Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BUD ANTLE INC., dba BUD OF CALIFORNIA, a Wholly Owned Subsidiary of CASTLE & COOKE, INC., Respondent, and FRESH FRUIT & VEGETABLE WORKERS, LOCAL 78-B, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC, Charging Party.	Case Nos. 89-CE-36-SAL 89-CE-37-SAL 89-CE-39-SAL 89-CE-39-1-SAL 89-CE-41-SAL 89-CE-43-SAL 89-CE-43-1-SAL 90-CE-31-SAL 90-CE-32-SAL 18 ALRB No. 6 (September 16, 1992)

INTERLOCUTORY DECISION ON JURISDICTION

Following an evidentiary inquiry into a threshold question of subject matter jurisdiction, Administrative Law Judge (ALJ) James Wolpman issued the attached Decision.[1] Thereafter, Respondent timely filed exceptions to the ALJ's decision with a brief in support of exceptions and General Counsel filed a brief in response. Amicus curiae briefs have been received expressing positions both in support of and in

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[1]At Respondent's behest, this proceeding has been bifurcated and the complaint held in abeyance in order to permit Respondent to attempt to establish at the outset that the underlying unfair labor practice charges should be dismissed on the grounds that the employees represented by the Charging Party are not engaged in agriculture.

opposition to the ALJ's ruling on jurisdiction.[2]

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached decision of the ALJ in light of the exceptions, responses, supporting briefs of the parties, and the amicus submissions, and has decided to affirm the rulings, findings and conclusions of the ALJ that cooling plant employees of Respondent Bud Antle, Inc. were engaged in agriculture within the meaning of section 1140.4(b) of the

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[2] Post-hearing motions filed by Respondent, are hereby denied. As the Board believes the record and the briefs of the parties have served to adequately apprise it of the issues, oral argument is not warranted. Respondent's additional motions to take administrative notice of certain documents and/or its request for special permission to file an interim appeal of the ALJ's taking of requested notice of related documents, but with the proviso that they would have no precedential value in this matter, are similarly denied. In this regard, the Board does not believe that the dismissal of unfair labor practice charges which Fresh Fruit & Vegetable Workers, Local 78-B filed with the National Labor Relations Board (NLRB) is equivalent to a ruling on jurisdiction. The NLRB's dismissal of the charges on the grounds that the conduct alleged therein had occurred outside the statutory limitations period was a threshold consideration and the grounds therefor were readily apparent from the face of the charges; the NLRB need have gone no further in order to decline to accept the filings. General Counsel's motion to strike the whole of Respondent's exceptions brief is granted in part. Certain portions of the brief not only fail to further Respondent's legal position in this matter but are no more than a rancorous assault on the integrity and processes of the General Counsel, the ALJ, and this Board. Accordingly, the following portions of Respondent's brief in support of exceptions should be, and they hereby are, stricken: Page 1, lines 17-26; page 2, lines 1-18; page 3; page 4, lines 1-11, fn. 4; page 26, lines 15-21; page 28, lines 18-21. General Counsel's motion to strike similar language in a portion of the brief of amicus Grower-Shipper Vegetable Association is granted as to page 6, lines 12-27.

Agricultural Labor Relations Act (ALRA or Act)[3] during times pertinent herein.

SUMMARY OF CASE

The question at this stage of the proceeding is whether Respondent has overcome General Counsel's prima facie showing that, at times material herein, the Union continued to represent Respondent's cooling plant employees as it had since certified by this Board in 1976.[4]

In challenging jurisdiction, Respondent asserts that it has undergone a comprehensive restructuring of its long established growing operations inasmuch as it now solicits the participation of outside growers and relinquishes to them much of the crop production which formerly had been performed solely by Respondent. Based on Respondent's perception of the result of reorganization, the Company's status as a grower-shipper has been markedly altered insofar as it is now only a shipper, handling commodities produced exclusively by so-called "independent" growers. Assessing the reconfiguration of the

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[3]All section references are to the California Labor Code, section 1140 et seq., unless otherwise specified herein.

[4]We believe it is worth noting that the parties herein consummated at least four collective bargaining agreements covering the cooling plant employees without apparent incident. While in the process of negotiating a fifth agreement in the summer of 1989, a labor dispute developed. First the Union, and then Respondent, filed a series of unfair labor practice charges with the ALRB. The following January, for the first time, Respondent questioned this Board's authority, contending that the NLRB had sole jurisdiction as to any matter concerning cooler employees due to a change in the manner in which Respondent heretofore had structured its business.

manner in which it conducts business, Respondent believes its employees now handle with regularity a sufficient amount of "outside" produce to render the cooling facilities commercial rather than agricultural.

Respondent reasons therefore that jurisdiction over those employees should lie solely with the National Labor Relations Board (NLRB or national board) and not with this Board. Since the NLRB would be time-barred from acting on the underlying unfair labor practice charges in this case, Respondent's alleged conduct, although potentially violative of both state and national acts, would escape enforcement under either act. This would result, according to Respondent, even though during the period at issue, it invoked this Board's jurisdiction and not that of the national board.

As appealing as this reasoning and its ironic consequence might be for Respondent, we do not believe it to be supportable. The unique circumstances of this case cannot overcome the basic reality that Respondent's business was, and may well continue to be, agricultural. Even acknowledging the changes in Respondent's growing operations, the question remains whether they so altered the nature of Respondent's grower/shipper enterprise as to divest Respondent of its status as a grower, or whether Respondent merely contracted out to custom growers certain aspects of production but nevertheless continued to be a farming operation.

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The ALJ found, and we concur, that although Respondent candidly admitted that it entered into growing agreements with ostensibly independent growers for the express purpose of curtailing its labor costs,[5] it is apparent from Respondent's conduct vis a vis the various contracting entities that the grower program lacks the "arm's length" relationship normally required by the labor laws to demonstrate that nominally distinct business entities are in fact independent. As demonstrated by the ALJ, the interaction between Respondent and the contract growers has not altered Respondents' prior status as a farmer-employer of the agricultural employees employed in its various California cooling facilities. Accordingly, Bud Antle, Inc. continued to be essentially the same grower/shipper it was at the time of the initial certification. It has not been demonstrated that we lack jurisdiction to proceed with this matter. Our resolution of the narrow question of jurisdiction is premised solely on the particular facts presented in this portion of the case and is to be held to those facts.

