maximize profits from the crop. RDM had no responsibility in any of those areas. S & J assumed many of the listed responsibilities pursuant to its land management contracts. (See Ex. No. 17.) Hence, S & J and not RDM exercised its independent judgment on those factors which could affect the margin of profit.

S & J argued that RDM bore the risk of loss on two theories. First, S & J asserted that RDM was paid on a per ton basis, which indicates the possibility of risk of loss (citing Tony Lomanto, supra.) A close scrutiny of that case shows that the custom harvester was paid on *a* per ton basis on what was accepted by the canneries. Hence, Lomanto had to exercise some judgment during the harvest in order to maximize his profit. In the present case, RDM was paid a flat per ton rate for harvesting the olives. The landowners were paid based on the type, size, and quality of the fruit. In the case of Bell Carter, the olives were weighed before they arrived at the processing plant, and that initial weigh-in determined the amount owed to RDM. The Weight slips were submitted to S & J from RDM. (See Ex. Nos. 12, 13 and 14.) Upon arrival at Bell Carter the olives were graded and reweighed to determine the amount owed to S & J's clients. Early California weighed the incoming fruit on a scale in its yard, sampled it to ascertain type, size, and quality, and paid S & J's clients on that basis. (TR: V, pp.

90-91) 5 & J used the tonnage figures from the Early California scales to determine payment to RDM.

RDM's payment remained the same regardless of the type, size, or quality of the crop. For example, if processors rejected the olives as unsuitable, i.e., too small or of inferior quality, they could still purchase the fruit at a lower price. (TR: III, p. 97.) However, RDM's payment would not be affected. If RDM workers only harvested small olives and the processors rejected a partial load, S & J's clients, the landowners, and not RDM absorbed the loss. (TR: III, p. 118.) There is no evidence that RDM's payment was dependent upon what was accepted by the olive processor. RDM did not have to exercise any independent judgment in order to maximize profits. Hence, I reject S & J's first argument.

Secondly, S & J argued that since RDM was paid a flat $161.00 per ton, RDM assumed the risk of loss if some judgment was not exercised during the harvest. The argument is essentially based on the following theory. Olive buckets weigh from 18-22 pounds and a bin may weigh 900-1000 pounds. RDM's profit is directly related to the amount of olives that RDM supervisors have their employees place into their buckets if RDM is paying on a piece rate.

S & J contends that by law the employer must pay piece-rate workers at least the minimum wage of $3.35 per hour. If RDM is paying the workers $1.10 per bucket, the employee must pick 3.045 buckets per hour. S & J states that if the employees

of RDM only average 2.5 buckets per hour, the per ton harvest cost for RDM would be as follows:

Profit Analysis of Rio Del Mar, Inc.

	18 lb. Bucket.	20lb Bucket	22lb Bucket
1) 2.5 Buckets/Hour $3.35/2.5 equals $1.34/bucket	$148.89[7/]	$134.00	$121.82
2) Equipment Rental	10.00	10.00	10.00
3) Payroll Taxes & Accounting	24.20	24.20	24.20
Harvest Cost Per Ton	$183.09	$168.20	$154.02
Harvest Price Per Ton	$161.00	$161.00	$161.00
Net Profit	$-22.09	$ 7.20	$ 4.98

Therefore, S & J asserts, RDM assumes the risk of loss or profit on the actual harvest cost per ton, while S & J is guaranteed a fixed harvest cost per ton.

A close scrutiny of S & J's "Profit Analysis of RDM" raises some questions. First, it is unclear how S & J arrived at the fact that a worker will average 2.5 buckets per hour. It would seem logical that the 2.5 buckets must be based on a certain bucket size; that point raises the second issue. In order to follow S & J's "Profit Analysis", we must assume the worker will average 2.5 buckets per hour regardless of the size of the bucket. It would seem more logical that, if the bucket size increases, the worker will pick less buckets per hour.

7/The dollar amounts are arrived at by the following formula:
2000 lbs. (1 ton)
16 lbs. (size of bucket) x 1.34 per bucket.

In other words, if a worker using an 18 pound bucket can pick 2.5 buckets in an hour, s/he using a 22 pound bucket will pick less than 2.5 buckets. Although S & J's mathmatical calculations appear correct, the analysis is suspect.

