Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ANDREWS DISTRIBUTION COMPANY, INC., Employer and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78-B, Petitioner.	)	Case No. 88-RC-l-EC 14 ALRB No. 19

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following the filing of a Petition for Certification by the Fresh Fruit and Vegetable Workers Union, Local 78-B (Union), on January 20, 1988,[1/] the Regional Director conducted a representation election on January 27 in a unit of employees employed by Andrews Distribution Company, Inc. (Employer or ADO in its vacuum cooling plant in Holtville, California. The official Tally of Ballots showed the following results:

Union	7
No Union	0
Challenged Ballots	1
Void Ballots	0
TOTAL	8

The Employer timely filed post election objections, three of which were set for a full evidentiary hearing before an Investigative Hearing Examiner (IHE). Upon commencement of the

[1/] All dates refer to 1988 unless otherwise indicated.

hearing, the Employer withdrew two of the objections which had been included in the Notioce of Objections Set for Hearing. In the remaining objection, the Employer alleged that the employees in the unit sought by the Union were not engaged in agriculture and, therefore, the election should be set aside.

In a Decision issued on August 2, IHE Barbara D. Moore found that ADC's employees were in fact agricultural employees and recommended that the Fresh Fruit and Vegetable Workers Union, Local 78-B, be certified as the exclusive representative of all ADC employees employed in Imperial County, California.

The employer timely filed exceptions to the IHE's Decision with a brief in support of exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the IHE's Decision in light of the record and the Employer's exceptions and has decided to affirm the IHE's rulings, findings, and conclusions to the extent they are consistent herewith, and to certify the results of the election.

The central issue in this case concerns the relationship between Jerry Neeley, an individual, and ADC, an off-the-farm facility devoted to the cooling (and/or packing and storing) of fresh produce in preparation for market or for delivery to market. ADC contends that Neeley is an independent grower and that the extent of the produce which ADC processes for him is sufficient to remove the cooling plant from the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act). ADC seeks to bring itself within federal precedents which provide that employees who handle a significant proportion of agricultural commodities for

independent growers are not agricultural laborers but are employees within the meaning, and, thereby, the jurisdiction of the National Labor Relations Act (NLRA).

The Employer excepts to the IHE's finding that Neeley is not an independent grower, as well as to her further finding that the vacuum cooler employees are engaged in activities falling within the definition of agriculture as set forth in Labor Code section 1140.4(b).[2/]

While we affirm the IHE's findings, we also believe it is incumbent upon the Board to define Neeley's actual status vis-a-vis ADC. For reasons discussed below, we conclude that Neeley is at most an investor in a single employing enterprise consisting of four nominally separate entities which function in effect as a single employer.[3/] The entities are: (1) Fred Andrews, owner or lessee of substantial farm acreage in California, including acreage in California's Imperial Valley; (2) Rainbow Ranches, Inc. (Rainbow), a growing company wholly owned by Andrews and under contract only to Andrews to produce lettuce on land controlled by Andrews; (3) ADC, the cooling facility described above, also wholly owned by Andrews and handling lettuce produced exclusively on Andrews land; and, (4) Neeley, owner of an undivided 22 percent interest in lettuce crops grown by Rainbow on

[2/] All section references are to the California Labor Code unless otherwise indicated.

[3/] We are concerned only with Neeley's role within the meaning of the ALRA and our Decision herein in no way purports to impinge upon business arrangements in any context other than that of agricultural labor-management relations.

Andrews land and processed by ADC.4/

Apparently, Neeley made weekly visits to the Imperial Valley/ as Andrews explained, "to become involved with all the spare time he could devote to this enterprise [in order] to become as familiar as he can with harvesting, packing and cooling ..." Andrews, on the other hand/ appears to devote full time to the operations of all of the entities involved in this proceeding and is actively engaged on a day-to-day basis in running Rainbow and ADC as well as overseeing cultural practices on the farm acreage he controls. Andrews effectively assumes responsibility for harvesting, packing, cooling and selling all the crops. In addition, neither Rainbow nor ADC owns any land and virtually all of the equipment utilized by either of them in their respective

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4/ The relationship between Andrews and Neeley began in August 1987, when the parties executed a written agreement whereby Neeley was to advance a specified amount of cash in exchange for the right to share in profits and losses from lettuce produced by Andrews. Neeley's losses were to be limited to the amount of his monetary investment whereas his profit potential could reach, but not exceed, 22 percent after all costs of production and marketing were deducted. While the agreement provides Neeley with an undivided interest in the crop, it does not grant him an equal voice in day-to-day decision making. The agreement permits Neeley to participate only in decisions regarding his share of the crop, but such participation is neither mandatory nor binding on Andrews. As the IHE observed, "in the absence of direction from Neeley or in following any such directions, Rainbow or Andrews will follow normal industry standards." The IHE's reading of the agreement is consistent with Andrews' description of actual practice, implying in his testimony that Neeley's limited participation resulted from his lack of prior experience with lettuce growing operations. The record indicates that Neeley's 22 percent interest extends in a like ratio to Andrews' lettuce operations in the Palos Verde and San Joaquin Valleys as well as the' Imperial Valley. The portion of the produce in which Neeley holds an interest is intermingled with that of Andrews and cannot be separately identified. All produce is packed and marketed under one of three labels registered to Andrews and/or ADC.

operations is leased from Andrews.