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[5]When asked at hearing to explain why Respondent had phased out direct growing operations, Richard Bascou, Respondent's vice-president for the Grower Program, replied:

> "Mainly because ... we felt we couldn't be competitive with small growing companies as a corporation to compete. It was mo[re] cost effective to work with independent growers than it was for us to try to do our own farming. We're a union company; we pay union wages. Its hard to compete with those wages with independent growers. (Tr. IV: 36) (emphasis supplied.)

As this decision is an interlocutory ruling on jurisdiction, it is not a final decision and order of the Board subject to judicial review within the meaning of section 1160.3. In this regard, we recognize that subject matter jurisdiction may be challenged at any time. General Counsel is now free to proceed to the next phase of this proceeding.

BACKGROUND

Section 1156.2 provides that the unit appropriate for collective bargaining shall be all the agricultural employees of the employer unless employed in two or more noncontiguous geographical areas, in which case the Board has discretion to determine the appropriate unit or units. In enacting that limitation on the nature and scope of bargaining units of employees working in California agriculture, the Legislature expressed a preference for comprehensive or plant-wide bargaining units. Shortly after passage of the Act, the Legislature published a Letter of Intent in the Senate Journal, Third Extraordinary Session, for May 26, 1975 of that year which provided for a limited departure from section 1156.2:

> It is the intent of AB 1533 and SB 813 [the ALRA's enabling legislation], that the Board in exercising its discretion to determine bargaining units in noncontiguous geographic areas, may consider processing, packing and cooling operations which are not conducted on a farm as constituting employment in a separate or noncontiguous geographic area for the purpose of section 1156.2.

It was on that basis that FFVW filed a Petition for Certification with the ALRB seeking to represent only those employees employed by Respondent in its off-the-farm cooling

facilities. Having received a majority of the valid votes cast in a Board conducted election, the Union was certified on January 22, 1976 as the exclusive representative of all production, plant clerical and maintenance employees engaged in the receiving, refrigerating, handling and loading of fresh vegetables by Bud Antle, Inc. in the State of California.

Beginning in 1977, Respondent and FFVW successfully negotiated a series of collective bargaining agreements. The fourth and most recent such agreement covered a three-year period through March 31, 1989. A labor dispute developed during negotiations for a fifth agreement, resulting in a strike and the subsequent filing of unfair labor practice charges by both Respondent and the Union, each alleging that the other had engaged in labor practices proscribed by the ALRA, and requesting that the Board invoke the investigatory and remedial provisions of the Act.

The record reflects that during the General Counsel's investigation of the unfair labor practice charges in 1990, Respondent contended for the first time that certain transitions in its operations, which had commenced nine years before, served to divest this Board of jurisdiction. Thereafter, in an attempt to test its position in that regard before a different tribunal, Respondent filed a Petition for Clarification of Bargaining Unit with Region 21 (Los Angeles) of the National Labor Relations Board (NLRB or national board), requesting that the NLRB designate the cooler employees non-agricultural and thereby

assert exclusive federal authority over them. On October 16, 1990, finding no basis for entertaining the question, the NLRB Regional Director dismissed the petition as inappropriate. Respondent's appeal of the dismissal to the NLRB's Washington division ultimately resulted in a December 24, 1991 order reinstating the Petition and directing the Regional office to investigate the matter.[6] In the interim, on December 21, 1990, the General Counsel of the ALRB issued the complaint in which he alleged that Respondent had unlawfully failed or refused to bargain in good faith with the FFVW represented unit of cooler employees, refused to provide the Union with bargaining related information upon request, illegally subcontracted out unit work, implemented unilateral changes, engaged in an improper lockout of striking employees in the summer of 1989, and then refused to reinstate them when they offered to return to work. In its

[6] The ALRB follows the same procedures as does the NLRB in unit clarification matters. As a general rule, the proceedings are utilized to determine whether a new classification of employee(s) should be included in an existing unit. Although the only unit in existence during times pertinent herein was that which had been ALRB certified, Respondent did not seek resolution of the jurisdictional question by means of the ALRB's mechanism for resolving unit appropriateness. Given the NLRB's eminently sensible policy of deferring to "responsible" agencies of state governments when it is satisfied that principles of due process have been met (Box Tree Restaurant of New York City. Ltd. (1978) 235 NLRB 926 [98 LRRM 1006]), and notwithstanding the NLRB's reliance on University of Dubuque (1988) 289 NLRB 349 [128 LRRM 1259], we are not persuaded that a different result should obtain in the circumstances here. This Board administers a statutory scheme which is modeled precisely after the election and unfair labor practice provisions of the NLRA. In Box Tree, supra, the NLRB declined to entertain a representation matter pertaining to employees who previously had been the subject of a state-directed election.

answer to the complaint, Respondent denied the allegations and, in particular, challenged the ALRB's assertion of jurisdiction on the grounds the cooler employees were not agricultural employees.

Respondent's request to the ALRB to suspend proceedings pending a ruling from the NLRB as to the status of the disputed employees was rejected, the Board holding that it could indeed determine whether it had authority to adjudicate charges which involved allegations of wrongdoing to employee-members of a bargaining unit it had certified nearly 14 years before and whose jurisdiction heretofore had never been challenged.

That same view subsequently was shared by Judge Brewster of the United States District Court for the Southern District of California, who stated on May 13, 1991, in response to Respondent's request for a preliminary injunction to prevent the ALRB from proceeding:

> The Agricultural Labor Relations Board (ALRB) is competent to decide the jurisdictional issue, and has in fact bifurcated the disputed hearing so that plaintiff may mount a full jurisdictional attack before proceeding on the merits .... The National Labor Relations Board (NLRB) has explicitly refused to interfere with the ALRB proceeding .... The court notes that the NLRB has the power to request injunctive relief in order to protect its own jurisdiction from an overreaching state agency. In this case, despite strong urging from plaintiff, the NLRB has not taken such action with respect to the hearing before the ALRB .... Where the NLRB does not act to protect its own jurisdiction, this court will not interfere with the proper activity of a competent state tribunal.