S & J is essentially arguing that RDM had some control over the harvest in order to maximize its profits, and, hence, exercise independent judgment. As mentioned above, olive profits were dependent upon type, size, and quality of the fruit. Factors such as decisions on what to plant, irrigation, fertilizer, soil conditions, and weed control, affect the type, size, and quality of the olives. Those factors were decided by S & J and not RDM. The only independent discretion left to RDM was the size of bucket the employees used. Such a decision hardly seems of *a* nature as to qualify RDM as a custom harvester. Moreover, any labor contractor may determine his/her profit by deciding what to pay the employees or how much to charge the grower. I am unconvinced by S & J's second argument.

Employer asserted that, since it was guaranteed a fixed cost per ton for the harvest and the landowners would absorb losses on nonconforming goods, S & J did not bear the risk of crop loss. However, S & J would be indirectly affected by such losses resulting from poor land management. Any managerial misjudgment by S & J would adversly impact the prospects for a continuing contractual relationship with the landowner. Hence, I find that, as between the two entities, S & J exercises independent judgment and bears the risk of loss for any misjudgment.

Do the parties have any financial or business relationship with each other, outside of the relationship at issue in the case? What form of business organization is each party to the case?

RDM has harvested citrus for S & J in the past. Aside from the citrus harvest and the relationship at issue, the parties do not have any relationship with each other. Both parties are California corporations.

How do the parties view themselves, i . e . , does the grower/landowner consider the contractor a custom harvester? If other growers enter into similar arrangements with the contractor, what are their views?

Employees of S & J testified that they viewed RDM as a custom harvester. Ruben Marin viewed himself as a labor contractor. No other growers testified. I do not find this factor particularly probative.

How long has each party been entering into arrangements of the kind at issue in the case? What is each party's investment in that line of business and how easily could that investment be liquidated?

Although RDM has only been formally incorporated since March 1982, Ruben Marin has provided similar services and equipment to other growers for approximately six to seven years. S & J has been in the land management business for at least twenty years.

The parties stipulated that RDM's total costs for acquiring transportation, agricultural and office equipment were approximately $312,000.00. The present fair market value of said equipment was stipulated to be between 5110,000.00 and $150,000.00. (TR: IX, p. 4.) RDM does not own any real property.

S & J's 1982 depreciation schedule was admitted into evidence as Ex. No. 24. For its Madera, Kings, and Fresno/Tulare operations, S & J's total acquisition cost for machinery, farming equipment, transportation equipment, office furniture, fixtures, and buildings was approximately $2,348,529.00. The "book value" of said items was approximately $1,032,551.00.[8/] For the S & J Madera operations alone, the acquisition costs of the above items totaled approximately $1,434 ,724.00 , while the book value was approximately $884,214.00 .

Based on the fact that S & J has been in the land management business for over twenty years and the fact that its capital investment is in the millions of dollars, I find that S & J would have the more difficult time liquidating its investment .

> What continuity of employment relationship exists between any of the parties and the agricultural employees involved in the case, e.g., did harvest employees also work before or after the harvest for one of the parties?

S & J argued that RDM should be considered the employer for bargaining purposes because RDM, and not S & J, has a continuing relationship with the employees. Furthermore, S & J asserted that RDM provides nearly yearly employment and is therefore a more stable employer.

Marin testified that when he started the 1982 olive

8/Once an item has been fully depreciated for tax purposes, it has a "book value" of SO. Therefore, the term book value does not necessarily equal the fair market value of those items.

harvest he brought along 70-80 workers from the citrus harvest which had just ended. He later testified that out of the 494 employees on RDM's payroll for the 1982 olive harvest, approximately 30%, or 150, had worked with him in citrus. (TR: II, pp. 13-14.) After the 1982 olive harvest, which S & J conducted, approximately 230 of the 494 workers went to harvest winter citrus with RDM. (TR: II, p. 39.)

S & J maintained that it had no continuing relationship with the employees based on a comparison between RDM's Master Payroll List (Ex. NO. 9) and S & J's Employee Master List (Ex. No. 11.)[9/] Based on Marin's testimony, I find that RDM had a more continuing relationship with the workers.