The IHE found that Neeley had no control over employees' rates of pay or other terms and conditions of their employment. Moreover, there is no evidence of wages paid or granted by Neeley, independent of Andrews, or that Neeley had a labor relations policy separate from that of Andrews.

The analysis employed by the National Labor Relations Board (NLRB or Board) and the courts in determining whether two or more entities are sufficiently integrated so that they may fairly be treated as a single employer is that set out in Parklane Hosiery Co. (1973) 203 NLRB 597 [83 LRRM 16303, amended 207 NLRB 991 [85 LRRM 1029]. The four principal factors considered by the NLRB in Parklane, supra, were: (1) functional interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. In NLRB v. Carson Cable TV, et al. (9th Cir. 1986) 795 F.2d 879 [123 LRRM 2225], the court observed that the NLRB has often stressed the first three of the factors listed above, particularly that which relates to control of labor relations, because such factors are reliable indicators of an operational integration. The court cautioned that while no one factor is controlling, neither must all four factors be present in order to find single employer status. Thus, single employer status depends on all of the circumstances and has been characterized as an absence of an "'arm's length1 relationship . . . among unintegrated companies." (Blumenfeld Theaters Circuit (1979) 240 NLRB 206, 215 [100 LRRM 1229], enforced (9th Cir. 1980)

626 F.2d 865 [106 LRRM 2369].)

Application of these standards compels a conclusion that Andrews, Rainbow, ADC and Neeley comprise a single integrated enterprise and, as such, are a single employer. (NLRB v. Carson Cable TV, supra, 795 F.2d 879; Parklane, supra, 203 NLRB 597.) The facts show that Rainbow and ADC, including Neeley's interest therein, are commonly owned, guided and controlled by a single personality, namely, Fred Andrews, with a single labor relations policy; that all operations are interrelated; and that they have common management not found in arm's length relationships existing among non-integrated companies. Furthermore, it is Andrews who meaningfully affects matters relating to the employment relationship of all employees of the various entities. (See, e.g., Chaim Babad, et al. (1985) 372 NLRB 1523 [118 LRRM 1230], wherein the NLRB found that six partnerships function as a single employer in view of their interrelationship with respect to operations, management, and centralized control of labor relations.)— Thus, Neeley is not an independent entity vis-a-vis

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˚5/ The employer herein calls attention to disclaimers in the Andrews/Neeley agreement which state that the relationship between them should be for all purposes that of independent contractors and that neither of them should be construed as an agent, employee, partner or joint venturer or associate of the other for any purpose whatsoever. While the provisions must be considered in determining Neeley's status, the descriptions therein are conclusions of law not binding on the Board. (Packing House & Industrial Services v. NLRB (8th Cir. 1978) 590 F.2d 688 [100 LRRM 2356].) As the NLRA expressly excludes "independent contractors" from the section 2(3) definition of "employee," independent contractor status typically is raised as a defense to the imposition of liability for unfair labor practices

(fn. 5 cont. on p. 7)

Andrews, Rainbow and ADC, but is a participant in a single integrated farming enterprise in which ultimate authority is vested in Andrews.

Examining ADC's legal argument in the best possible light from its point of view and assuming, for purposes of analysis only, that Neeley is indeed a distinct business entity, the question here would be governed by NLRB v. Carson Cable TV, et al., supra, 795 F.2d 879, wherein the court concluded that although three business enterprises were nominally autonomous, each with its own labor force and labor relations policy, effective control and major labor policy decisions relating to the overall or combined enterprise were vested in a central authority.6/

(fn. 5 cont.)

in the employment or agency context. Thus, "the Act requires application of the 'right to control1 test" when determining whether a person is an independent contractor. (Packing House, supra, 698, 699, fn. 15.) In light of the traditional "independent contractor" analysis, we do not find it applicable in examining whether an individual is a distinct business entity for purposes of determining single or joint employer status under the ALRA. (See, Boire v. Greyhound (1964) 376 U.S. 473 [55 LRRM 2694].)

6/ Were it shown, under a joint-employer analysis, that Neeley did possess indicia of employer status sufficient to deem him an independent company, and that the at least shares in matters affecting Rainbow/ADC employees in his association with Andrews, he would be a joint-employer of ADC employees. Joint-employer status presumes that two or more business entities are independent and separate for other than labor relations purposes. (NLRB v. Browning-Ferris Industries (3d Cir. 1982) 691 F.2d 1117 [111 LRRM [111 LRRM 27481.) The concept differs from whether two or more companies are a single employer as it is premised on the recognition that the business entities are in fact separate but they share or codetermine the essential terms and conditions of

(fn. 6 cont. on p. 8)

Having thus determined that all of the entities in question in this proceeding constitute a single enterprise, we turn now to the question whether ADC employees are engaged in agriculture. Section 1140.4(b) requires that we answer that question in conformity with the definition of agriculture as set forth in the Fair Labor Standards Act of 1938 section 3(f), 29 U.S.C. section 203(f) (FLSA). Ultimate decisions on interpretations of the FLSA are made by the federal courts. (Mitchell v. Zachry (1959) 362 U.S. 310; Kirschbaum v. Walling (1942) 316 U.S. 517.) Thus, in Farmers Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755, the U.S. Supreme Court defined "agriculture" to include primary and secondary farming activities. Primary farming was defined as actual farming practices including the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities. Secondary agriculture refers to practices not falling within the primary meaning of agriculture but which are performed by a farmer or on a farm as an incident to or in conjunction with the same farming operations.