The ALRB hearing on jurisdiction was completed on May 10, 1991. Earlier, the NLRB's Regional Director issued her ruling in which she found that, at the time of the NLRB hearing, which had concluded in March, 1991, Respondent, with respect to its cooler operations, was not a "farmer" as that term is defined in section 3(f) of the Fair Labor Standards Act (FLSA, 29 U.S.C. sec. 203(f)).[7] On that basis, she concluded that the FFVW represented unit was not comprised of agricultural employees subject to coverage of the ALRA. In so doing, she expressly rejected Respondent's urging that she broaden her examination and rule on Respondent's status as of 1989, the period covered by the unfair labor practice charges filed with the ALRB. As she explained, "[t]he employer-Petitioner cites no case authority which mandates such a finding by me, and I conclude that it is inappropriate in the present proceeding." She further ruled that the effect of her decision on the proceedings pending before the ALRB should be determined by the

[7] Section 1140.4 provides that the provisions of the ALRA apply only to those employees who are excluded from the coverage of the NLRA as "any individual employed as an agricultural laborer" (29 U.S.C. sec. 157) and "agriculture" will be as defined by the Wage & Hour Division of the U.S. Department of Labor (DOL) pursuant to section 3(f) of the Fair Labor Standards Act (FLSA) 29 U.S.C. sec. 203(f). There is neither a definition of agriculture nor a reference to the FLSA in the National Labor Relations Act. However, Congress appends an annual rider to the NLRB's appropriations measure specifying that the term "agriculture" will be as defined by the FLSA. It is the NLRB's policy to accord great weight to the interpretations of the section made by the DOL. (See, Olaa Sugar Co.. Ltd. (1957) 118 NLRB 1442 [40 LRRM 1400] and cases cited therein.) The ALRA's reference to the FLSA is a codification of the Congressional directive.

ALRB and its reviewing court. Thereafter, the Union's timely filed request for review of the Regional Director's decision was denied by the NLRB.[8]

ALJ'S ANALYSIS: Single Integrated Enterprise

Respondent's position is that whereas it once was both a grower and a shipper of fresh vegetable commodities, it is now solely a shipper. The difference offered is that the produce it markets today is the product of individual growers with whom it contracts to custom grow crops predetermined as to variety and amount by Respondent's customers. The ALJ found, in essence, that, for purposes of jurisdiction, the growers are not distinct business entities engaged in independent agricultural

[8] Notwithstanding the express ruling of the NLRB's Regional Director that her decision on unit clarification, by its terms, is not retroactive, Respondent continues to argue that her ruling nevertheless should stand as an impediment to this Board's authority to adjudicate conduct occurring prior to the time covered by the NLRB hearing. Respondent reasons that since there was no change in its operations between 1988 and the period subject to the NLRB's investigation, the ruling would be equally applicable to the earlier time period. It is important to recognize that, unlike the NLRB, and as will be demonstrated below, this Board's examination of the jurisdictional question is premised on a somewhat different theory based on the totality of circumstances yet one which is predicated on sound federal principles of labor law. There is here no conflict between federal and state labor statutes which in turn might raise considerations of preemption. Moreover, the findings of the Regional Director are the result of a representation matter which is purely investigatory in nature and is not a final decision and order of the NLRB subject to judicial review. Non-reviewable administrative determinations are not subject to the doctrine of collateral estoppel. (Anderson Cottonwood Disposal Service v. Workers Compensation Appeals Board (1982) 135 App.3d 326, 332; 2nd Restatement of Judgments, sec. 286.) Nor is collateral estoppel applied where the initial forum expressly declined to rule on the issue in dispute. (Bronco Wine Company v. Frank A. Logaluso Farms (1989) 214 Cal. App.3d 699, 712); American International Underwriters Agency Corp. v. Superior Court (1989) 208 Cal. App.3d 1357.)

production, but are components of a unitary organization controlled by Respondent. As he said:

> Such then are the economic realities of Bud's relationship to its growers: The attempt to cut labor costs by creating an independent contractor structure while at the same time preserving--at every juncture and by every means, both formal and informal--the power and control which it had always enjoyed; and, along with that, a marked willingness--in its dealings with land, with equipment, and with labor contractors--to ignore the legal niceties of that structure whenever they come into conflict with its need to maintain its position as America's leading producer of fresh vegetables. (ALJD 47.)

Whether nominally distinct business entities may be considered together as a single enterprise for purposes of labor relations ultimately depends on "all the circumstances of the case" and is characterized by the absence of the "arm's length relationship not found among unintegrated companies." (Blumenfeld Theaters Circuit (9th Cir. 1980) 626 F.2d 865 [106 LRRM 2869}; Operating Engineers Local 627 v. NLRB (D.C. Cir. 1975) 518 F.2d 1040.)

Our agreement with the ALJ's analysis is informed by statutory language which requires that the definition of "employer" be liberally construed in order that it may extend to "any person who owns or leases or manages land used for agricultural purposes" as well as "any association of persons . . . engaged in agriculture." (Section 1140.4(c).) Notwithstanding the broad definition of the term, the statute expressly denies farm labor contractors employer status, ostensibly because the farmers who employ their services are more likely to be able to provide the stable long-term

collective-bargaining relationship which is a hallmark of the Act. The California Supreme Court gave meaning to that principle when it held that the ALRB has a particular responsibility to fix the employment relationship on the entity with the long-range interest in employees. (Rivcom Corp. v. ALRB (1983) 34 Cal.3d 743.) Moreover, as a California court recently reminded us, "[a] contractual description of the parties' business relationship is not necessarily controlling. What is important is the underlying reality." (Michael Hat Farming Co. v. ALRB (1992) 4 Cal.App.4th 1037.)

On a related note, in S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 359, the California Supreme Court examined the "realities" of contractual arrangements between a grower and the harvesters it hired under the guise of independent contractors and concluded that, contractual terms aside, one entity exercised "pervasive control over the operation as a whole." The court observed that its authority to go behind the contract, so to speak, stemmed from a duty to guard against means by which employers avoid their "obligations under other California legislation intended for the protection of 'employees,' including laws enacted specifically for the protection of agricultural labor." Thus, we are indeed mindful of our duty to examine the business combinations which parties have created and their implications vis-a-vis agricultural labor relations.