The fact that RDM may have a continuing relationship with the employees does not necessarily make RDM a custom harvester. A labor contractor is normally hired to provide workers to a grower. It is not unusual for the workers to have their primary ties to the labor contractor. One could argue that, since RDM has a relationship with the employees, it controls the terms and conditions of employment. As mentioned above, supervision of labor, bookkeeping duties, and providing workers are the normal duties of a labor contractor. S & J and the olive

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9/I question the probative value of the comparison. Ignacio Rivas testified that some workers in the olive harvest worked under their spouse's name/social security number. (TR: VII, pp. 90-91.) Rivas' testimony is supported by an examination of Ex. No. 9, which shows the number of buckets a worker picked per day. Some workers picked an extraordinary high number of buckets per day which leads me to conclude the Ex. No. 9 does not show the names and/or social security numbers of everyone who worked in the 1982 olive harvest. Hence, any comparison with Ex. No. 9 would result in an inaccurate conclusion.

processors determine whether to pick at all, where to pick, when to pick, and the amount to be picked. Those decisions ultimately impact whether the employees work at all, the number of employees who will work, and how much an employee will eventually earn. I find that S & J and the olive processors ultimately made the decisions which affected the terms and conditions of employment.

Ultimately, who is the "employer" for collective bargaining purposes and what is the correct legal status of each of the parties?

A review of the whole activity of RDM shows that it provided labor, supervision of that labor, and harvesting equipment. In addition, RDM may have had a more continuing relationship with the employees. However, RDM's responsibilities ended with the harvest. Providing labor and supervision are normal duties of a labor contractor, and the equipment RDM provided was neither specialized nor costly. Finally, the fact that employees may have had a continuing relationship with RDM is not an unusual attribute of a labor contractor.

The Board has found agricultural entities to be custom harvesters when they "exercised managerial judgment," had "complete managerial responsibility," or were "hired to exercise [their] own initiative, judgment, and foresight." See Garin Co. (1979) 5 ALRB No. 4; Joe Maggio, Inc. (1979) 5 ALRB No. 26; and Napa Valley Vineyards Co. (1977) 3 ALRB No. 22. RDM exercised no managerial judgment nor was it hired to exercise its own initiative, judgment, or foresight. On the other hand, S C, J maintained control over the year-round farming operations and, pursuant to its land management contracts, was responsible for

exercising its independent judgment in order to maximize profits for the various landowners.

Weighing the activities of the two entities, I find that RDM did not have the type of control over the harvest, nor did it exercise the type of independent judgment needed to be deemed a custom harvester. Although RDM provided "something more" in the form of equipment, it was neither specialized nor costly, and is insufficient to raise RDM's status to that of a custom harvester. I conclude that RDM was a labor contractor and not the employer of the workers who voted in the October 22 election.

Assuming, arguendo, that RDM was a custom harvester, an examination into which entity would promote the more stable relationship for the purposes of collective bargaining is necessary. See Sutti Farms (1982) 8 ALRB No. 63. The monetary investment of S & J is far greater than that of RDM. S & J's tie to the olive harvest and land in question is based on a ten-year contract with grower partnerships which are partly owned by S & J's parent company, AGL. S & J has also provided land management services for those landowners since the inception of the three different partnerships. RDM has no continual tie to the olive harvest nor the land in question. S & J has provided land managment services for at least twenty years while Ruben Marin has been in the business for six or seven years. I find that, of the two entities, S & J would provide the more stable relationship for collective bargaining purposes.

CONCLUSIONS AND RECOMMENDATION

I find that S & J Ranch, Inc., is the agricultural employer for the employees who voted at the October 22, 1982, election. Pursuant to the parties' stipulation that the resolution of the objections is dependent upon my finding concerning RDM's status as a custom harvester or labor contractor I make the following findings:

1. I find that the Fresno Regional Director properly included RDM workers in the bargaining unit on the basis that they were employees of S & J;

2. I find that the Fresno Regional Director properly comingled the ballots of employees working for S & J with the ballots of employees working for S & J with the ballots of RDX workers;

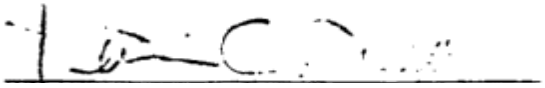
3. I find that the Fresno Regional Director properly conducted a 48-hour election based on the fact that S & J employees were on strike, and;

4. I find that the election was conducted at a time when S & J was at 50% of peak agricultural employment.

Based on the above, I recommend that the Board dismiss Objection Nos. 1, 2, 3, and 4. Furthermore, I recommend that the Board certify the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of all the agricultural employees of S & J Ranch, Inc.

DATED: November 29, 1983

Respectfully submitted,



KELVIN C. GONG
Investigative Hearing Examiner