There is no dispute that employees who work in the production, cultivation, growing, and harvesting of agricultural commodities for Andrews and Rainbow are engaged in actual farming operations. But, inasmuch as employees who work in the ADC

(fn. 6 cont.)

employment of the employees in question. (Thus, there need be no additional showing of common ownership, management or interrelation of operations as is required for single employer status). (See, e.g., NLRB v. C. R. Adams Trucking, Inc. (1983) 718 F.2d 869 [114 LRRM 2905]; Laerco Transportation & Warehouse (1984) 269 NLRB 324 [115 LRRM 12261.)

cooling plant are not engaged in actual farming practices on the farm, the question is whether they qualify within the secondary meaning of agriculture.

"Preparation for market" is included in the secondary meaning and refers to operations, normally performed upon farm commodities to prepare them for the farmer's market (i.e., the wholesaler, processor, or distributor to which the farmer delivers his products). Where a producer of agricultural commodities rents or owns space in a warehouse or packinghouse located off the farm, and the farmer's own employees there engage in handling or packing only his or her products for market, such operations are within the secondary meaning if performed as an incident to or in conjunction with his or her farming operations. The fact that the packing shed may be conducted by a partnership, packing products grown exclusively on lands owned and operated by individuals constituting the partnership, does not alter the status of the packing activity. (Dofflemeyer, et al. v. NLRB (9th Cir. 1953) 206 F.2d 813 [32 LRRM 2700]; NLRB v. Olaa Sugar Co. (9th Cir. 1957) 242 F.2d 714 [39 LRRM 2560].)

FLSA principles, discussed above, compel the conclusion that ADC employees are engaged in agriculture within the meaning of the Act. They perform services exclusively for the single employing enterprise of which ADC is an integral and necessary component, the practices are those which are commonly performed by farmers, and the cooling facility is not set up as a distince business but is an established part of agriculture.

Finally, ALRA section 1156.2 provides that the unit

appropriate for bargaining shall be comprised of all the agricultural employees of the employer unless they are employed in two or more noncontiguous geographical areas, in which case the Board shall have discretion to determine the appropriate unit or units. An off-the-farm packing or cooling facility may be deemed a noncontiguous geographical area within the meaning of section 1156.2 and, therefore, employees employed therein may, as the Board hereby finds, constitute a unit appproriate for bargaining. (See, e.g., Harry Tutunjian & Sons, Packing (1986) 12 ALRB No. 22.)7/

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots were cast for the Fresh Fruit and Vegetable Workers Union, Local 78-B, in the representation election conducted on January 27, 1988, among the vacuum cooler employees employed by Andrews Distribution Company, Inc. in Imperial County, California, and that the Fresh Fruit and Vegetable Workers Union, Local 78-B, is hereby certified as the exclusive representative of said employees

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7/ The Employer believes the IHE erred in denying it an opportunity to introduce evidence concerning its stated intention to become a nonagricultural operation. However, the question posed in its objections to the election, and that which was the subject of the evidentiary hearing, concerned the jurisdiction of the ALRB to honor the Petition for Certification and to conduct the representation election on January 27, 1988. Should the Employer believe at some time in the future that ADC employees no longer qualify for agricultural status within the meaning of the Act, the question may be presented to the Board by means of a Unit Clarification Petition filed in accordance with the provisions of Title 8, California Code of Regulations, section 20385.

for the purpose of collective bargaining as defined in Labor Code section 1155.2(a).

DATED: December 22, 1988

BEN DAVIDIAN, Chairman-8/ JOHN

P. MCCARTHY, Member

8/ The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. Members Ramos Richardson and Ellis did not participate in this case.

MEMBER GONOT, Concurring:

The purpose of this concurrence is to suggest an alternate analysis that could provide a simplified factual basis for the Board's ultimate determination. When, on the one hand, the ALRB or the national board attempts to establish single integrated employer status, strict adherence to the test set out in Parklane Hosiery Co., Inc. (1973) 203 NLRB 597, 612 [83 LRRM 1630] is required. (See Tex-Cal Land Management Co., Inc. (1986) 12 ALRB No. 26; Los Angeles Marine Hardware Co. v. NLRB (9th Cir. 1979) 602 F.2d 1302 [102 LRRM 2498]; Bobs Motors, Inc. (1979) 241 NLRB 1236 [101 LRRM 1081].) On the other hand, when joint employer status is the question, the focus is not on interrelationship or common management and ownership; rather the inquiry is merely whether two or more admittedly separate entities share or co-determine those matters governing the essential terms and conditions of employment. (NLRB v. Browning-Ferris Industries (3rd Cir. 1982) 691 F.2d 1117, 1122-23 [111 LRRM 2748].) Under

the facts of this case, joint employer status between Andrews and ADC is readily shown since Andrews determines the wage rates of ADC's employees notwithstanding the presence of ADC's own on-site management. As I agree with the majority's finding that Neeley is merely an investor in Andrews V lettuce projects, I conclude that ADC's employees are agricultural since their sole function is to process the crop of the other joint employer, Andrews. Having reached, under a joint employer analysis, the same conclusion the majority reaches utilizing a single integrated employer approach, I find it unnecessary to resolve the additional factual questions the majority has addressed.