Labor and labor-related costs are among the growing costs which Respondent shares with its growers and which it

often underwrites pending final end-of-season accountings and disbursements. The record reveals that at least some of the labor contractors who provide employees to individual growers to work on contracted crops submit their billings directly to Respondent. According to Respondent's analyst, any questions concerning the billings are referred to the contractor rather than the grower. Another witness indicated that Respondent favors this method of payment as it enables Respondent to oversee growing costs. While labor costs are ultimately charged to the accounts of the individual growers, the system does suggest common control of labor relations. Logic dictates that contractors who provide identical services, albeit to different growers, to be reimbursed by the same payer, would not vary labor and related charges from grower to grower. Thus, subtle as it may appear, there is effectively a common labor relations policy governing employees who work in the production end of the integrated enterprise. Control of labor at only the executive level is sufficient to satisfy that component of the single enterprise test. (Sakrete of Northern California. Inc. v. NLRB (9th Cir. 1964) 332 F.2nd 902 [56 LRRM 2327] cert. den. (1965) 379 U.S. 961 [58 LRRM 2192].)

We also find indicia of common ownership or control of equipment. When Respondent purchased the sizable land holdings of Hanson Farms, it also acquired a large inventory of assorted farm machinery and equipment. Although it was successful in attracting some outside buyers, the bulk of the equipment was rented to the contract growers and eventually sold to them by

charging the equipment to their growing costs. In Emsing's Supermarket. Inc. (1987) 284 NLRB 302, 304 [125 LRRM 1178], the NLRB found that two nominally separate supermarkets were in fact a single employer because, in part, the transactions between them "were not at full arm's length." In one key transaction, Emsing's used the second market "as a captive customer" to purchase leftover inventory and equipment by means of "a convenient bookkeeping entry to account for payments made . . . on Emsing's behalf."

In sum, the findings of the ALJ and the inferences that can be drawn therefrom support the conclusion that Respondent has merely modified the manner in which it has in the past controlled the growing operations, relinquishing direct management in exchange for a form of controlled or centralized management. Although Respondent entered into complex agreements with ostensibly independent growers, it continued to maintain critical policy and operational control at the highest or executive level over all entities which it had solicited and bound together contractually and financially. As amply demonstrated by the ALJ, Respondent was positioned to meaningfully influence the labor relations policies which governed a significant number of employees who performed services for contract growers. That as well as other controls described by the ALJ belie the asserted independence of the individual growing entities; they are not unlike the level of control evident between branches of a unitary enterprise system.

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AGRICULTURAL EMPLOYMENT IN CALIFORNIA

Under the National Labor Relations Act (NLRA), agricultural laborers are not employees and therefore have no statutory right to collective bargaining (29 U.S.C. sec. 157) and no unfair labor practices may be committed against them (29 U.S.C. sec. 158). The NLRB can neither direct an election among them nor act towards their protection (29 U.S.C. sec. 160). In contrast, the ALRA was enacted in order to provide employees in California's single largest economic sector with access to the same rights and remedies for purposes of labor-management relations as are available to their counterparts in industry. An estimated 882,000 farmworkers are employed annually in California, with an average of 342,500 of them working at any one time.[9] Modeled in the main after the federal statute, the ALRA's protective mantle is identical to that of the NLRA. While the ALRB is statutorily required to follow NLRA precedents, including federal court rulings construing the national act, it need do so only when it deems them applicable in an agricultural context. (Section 1148).

As previously pointed out, however, both labor boards have been required by their respective legislative bodies to follow the definition of agriculture set forth in section 3(f) of the Fair Labor Standards Act (FLSA), supra, 29 U.S.C. sec

[9] Figures obtained from State of California, Employment Development Department (EDD) and published in EDD Agricultural Employment Study, 1989, and California Agricultural Employment and Earnings Bulletin, 1991.

203(f). Thus we are met at the outset of our inquiry with certain provisions of the FLSA which define agriculture as follows:

> "Agriculture" includes farming in all its branches and among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (29 U.S.C. sec. 203(f).)

The same language appears in the ALRA, at section 1140.4(a).

The ALRB recognizes that the FLSA is controlling in its sphere, Gotliff Coal Co. v. Cox (6th Cir. 1945) 152 F. 2d 52, and therefore looks to federal court decisions construing and applying the FLSA exemption for agriculture as the most compelling authority in that regard. It cannot be disputed that, pursuant to the FLSA, employees engaged in the actual field production and harvesting of crops (i.e., direct farming) are engaged in primary agriculture. (Farmer's Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755. Such employees are agricultural employees regardless of where the work is performed and whether or not performed for a "farmer." In such circumstances, the employer is whomever the Board determines hires, fires, supervises, and disciplines them and who determines their hours, wages and other terms and conditions of employment. The secondary definition of agriculture within the meaning of Farmer's, supra, with limited exception not material

here, defines work performed "by a farmer or on a farm" as an incident to or in conjunction with the agricultural activities of the grower-employer. The issue in this case is whether cooler employees are engaged in secondary agriculture.

Where, as here, employees handle agricultural commodities in their raw or natural state in an off-the-farm facility, the NLRB will find them entitled to the agricultural exemption unless a "regular and substantial" amount of their employer's business is performed for outside growers. (See, e.g., Employer Members of Grower-Shipper Vegetable Association of Central California (1977) 230 NLRB 1011 [96 LRRM 1054].) Since we find Respondent that its growers comprise a single enterprise controlled by Respondent, the produce handled by the cooler employees is that of the same enterprise and therefore, even under the NLRB's Grower-Shipper standard, those employees are engaged in secondary agriculture as that term is defined in the FLSA. As will become apparent below, we do not believe we are compelled to accord to the so-called "outside mix" such significance that it may result in the loss of jurisdiction. The "mix" is neither essential nor incidental to Respondent's business purpose and is no more than a service which Respondent makes available as a convenience to established customers.

Respondent erroneously believes that the U.S. Supreme Court has squarely addressed and disposed of the jurisdictional question at issue here, citing Bayside Enterprises, Inc. v. NLRB (1977) 429 U.S. 298 [97 S.Ct. 576 [94 LRRM 2199]). The question in that case was whether six truck drivers who hauled feed from

the mill of a vertically integrated poultry processing operation to the farms of contract growers were engaged in activity which was incidental to Bayside's agricultural operations or to its non-agricultural operations. Although Bayside operated some purely agricultural functions, including, hatcheries and breeding farms, the Supreme Court concluded that Bayside was primarily a feed manufacturing and poultry processing operation and that the truck driver's work was part and parcel of those predominantly nonagricultural functions.[10]

Bud Antle, Inc. is not to be compared to poultry "integrators" as that name is commonly used in the poultry industry to denote entities such as Bayside which own hatcheries, breeder flocks and farms (for the production of eggs) and also own and operate highly mechanized feed mills and processing plants which are more akin to manufacturing than to farming. (See, e.g., U.S. v. National Broiler Marketing Association (5th Cir. 1977) 550 F.2d 1380.) Moreover, and contrary to Respondent's assertion, the Bayside Court did not overrule either NLRB v. Strain Poultry Farms. Inc. (5th Cir. 1969) 405 F.2d 1025 [70 LRRM 2200] or NLRB v. Ryckebosch. Inc. (9th Cir. 1972) 471 F.2d 20 [81 LRRM 2931]). Instead, the Court found them distinguishable because the entities involved were

[10] Similarly, in Careau Group v. United Farm Workers of America, AFL-CIO (1989) 716 F.Supp. 1319, it was held that "for purposes of determining whether a particular type of activity is agricultural within the meaning of the FLSA, the question is whether the activity is carried on as part of the agricultural function or is separately organized as an independent productive activity."

engaged primarily in traditional agriculture. Indeed, in both cases, the circuit courts had found that drivers who transported poultry from the farms to market or to processing plants were engaged in agriculture because they worked for employers whose primary business was the raising of poultry.

In Coleman v. Sanderson Farms. Inc. (5th Cir. 1980) 629 F.2d 1077, a case construing the definition of agriculture within the meaning of the FLSA, the same court which had previously decided Strain Poultry, supra. held that Strain (and thus, by inference, Ryckebosch as well) was still viable.[11] The Coleman court reasoned that:

> Sanderson's live haul drivers and loader operators are in a situation distinctly different from those in Bayside and must be regarded as agricultural employees . . . unlike the operation of a feedmill in Bayside. Sanderson's practice here must be characterized as agricultural activity. Transportation of grownout broiler chickens from the contract farms where they are raised to the processing plants where they are sold is clearly work performed by 'a farmer . . . as an incident to or in conjunction with' Sanderson's primary farming task of raising poultry. Any doubt that this is the case is removed by the express statutory language including 'preparation for market' and 'delivery to storage or to market' as practices incidental to any agricultural enterprise.

In contrast to Bayside, Supra, Wirtz v. Tyson's

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[11]The court chastised the plaintiffs in that case for asserting, as does Respondent herein, that the Supreme Court granted certiorari in Bayside in order "to reconcile the 'apparent conflict' between the Circuits, specifically citing our Strain Poultry decision." As the Court said, "[W]e reject this uncritical reading of Bayside" and then explained that the Bayside Court merely declined to follow the Strain rationale. leaving Strain intact. (Coleman v. Sanderson Farms. Inc. (5th Cir. 1980) 629 F.2d 1077, 1080.)

Poultry, Inc. (8th Cir. 1966) 355 F.2d 255 illustrates the markedly different result which can obtain when Bayside's "nature of the activity" test is applied to an extension of the predominately agricultural segment of an integrated contract growing system. Tyson contracts with individual farmers for the production of eggs on a large scale, providing them with laying hens for that purpose. The question before the court was whether Tyson was entitled to claim the FLSA's agricultural exemption for employees whose work included the "handling, cooling, grading, candling and packing" of eggs from the farms of the contract growers. The court reasoned that since the work in question was so closely related to the ordinary farming operation of producing eggs as "part of a self-sustained and operated entire 'agricultural function'", it was work ordinarily done by a farmer and therefore the employees were agricultural laborers.

As explained in Maneja v. Waialua Agricultural Co., Ltd. (1955) 349 U.S. 254 and quoted in Wirtz v. Tyson's Poultry. Inc., supra, 355 F.2d 255, 258: ". . .in making the factual determination [as to if a particular operation fell within the agricultural exemption] we must . . . [consider] what is ordinarily done by farmers with regard to this type of operation." Then, in borrowing from Wirtz v. Jackson & Perkins Co. (2d Cir. 1963) 312 F.2d 48, 50, the Tyson court found nothing in the FLSA "to suggest that Congress intended the availability of the agricultural exemption to turn upon the technicalities of corporate organization within which farming

operations or practices performed incidental thereto were conducted."

In this case, as a general rule, produce is field packed (usually in cartons or bins) by field employees engaged in primary agriculture before it is transported to Respondent's cooler facilities. The produce so packed is then cooled and stored pending sale and shipment to wholesalers. The work within the cooler involves the fork lifting of pallets of prepacked produce from a loading dock followed by immediate transfer to a cold storage holding room or, with regard to different varieties of produce, quick-cooling to reduce field heat as quickly as possible before storage. Broccoli may be subjected to a different treatment, the injection of ice into pre-cut holes in the cartons. Unlike a processing plant, where products are changed from their raw or natural state in a process more akin to manufacturing, there is no change in the physical properties of the produce, the only change being a matter of temperature and location. Actual handling of the crops by cooler employees is minimal as they neither sort, grade, trim, size, bunch, wrap, tie nor even pack the freshly harvested produce. Aside from cooling operations tailored to certain crops, the bulk of the work of the cooler employees consists of moving pallets of packed vegetable cartons in and out of cold storage.

Since that work, in our view, is a necessary incident to the production of crops and/or the preparation of them for market, the coolers are an integral component of the overall

enterprise whose employees engage in activities within both the primary and secondary meaning of agriculture. Respondent "is engaged in the single, indivisible enterprise of growing and preparation for market" and the cooling plants are operated "as an incident to or in conjunction with" the farming operations of the integrated enterprise and "not as a separate commercial enterprise." (B. F. Maurer. dba John C. Maurer & Sons (1960) 127 NLRB 1459 [46 LRRM 1216]; see, also, Bodine Produce Company (1964) 147 NLRB 832 [56 LRRM 1276] (significant that melons leave the packing shed in practically the same raw or natural state as when they are received from the field.)