DATED: December 22, 1988

GREGORY L. GONOT, Member

CASE SUMMARY

Andrews Distribution Company, Inc. (FFVWU, Local 78-B)

14 ALRB No. 19
Case No. 88-RC-l-EC

Background

Following the filing of a Petition for Certification by the Fresh Fruit & Vegetable Workers Union, Local 78-B (Union), the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB or Board) conducted a representation election among the employees employed by Andrews Distribution Company, Inc. (ADC or Employer) a vacuum cooler plant located in Holtville, California. Eight employees participated in the election which was held on January 27, 1988. The Official Tally of Ballots revealed that seven votes had been cast for the Union and one for No Union. Thereafter, the Employer timely filed post-election objections. One of the objections, that which alleged that the employees were not engaged in agriculture and therefore the election should be set aside for want of jurisdiction under the Agricultural Labor Relations Act (ALRA or Act), was the subject of a full evidentiary hearing before an Investigative Hearing Examiner (IHE). It was the position of the Employer that since a 22 percent undivided interest in the lettuce crop which was processed by the cooler was derived from an independent grower, cooler employees were not engaged in agriculture. The Employer sought to bring itself within federal precedents which indicate that a processing or packing facility which handles a significant amount of produce for independent growers is a commercial rather than an agricultural enterprise.

IHE Decision

The IHE found that Jerry Neeley, the allegedly independent grower, provided up-front costs of producing and selling the lettuce crop in exchange for an opportunity to share in profits or losses with a specified maximum and minimum monetary exposure. The IHE found, in particular, that Neeley did not make decisions governing employees' rates of pay and other terms and conditions of employment. Having thus found no independent grower involvement in the cooling plant operations, the IHE concluded that ADC employees were engaged in agriculture and recommended that the Union be certified as the exclusive collective bargaining representative of all ADC employees.

Board Decision

Although affirming the IHE's finding that Neeley was not an independent grower vis-a-vis ADC, the Board was reluctant to leave undetermined Neeley's actual status in relation to additional entities involved in this proceeding. Thus, on the basis of the totality of circumstances and fully litigated facts, the Board found that Fred Andrews owns or

leases substantial farm acreage for the production of lettuce; that Rainbow Ranches, Inc., a growing company wholly owned by Andrews, engages only in the farming of lettuce crops for Andrews; that ADC, likewise wholly owned by Andrews, only handles lettuce grown by Rainbow on Andrews' land. The Board further found that Rainbow and ADC were commonly owned and managed by Andrews, with a single labor relations policy, and that the operations were functionally interrelated. On that basis, the Board concluded that the nominally separate entities constituted a single employing enterprise and a single employer within the meaning of the Act. The Board noted, in particular, that Neeley had no control over employees' rates of pay or other terms and conditions of their employment. Nor was there any evidence of wages paid or granted by Neeley independent of Andrews or of a labor relations policy separate from that of Andrews. The Board concluded, therefore, that Neeley was no more than a participant or an investor in the production of lettuce produced by the single employing enterprise.

The Board also found that since produce handled by ADC was derived solely from the single employing enterprise, the employees were engaged in agriculture within the meaning of the Act. Finally, while the Act requires that the bargaining unit shall include all agricultural employees of the employer, it also permits the Board to exercise discretion in that regard whenever it is deemed that employees are employed in two or more noncontiguous geographical areas. An off-the-farm packing or cooling facility may be deemed a noncontiguous geographical area for purposes of establishing a separate unit. Having determined that ADC is off-the-farm, the Board exercised its discretion and concluded that a unit comprised of only ADC agricultural employees, rather than all agricultural employees of the single employing enterprise, was appropriate. Accordingly, the Board certified the Fresh Fruit and Vegetable Workers Union, Local 78-B, as the exclusive representative of all ADC agricultural employees in Imperial County for purposes of collective bargaining.

Concurring Opinion

Member Gonot agreed with the majority's result finding the employees to be agricultural based on a conclusion that the relevant business entities constituted a single integrated employer. He would, however, use the simpler joint employer analysis articulated in NLRB v. Browning-Ferris Industries (3rd Cir. 1982) 691 F.2d 1117 to avoid factual questions the majority has addressed.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ANDREWS DISTRIBUTION COMPANY, Employer, and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78-B Petitioner.	Case No..88-RC-l-EC

Appearances:
Larry Dawson, Esq.
El Centro, California
for the Employer

Keith Jones
Michael Lyons
for the Petitioner

Before: Barbara-D. Moore
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

BARBARA D. MOORE, Investigative Hearing Examiner:

On January 20, 1988,[1] the Fresh Fruit and Vegetable Workers Union, Local 78-B, (hereafter Union) filed a "Petition for Certification" with the Agricultural Labor Relations Board (ALRB or Board) seeking to represent all agricultural employees of Andrews Distribution Company, Inc. (hereafter ADC or the Employer) who are located in Imperial County, California.

The Board issued the Notice and Direction of Election (hereafter Notice) on January 26, and held an election the next day, January 27. The Tally of Ballots, issued that same day, showed the following results:

Union	7
No Union	0
Unresolved Challenged Ballots	1
Total Number of All Ballots	8

On February 2, the Employer filed objections to the election which are embodied in the "Employer's Petition to Set Aside Election" (hereafter Objections). The Board set three of

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[1]All dates are 1988 unless otherwise noted.

[2]The Notice erroneously identified the unit as "vacuum cooler employees employed by the employer in the State of California." An Erratum issued on May 17 correcting the description of the unit to encompass only vacuum cooler employees of ADC in Imperial County, California, which the parties stipulated is the correct unit description.

[3]I take official notice of: the Petition for Certification; the Notice and Direction of Election; the Tally of Ballots; the Employer's Petition To Set Aside Election; and the Notice of Objections Set For Hearing; Notice of Partial Dismissal of Objections; Notice of Opportunity to File Request for Review.

the objections for hearing, to wit:

> 1. Whether Andrews Distribution Company, Inc. is an agricultural operation subject to the jurisdiction of (sic) Agricultural Labor Relations Board or a commercial operation subject to the jurisdiction of the National Labor Relations Board (Objection No. 1);
>
> 2. Whether the Regional Director improperly determined the scope of the bargaining unit (Objection No. 2); and
>
> 3. Whether the petition for certification was filed at a time when the Employer was at 50 percent of its peak agricultural employment for the current calendar year, and whether the Regional Director's peak determination was reasonable in light of the information available at the time of the investigation of the petition. (Objection No. 3)

I convened the hearing on the objections on May 17. At hearing, the Employer withdrew the latter two objections, and the hearing proceeded on Objection No. 1. The Employer and Union were present throughout the hearing and participated fully in the proceeding. Only the Employer filed a brief.

Upon the entire record,[4] including my observation of the demeanor of the sole witness, and after careful consideration of the parties' arguments and the Employer's brief, I make the following findings of fact and conclusions of law.

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[4]At hearing, ADC sought to introduce a copy of a purported agreement between Fred Andrews and Jerry Neeley (Employer Exhibit 1) and a copy of a purported agreement between Neeley and Rainbow Ranches, Inc. (Employer Exhibit 2.) Neither exhibit was signed, and page 4 of Exhibit 1 was missing. The Union objected to both proposed exhibits. Counsel for ADC represented that he had not brought signed copies and could not obtain them from Bakersfield until possibly the next day. I rejected the exhibits but permitted Mr. Andrews to testify and left the record open to allow ADC an opportunity to obtain signed copies. I stated that those documents would, of course, be subject to any objections the Union might have and suggested that counsel for ADC might obtain a stipulation from the Union.

I. FACTS

Fred Andrews was the only witness.5 According to Mr. Andrews, ADC and Rainbow Ranches, Inc. (Rainbow) are both corporations, and he is the sole stockholder in each. He and four members of his family comprise the officers and directors of both ADC and Rainbow except that the position of Treasurer was held by Carla Lacey. (p. 9-10.)[6]

ADC operates a cooling facility in Holtville, California, on a site owned by Mr. Andrews. The function of the facility is to cool harvested crops, in this case lettuce. Cooling prolongs the life of the lettuce enabling it to be shipped over long distances.

Lettuce which has been harvested is brought to the cooling facility, put on pallets, placed in a vacuum chamber and

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Counsel for ADC mailed me a letter dated May 17 enclosing two documents which counsel represented were the aforementioned agreements with Andrews' and Neeley"s signatures and containing the page missing from Employer Exhibit 1. (The proof of service shows that copies were hand delivered to the Union.) Although Counsel has not yet properly authenticated the documents nor obtained a stipulation from the Union, the Union made no objection to the newly submitted documents. In the absence of any objection, I admit the letter to me from Larry Dawson, the agreement between Andrews and Neeley and the agreement between Neeley and Rainbow as Employer Exhibits 3, 3a and 3b, respectively. (Since only the Employer proffered any exhibits, they will be identified hereafter as Ex. number.)

[5]Counsel for ADC notes in his brief that the hearing transcript incorrectly identifies the witness Fred Saleem Andrews as Burt Saleem Andrews. (Employer's Brief p. 30.) I construe counsel's observation as a motion to correct the transcript which is hereby granted.