OUTSIDE MIX

Finally, we turn to the NLRB's recently revised and apparently now prevailing standard when determining whether to grant or to deny application of the exemption for secondary agriculture to employees of an off-the-farm packing or cooling facility who otherwise would be agricultural laborers. In Camsco Produce Company. Inc. (1990) 297 NLRB No. 157 (Camsco), the NLRB ruled that henceforth "any amount of outside produce" handled with regularity will serve to invoke NLRB jurisdiction. Camsco issued on March 15, 1990, some 6 months after the conduct which is alleged in the Union's pending unfair labor practice charges.

Having affirmed the ALJ's finding that the cooler employees prepare for market produce grown by a single integrated enterprise which is their employer, we are now required to determine whether produce which Respondent

characterizes as the "outside mix" falls within the ambit of the new rule and is sufficient to take the employees out of agriculture altogether. The product which Respondent believes falls within the purview of Camsco and which on the basis of Camsco should serve to divest cooler employees of the provisions of the ALRA is comprised solely of produce which Respondent neither grows nor packs but which it merely keeps on hand as a service to its customers. As explained by Respondent's agricultural manager, the "mix" is usually just a small quantity of produce which does not even carry Respondent's label - "we receive it, hold it, and reload it" so that a customer need not stop at another cooler when it occasionally needs a product not carried in Respondent's regular line.

Although Respondent urged the NLRB's Regional Director to apply Camsco retroactively to Respondent's operations, she declined to do so, applying Camsco prospectively only from the date of the NLRB's Unit Clarification hearing which concluded on March 6, 1991. Having determined that Respondent is not a "farmer" within the FLSA's secondary meaning of agriculture, the Regional Director was not required to reach Camsco. However, since we find that Respondent is a "farmer" with respect to both primary and secondary agriculture, Camsco poses potential relevance to the amount of and the regularity with which the outside mix is a component of the overall single integrated enterprise. Were we to find Camsco binding precedent upon the deliberations of this Board, (sec. 1148), we then must determine whether Camsco represents the prevailing rather than a new rule

of law which warrants retroactive application and thus controls disposition of the conduct at issue herein. We respond negatively to both lines of inquiry.[12]

In DeCoster Egg Farms (1976) 223 NLRB 884 [92 LRRM 1120], the national board interpreted and applied the exemption for "secondary agriculture" according to the extent to which the employees' work is devoted to agricultural commodities produced by their own employer or by independent growers. In that case, the NLRB concluded that henceforth "any amount" of outside or non-employer goods will be sufficient to defeat the agricultural exemption. One year later, the DeCoster standard was followed by one which would deny the exemption whenever a "regular and substantial" portion of the employees' work relates to the crops of independent growers. (Employer Members of Grower-Shipper Vegetable Association of Central California (1977) 230 NLRB 1011 [96 LRRM 1054].) The obvious conflict between the DeCoster and Employer Member standards ultimately was resolved by Camsco which borrows from only a portion of each of the prior rules. Under the new Camsco standard, the exemption will not apply to employees who regularly handle any amount of agricultural commodities grown by other than their employer.

In Sunny-Cal Egg & Poultry. Inc. (1988) 14 ALRB No. 14, we had occasion to decide whether DeCoster was an applicable precedent. We noted that:

/ / /

[12] We agree with the ALJ's finding that Camsco represents a new rule of law which should not be applied retroactively.

> [A] strict application of the reasoning in DeCoster would lead to an absurd result, where all an egg processor would have to do to make its operation commercial would be to purchase a dozen eggs for processing from an independent producer. Furthermore, an employer could slip in and out of jurisdiction of first the ALRB and then the NLRB by continually adjusting the quantity of eggs it accepted for processing from other producers. (Id. sl. op., p. 14)

In the interest of maintaining stability in agricultural labor relations, we announced that we would continue to follow the rule first propounded by the NLRB in Olaa Sugar Company. Ltd. (1957) 118 NLRB 1442 [40 LRRM 1400], and reaffirmed in Grower-Shipper. Accordingly, we concluded that we will deny employees the protection of our Act only where we determine that a regular and substantial portion of their work effort is directed towards the crops of a grower other than the grower by whom they are employed. (Id.)

Following the same rationale for rejecting DeCoster which we expressed in Sunny-Cal, we observe that Camsco similarly will permit an employer to weave in and out of NLRB and/or ALRB jurisdiction by merely purchasing a dozen eggs from an independent producer providing it does so with regularity, once a week or perhaps only once a year. By deliberate manipulation, an employer may succeed in avoiding the jurisdiction of either the ALRA or the NLRA altogether.

In Wirtz v. Jackson & Perkins Company (2nd Cir. 1963) 312 F.2d 48, the court examined the agricultural exemption of the FLSA in relation to employees of a company which grew nursery stock and who worked in one of its warehouses oh stock

purchased from independent sources when necessary to compensate for temporary shortages in the company's own output. The court concluded that such work was incidental to and performed in conjunction with the employer's farming operations and therefore the employees were engaged in agriculture. In light of the fact that the "mix" is no more than a service which Respondent provides as a convenience for established customers, and is peripheral to the operation of Respondent's cooling facilities, we find the reasoning of Jackson & Perkins persuasive.

CONCLUSION

In summary, the employees whose status is in dispute herein were engaged in agriculture within the FLSA's secondary meaning of that term during the time of the conduct alleged in the unfair labor practice charges which their representative filed on their behalf with this Board.

DATED: September 16, 1992

BRUCE J. JANIGIAN, Chairman[13]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[13] 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.

CASE SUMMARY

BUD ANTLE, INC., dba
BUD OF CALIFORNIA, a Wholly
Owned Subsidiary of
CASTLE & COOKE, INC.

18 ALRB No. 6
Case Nos. 89-CE-36-SAL,
et al.

Background

In 1976, pursuant to a Petition for Certification filed with the Agricultural Labor Relations Board (ALRB or Board) and a Board conducted representation election, the Fresh Fruit & Vegetable Workers (FFVW or Union) was certified to represent employees of Respondent's off-the-farm cooling facilities for purposes of collective bargaining as that term is defined in the Agricultural Labor Relations Act (ALRA or Act). Thereafter, the parties consummated at least four collective bargaining agreements covering the cooling plant employees without apparent incident. While in the process of negotiating a fifth agreement in the spring and summer of 1989, a labor dispute developed and both the Union and Respondent filed unfair labor practices against the other with the ALRB, seeking to invoke the Board's processes. The following January, after charges had been filed by both parties with the ALRB, and for the first time, Respondent questioned this Board's authority to entertain matters concerning the cooler employees on the grounds that the Company had implemented certain changes in the nature of its operations so as to divest those employees of their prior status as agricultural employees.