[6]Since there is only one volume of hearing transcript, references thereto are to page number(s) only.

cooled by a vacuum process to approximately 30 to 35 degrees Farenheit. After being cooled, the lettuce is either placed in a cold room to be shipped later or is loaded directly onto trucks.[7] (p. 5)

ADC was formed in the fall of 1987. In the 1987-88 Imperial Valley lettuce season, which ran from about mid-December 1987 to mid-March 1988, ADC cooled the lettuce crop grown on approximately 780 acres of land owned or leased by Fred Andrews in the Imperial Valley.[8] The lettuce crop from this acreage constituted the sole product processed at the cooler in that lettuce season. (p. 12.) The crop was owned by two individuals, Fred Andrews and Jerry Neeley. The terms of the relationship between Andrews and Neeley regarding this crop are set out in Exhibits 3a and 3b.

Pursuant to his agreement with Andrews, Neeley has an undivided interest in the lettuce crop from the aforementioned 780 acres in the Imperial Valley and also in a lettuce crop from seventy one acres in the Palo Verde Valley (Blythe) and one from

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[7]The basic duties of the employees at ADC petitioned for herein are to receive the pallets of lettuce, cool, store and load them (using forklifts leased from Andrews) and to monitor the vacuum cooling tube. Their wages are set by Andrews after consultation with Mr. Roten who is the engineer and cooling expert. (p. 45.) Jerry Neeley, see below, has no involvement with setting the wages or working conditions of the employees.

[8]Andrews estimated he owned more than 300 acres of farmland in the Imperial Valley and, in addition, leased perhaps another "couple thousand" acres in the Valley. (p. 21.)

600 acres in the San Joaquin Valley.[9] (p. 35, Ex.3.) All the land used to grow the lettuce crop in these three areas is owned or leased by Andrews. Andrews and Neeley separately contracted with Rainbow to plant and grow (i.e. farm) the crop in each location, and Andrews took responsibility for harvesting, packing, cooling and selling the crop.[10] (Ex.3a.)

Andrews subcontracted these responsibilities to ADC. ADC in turn subcontracted the harvesting to West Valley Packing. H (p. 13). Both Rainbow and ADC lease most of the equipment they need from Andrews. (p. 22.)

Andrews and Neeley share in the profits and losses from the sale of the crop in all three locations and the Arakalian venture.[12] Neeley put up $500,000 to cover his share of the anticipated costs of the enterprise. The money was deposited in a bank account and the then treasurer of ADC and Rainbow, Ms. Lacey, was authorized to make withdrawals to pay Neeley's estimated share of the costs which periodically were to be billed to Neeley.

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[9] Neeley has the same undivided interest in the fall and spring lettuce crop in which Andrews had a interest in a separate agreement Andrews had with George Arakelian Farms, Inc. (Ex.3a.) This land is located in Blythe in the Palo Verde Valley.

[10] Rainbow farms all the land leased or owned by Andrews. (p. 22.)

[11] Neither Mr. Neeley nor Mr. Andrews owns West Valley Packing.

[12] In addition to any profits from the sale of the lettuce, Neeley also is to receive a share of the cooling profits based on his ultimate percentage. ADC charges a cooling fee of 65 or 70 cents per carton to the buyers of the lettuce. In the 1987-88 season, ADC cooled approximately 400,000 cartons of lettuce. Andrews aid not yet know if there were any cooling profits, (p. 30).

Similarly, periodic payments were to be made by Andrews to Neeley based on the latter's estimated share of the proceeds from the sale of the lettuce.[13] (Ex.3a and 3b.)

Neeley's share of the costs and the proceeds was expressly limited. The most he could lose was the $500,000 he put up. (Ex.3a, p. 5.) His maximum share of the profits was 22 percent. His share was to be calculated by dividing 500,000 by all the costs associated with planting, growing, harvesting, packing, cooling and selling the lettuce from all four components of the deal. If the resulting percent were equal to or greater than 22, then Neeley would receive a maximum of 22 percent. If, on the other hand, the percentage were less than 22, Neeley would receive the actual percentage.

The lower the costs, the higher Neeley's percentage. Thus, Andrews benefits if costs are kept low because Neeley's percentage tops out at 22. Conversely, since Neeley's share of the costs are based on his percentage, his share of the costs tops out at 22 percent and is further protected by the $500,000 limitation. Neeley's exact percentage or share will not be known until there is a final accounting.[14] Depending on the expenses incurred and the receipts from the sale of the lettuce, Neeley could receive less but not more than 22 percent. (Ex.3a.)

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[13] Neeley is required to pay his estimated costs to Andrews and Rainbow within three days after he or Lacey receive the bill whereas Andrews is not obligated to make interim payments to Neeley until 75 days after Andrews receives the money. (Exs.3a and 3b.)

[14]That accounting had not occurred as of the date of the hearing,

The accounting does not take place until after the end of the seasons in all three areas plus the Arakelian crop.. Andrews testified that Neeley owns 22 percent of the whole crop and 22 percent of the crop in each location. He characterized them as the same. (p. 34).

Both Ex.3a and 3b provide for a final accounting after the sale of "the Crop" and after Andrew receives the final accounting from Rainbow and Arakelian. "The Crop" is defined as the lettuce crop from the three areas and the Arakelian deal. (Ex.3a.) Accordingly, I find that Neeley's percentage is based on the entire deal, that is, all four elements combined.