At Respondent's behest, the Board agreed to bifurcate this proceeding, holding in abeyance the unfair labor practice complaint which General Counsel had issued following his investigation of the Union's charges and permit Respondent an opportunity to attempt to establish its jurisdictional claim as a threshold matter.

Decision of the Administrative Law Judge

Thereafter, following a full evidentiary hearing before an Administrative Law Judge (ALJ), the ALJ issued a decision in which he found that, on the basis of federal labor law precedents, Respondent, in combination with the growers it solicited to custom grow those crops which Respondent previously had itself cultivated, comprised a single integrated enterprise. Therefore, the employees who cooled and stored the agricultural commodities grown for the enterprise pending shipment to market were engaged in "secondary" agriculture as that term is defined in section 3(f) of the controlling Fair Labor Standards Act (29 U.S.C. sec. 203(f)) which the National Labor Relations Board as well as this Board are required by their respective

legislative bodies to follow when defining employment in agriculture.

Decision of the Board

In its decision upon appeal, the Board cautioned at the outset that this case turns on its unique facts and should be held to those facts. The Board determined that Respondent had not overcome General Counsel's prima facie showing of jurisdiction. While acknowledging that Respondent had indeed restructured its business operations, the reorganization had not served to alter the established agricultural status of the employees whose rights are disputed herein. In agreement with the ALJ's theory of analysis based on the totality of circumstances, the Board found Respondent's oversight of and continued participation in the entire process of agricultural production such that the requisite "arm's length" relationship between nominally independent growing and shipping activities was not established,

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: BUD ANTLE INC., d/b/a BUD OF CALIFORNIA, a Wholly Owned Subsidiary of CASTLE & COOKE, INC. Respondent. and FRESH FRUIT & VEGETABLE WORKERS, LOCAL 78-B, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC, Charging Party.	Case Nos. 89-CE-36-SAL 89-CE-37-SAL 89-CE-39-SAL 89-CE-39-1-SAL 89-CE-41-SAL 89-CE-43-SAL 89-CE-43-1-SAL 90-CE-31-SAL 90-CE-32-SAL 90-CE-33-SAL

Appearances:

Theodore R. Scott
Scott A. Wilson
William C. Wright
Littler, Mendelson, Fastiff & Tichy
San Diego, California
for the Respondent

Michael Lyons
Fresh Fruit & Vegetable Workers
Salinas, California
for the Charging Party

Marvin J. Brenner
Clifford R. Meneken
Salinas Regional Office
Salinas, California
for the General Counsel

December 16, 1991

RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE
ON THE ISSUE OF JURISDICTION

JAMES WOLPMAN, Administrative Law Judge:

This matter was heard by me in Salinas, California, over a period of eight hearing days, between April 16 and May 10, 1991.

It arose out of charges filed against Bud Antle, Inc. ("Bud") by the Local 78-B of the Fresh Fruit & Vegetable Workers ("FFVW"), the union which represents employees at the various cooling facilities which Bud operates in California. In those charges the FFVW alleged that Bud committed numerous violations of the Agricultural Labor Relations Act during the course of a labor dispute which started in the Summer of 1989 when its collective bargaining agreement with the company expired and negotiations began for a new agreement. In late August, the employees struck, and Bud declared a lockout and began operating with replacements. In early September, the company announced that negotiations were at an impasse and unilaterally implemented certain of its proposals. In mid-November, the striking employees offered to return to work, but their offer was rejected. The lockout was still in effect in May 1991, when the Hearing concluded.

After investigating the FFVW's charges, the General Counsel issued a complaint alleging that Bud had engaged in surface bargaining, failed to provide the union with the information it requested and needed for bargaining, implemented its last proposal without having reached impasse, subcontracted out bargaining unit work without notifying or bargaining with the

union, unilaterally altered employee life insurance and vacation pay programs, wrongfully locked out its employees and hired replacements for them, and wrongfully rejected their offers to return to work.

The Respondent answered, denying that it had violated the Act, and went on to raise numerous affirmative defenses, including a claim that the Agricultural Labor Relations Board was without jurisdiction over the conduct complained of because the affected workers were not "agricultural employees" as defined in the Act.[1]

In connection with this later claim, the Respondent requested that the Board bifurcate the instant proceeding and resolve the jurisdictional issue before considering the merits of the complaint. The Board granted the motion and directed that the jurisdictional and liability issues be bifurcated and that I issue an order setting forth the parameters of the jurisdictional phase. In that order, issued May 3, 1991, I directed that the parties conclude their evidentiary presentations on the issue of jurisdiction, after which the record would be prepared and post hearing briefs filed. A Recommended Decision on Jurisdiction would then be issued, and it would be subject to exceptions and appeal to the Board.

The hearing on jurisdiction was concluded on May 10,

[1]The complaint was later amended to include an allegation that Bud wrongfully refused to recognize the Union by asserting that its operations were outside the jurisdiction of the ALRB.

1991,[2] the record was prepared, and post hearing briefs were filed by the Respondent and by the General Counsel on August 5, 1991.[3] Based on that record, including the documentary evidence

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[2]On May 2, 1991. during the course of the hearing, the General Counsel called Bud's Acting Director of Personnel Relations, Danny Urbano, as an adverse witness. (VII:74.) He refused to testify, claiming that the ALRB was without jurisdiction to proceed and that his answers would only provide the Union and the ALRB with information concerning other threatened and pending litigation. (VII:76.) I warned Mr. Urbano and his counsel that if he persisted in his refusal, I would strike all of his prior testimony relating the issues about which the General Counsel planned to question him. (VII:83.) At my request, the General Counsel then described the prospective scope of his examination; it covered his entire testimony before the NLRB [the record of which had been incorporated into the instant proceeding] (VII:90-106.) Counsel then informed me that Mr. Urbano would respond to none of those questions. (VII:106.) I therefore ordered all of his prior testimony stricken. On the following day, Respondent's co-counsel appeared and announced that the witness was now available to testify and that his prior refusal had not prejudiced the General Counsel. No apology whatsoever was forthcoming for the behavior of co-counsel or the witness on the previous day or for their having wasted a half day of valuable hearing time. (VIII:115.) I declined to rescind my ruling because I considered the behavior of the previous day reprehensible. (VIII:116.) Orderly hearings would be impossible if counsel were allowed to usurp the function of the administrative law judge and decide for themselves how and when witnesses are to be questioned. (Cal. Code Regs., tit. 8, §20262.) The issue is not whether the other side has been prejudiced; the issue is whether counsel and his witness acted in a manner which interfered with the orderly conduct of the hearing. They did, and the striking of testimony is, in the exercise of my sound discretion, a proper sanction for such behavior. (Id. §20255.)