Andrews summed up the venture saying that Neeley "gets whatever the returns are, whether it's a profit or a loss, based on his involvement in the crop, and the costs in all three districts vary." (p. 39.) Since Neeley's percentage will vary depending on the costs, Andrew's statement confirms that 22 percent of the whole may or may not be the same as a 22 percent share in each portion of the overall venture. In the Imperial Valley then, Neeley's percent could be less or more than 22 percent depending on what happens in the other areas.

Both Exs.3a and 3b provide that Neeley has responsibility for all decisions regarding his share of the crop. Both also provide, however, that in the absence of direction from Neeley or in following any such directions, Rainbow or Andrews will follow normal industry standards.

Mr. Andrews testified that Jerry Neeley recently stepped down from his position as president and chief executive officer of

Smith International which is a large oil tool manufacturing company located in Newport Beach. (p. 17.) Neeley had been with that company for 25 years. As Andrews put it, Neeley is "obviously a man in a different business." The extent of Neeley's involvement was that he took time each week to get together with Andrews regarding the ranches in order to meet his responsibilities which, according to Andrews, were:

> to become involved with all the spare time he could devote to this enterprise to become as familiar as he can with harvesting, packing and cooling, as well as pruning, and many times [Neeley] had direct inputs on the decisions that we made. . . (p. 15).

Although Neeley has agricultural fields in San Juan Capistrano and Newport Beach, agriculture is not his main business, and there is no evidence he has any experience with growing lettuce in the Imperial Valley or elsewhere.

ANALYSIS AND CONCLUSIONS

The issue presented by this case is whether the employees at ADC's cooling facility are part of an agricultural operation subject to this Board's jurisdiction or a commercial operation and thereby outside the purview of the Agricultural Labor Relations Act (Act or ALRA).

The ALRA defines "agricultural employee" broadly to include all employees excluded from the jurisdiction of the National Labor Relations Board (NLRB) as agricultural workers under 29 U.S.C. section 152(3). (ALRA section 1140.4(b).) An agricultural employee is a person "engaged in agriculture," which under section 1140.4(a) 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 and delivery to storage or to market or to carriers for transportation to market." The A.L.R.A. definition tracks that appearing in section 3(f) of the Fair Labor Standards Act (FLSA).

The FLSA definition was interpreted by the U.S. Supreme Court in Farmers Reservoir and Irrigation Company v. McComb (Farmers) (1949) 337 U.S. 755. The Court divided the FLSA definition of agriculture into "primary" and "secondary" classifications. The primary classification includes practices directly involved in the cultivation and harvesting of crops. The "secondary" classification includes functions not directly associated with the actual growing and harvesting of agricultural commodities, but includes activities performed "by a farmer or on a farm, incidently to or in conjunction with . . . farming operations." (Id. at 762.)

The agricultural/commerical distinction often arises in the context of whether packing shed employees fall into one category versus the other. Packing shed employees, the Court in Farmers noted, could be considered to be engaged in agriculture only if the commodities they packed were "primarily" produced by their own employer. (Id. at 766, fn. 15.) The same analysis is applicable to the employees herein.

This Board has adopted the Supreme Court's Farmers standard in determining whether a shed is commercial or agricultural. (Sequoia Orange Co. (Sequoia) (1986) 11 ALRB No.

21; Grow Art (1981) 7 ALRB No. 19). This Board has further held that "[i]n determining whether shed workers are agricultural employees, we look to the precedents of the National Labor Relations Board, the courts, and the U.S. Department of Labor." (Transplant Nursery, Inc. (1979) 5 ALRB Ho. 49, p. 3, fn. 1.)

This Board has cautioned against utilizing a "mechanical application of any rule or percentage" (Grow Art, supra) in resolving the agricultural/commercial question, and has indicated that it will examine the "totality of the situation rather than isolated factors." (Bonita Packing (1978) 4 ALRB No. 96; Sequoia, supra.) The NLRB has taken the same approach. (Bodine Produce Company (1964) 147 NLRB 832 [56 LRRM 1276].)

Cases decided by both the ALRB and NLRB nonetheless have frequently determined the issue by analyzing the proportion or percentage of crops handled at the shed which are grown directly by the shed employer itself, as compared with the percentage of crops processed at the shed which are grown by other employers.15 Unless the employees handle "a significant percentage of produce for independent growers, the workers are engaged in agriculture." (Sequoia, supra)

The NLRB has held that where approximately 10 percent or less of a packing shed's operations are devoted to crops from an independent grower, the shed is deemed agricultural (Grower-Shipper, supra.) Conversely, where 15 percent of a shed's

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[15]Grain Company (1964) 148 NLRB 1499 [57 LRRM 1175]; Employer Members of Grower-Shipper Vegetable Association of Central California (Grower-Shiooer) (1977) 230 NLRB 1011 [96 LRRM 1056].

operations involved processing crops from independent growers, the shed has been termed commercial and consequently subject to NLRB jurisdiction. (Garin Co., supra.) Under a strict percentage NLRB analysis, therefore, the critical level, or dividing line between considering a shed commercial or agricultural, lies somewhere between 10 percent and 15 percent of the crops handled. Relying on the 15 percent rule of thumb, ADC argues it is a commercial operation because 22 percent of the lettuce it processed was owned by Jerry Neeley.

The determination of whether the employees at ADC are agricultural or commercial hinges on "the extent to which their work relates to crops grown by their own employers or by independent growers." (Grower-Shipper, p. 1013.) The initial inquiry then is the independent status of Neeley.

This inquiry boils down to determining the relationship between Neeley and Andrews, for if Neeley is not independent of Andrews, his percent ownership of the crop handled by ADC is immaterial. Understandably, ADC does not contend that its functions are not incident to Andrews' agricultural operations.

Neeley owns an undivided interest in a lettuce crop grown on lands owned or leased by Andrews. His interest or share of the profits or losses from the sales (and cooling receipts) of that crop derives from his providing $500,000 to defray the up front costs of producing, harvesting and selling the lettuce.

The evidence demonstrates that in reality Andrews was in control of all phases of his enterprise with Neeley. Rainbow farmed the land, and ADC fulfilled Andrews' responsibilities of

harvesting, cooling, packing, selling and shipping the crop.

The lower the costs of the venture, the more Andrews stood to profit. While this is always true, here it is especially so because Neeley's share of profits tops out at 22 percent so beyond this point Andrews reaps all of the advantage.

Although the agreements nominally give Neeley control over decisions regarding his share of the crop, I find this language does not establish Neeley's independence for several reasons. First, Andrews acknowledged that, at most, Neeley had "direct input." The degree of control Neeley could have exercised is not the issue. Rather, it is the degree of control he actually exercised. (Grow Art, supra).

Second, Neeley actually had little control to exercise. In the absence of his direction, Rainbow and Andrews were to make the decisions. To the extent Neeley did make any decisions, Rainbow and Andrews had authority to implement those decisions according to normal industry standards. Being substantially more familiar with these than Neeley, they in effect determined the standard.

This reservation of decision making authority to Rainbow and Andrews is consistent with the objective reality that Neeley was not experienced with growing lettuce in the Imperial Valley (and the other areas that were part of the overall deal) and that he got together with Andrews only about once a week and was learning about the business. It is also consistent wih the objective reality that Andrews owned 78 percent or more of the crop. To have Neeley making decisions based on his maximum

interest of 22 percent which affect Andrews' 78 percent is truly to have the tail wag the dog.

I have written in terms of Rainbow and Andrews, but since Andrews subcontracted his responsibilities to ADC, ADC stands in his shoes, as it were. Thus, all the functions from planting to selling the lettuce crop were performed by Rainbow and ADC, both of which are controlled by Andrews.

Neeley simply provided capital for a business venture constructed and controlled by Andrews.[16] In return for putting up money to cover the up front costs of producing and selling the lettuce, risking a pun one might call it "seed money", Neeley is to receive a share of the profits or losses with a specified maximum and minimum monetary exposure. •

Based on the foregoing, I find that Neeley is not an independent grower (Grow Art, supra) and that the employees at ADC's cooling facility engaged in activities falling within the secondary definition of agriculture are therefore agricultural

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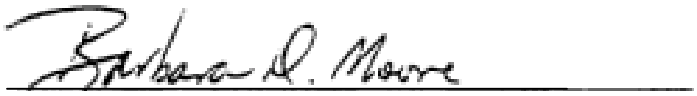
[16]Andrews' control is further exemplified in other terms of the agreements such as giving him the advantage of having 75 days to pay Neeley his estimated share of interim profits but requiring Neeley to pay his estimated share of interim costs within three days. Andrews testified that Neeley could have his lettuce cooled by some entity other than ADC. (p. 36.) The agreement however, provides that Andrews had responsibility for providing cooling, thus absent Andrews' concurrence, Neeley could not simply take "his" lettuce elsewhere. Moreover, the evidence shows that Neeley did not cool "his" lettuce elsewhere and that, as provided in the agreement, Andrews and ADC controlled the cooling. In fact, it is inaccurate to speak in terms of "Neeley's lettuce" or "Andrews' lettuce" since Neeley owned a share of the crop from the entire venture. The evidence demonstrates that all the lettuce in the Imperial Valley was considered and treated as fungible. For example, Neeley's and Andrews' lettuce was indistinguishable and was packed together.

employees.[17]

Therefore, I recommend that the Employer's objection be dismissed, the results of the election be certified and the Union be certified as the exclusive bargaining representative of ADC's vaccum cooler employees employed in Imperial County, California.

DATED: August 3, 1988



BARBARA D. MOORE
Administrative Law Judge

[17]As noted above, Neeley's percent ownership of the crop is immaterial unless he is an independent entity. I point out, however, that ADC has failed to establish how much of the lettuce it processed in Holtville belonged to Neeley. As of the date of the hearing, the final accounting had not taken place. Thus, Neeley's percentage of the lettuce processed there remains unknown. Since his share is a maximum of 22 percent of the crop in the Imperial Valley, San Joaquin Valley, Palo Verde Valley and the Arakelian deal combined, his share of the Imperial Valley crop may be less than 22 percent and perhaps even less than 15 percent.