[3]Respondent filed two motions to strike portions of the General Counsel's Post Hearing Brief: One directed to the portion which argues that Bud's action in refusing to recognize the Union by asserting that its operations were outside the jurisdiction of the ALRB was itself a illegal refusal to bargain, and the other directed to the inclusion of the Salinas Regional Director's Recommendation on Unit Clarification Petition in the Matter of IUAW and Jack T. Baillie, Inc. For the reasons stated during the hearing (VII:127), I grant the motion to strike the portions of the brief concerned with the alleged refusal to bargain; however,

introduced and my observation of the demeanor of witnesses, and after consideration of the arguments and briefs submitted, I hereby issue the following Recommended Decision on Jurisdiction.

I. INTRODUCTION

A.

Bud Antle, Inc. is the largest volume producer of fresh vegetables in the United States; it currently markets 40 million cartons per year. In 1978 it was acquired by Castle & Cooke, Inc., a multi-national corporation which, in addition to its extensive real estate holdings in California and Hawaii, also owns one of the world's largest food processors, Dole Food Company, as well as several other subsidiaries directly or indirectly involved in California agriculture.

While Bud's primary crops--iceberg lettuce, broccoli, cauliflower, and celery--constitute 75% to 80% of its business, it also handles a number of other varieties of fresh vegetables. Originally, it functioned as a traditional "Grower/Shipper"; that is, a fully integrated operation, using--for the most part--its own employees and equipment to prepare and cultivate land it either owned or leased and to plant, grow, harvest, cool, pack, transport and market the crops it produced on that land. Then,

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the motion is granted without prejudice to the General Counsel's right to renew its argument should this matter eventually be scheduled for hearing on the merits. I deny the motion to strike the Appendix containing the Baillie Recommendation. While it has no evidentiary or precedential value, it contains an interesting and suggestive analysis which may be helpful, as any non-binding legal authority would, in understanding the issues here presented. I note that an NLRB Decision involving the same company and related issues was admitted as Respondent's Ex. E-45.

in the 1980's, instead of using its own employees in its growing operations, it began to contract out that work to "growers". Typically, those growers lease or sublease land from Bud pursuant to contractual arrangements under which profits and risks are shared, usually on a 50/50 percent basis, with Bud. While the growers assume contractual responsibility for the actual growing, Bud remains very much involved: It sets rigorous planting schedules, often providing its growers with seed or actually transplanting its own seedlings to the land they are farming; it leases equipment to them; it may help line up labor contractors to perform their thinning and weeding or their pesticide work; it carefully tracks their crops as they mature, at times providing advice and technical assistance; and it operates as a financial clearing house, advancing funds to its growers, deducting rents for land and equipment, often times paying their labor contractors and day-to-day farming expenses, and off-setting all of those advances and payments against their eventual share of the hoped for profits. When crops are ready for harvest, Bud typically does the harvesting, though some growers do their own. After that, Bud takes full control and transports the crops to its processing facilities where they are cooled, packed, stored, and eventually shipped to market. By 1989, the transition was complete, and Bud employees were no longer directly involved in growing the crops it harvested, cooled, packed, shipped and marketed. In Bud's view, it had ceased to be a "Grower/Shipper" and become simply a "Shipper".

The employees here at issue all work in Bud's cooling facilities in Marina {near Salinas), Holtville, Guadalupe, Gonzalez, and Huron. The facilities vary in size; Marina is by far the largest, handling between four to five times the volume of the other coolers (see Respondent's Exs. E-4, E-6 & E-7) and, at peak, employs up to 100 workers.[4] Coolers operate on a seasonal basis, and so, during the course of a year, employees may move from one location to another.

Produce arriving at a cooler is, in most instances, unloaded from trucks onto "shuttles" which convey it to a cooling machine--vacuum cooling tube, hydro-vac, pressure tube, or hydro-shower--which quickly lowers its temperature. Once cooled, it is taken by forklift to a "cold room" where it is stored. As the need arises, it is moved from the cold room to a loading dock where it is loaded on customers' trucks for delivery to market.

Each function at the cooler has its own job classification: there are loaders, operators, "mix men", "strappers", general floor help, dispatchers, "stackers", "numbers runners", maintenance workers and parts employees, and so on. All, however, are members of a single, bargaining unit, certified by the Agricultural Labor Relations Board, represented by Locals P-78-A and B of the Fresh Fruit and Vegetable

[4]Overall, Bud employs 3000 to 3500 workers in its various operations during its peak seasons.

Workers,[5] and made up of:

> "All production, plant clerical and maintenance employees [of Bud Antle, Inc.] engaged in receiving, refrigerating, handling and loading fresh vegetables in the State of California."

There is no indication that Bud's change in the manner in which its produce was grown--using contractual growers rather than employees--had any effect on operations and work at the cooling facilities. Nonetheless, that change, along with a modification in NLRB precedent which occurred in 1990,[6] is responsible for the jurisdictional issue here presented. Stated succinctly, it is this:

> Have the Bud employees who work in its cooling facilities ceased to be agricultural employees because Bud no longer uses its own employees to grow the produce they cool?

B.

Since this proceeding turns on the question of who is and who is not an agricultural employee, the place to start is with the statutory definition of the term. Section 1140.4(b) of the ALRA begins by defining an agricultural employee "as one engaged in agriculture, as that term is defined in subsection (a)." Subsection (a) describes agriculture as:

> "[I]ncluding farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities

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[5]In 1988, Local P-78-A was merged into Local P-78-B, which now represents all of the cooling employees in Bud's California operations.

[6]Camsco Produce Company, Inc. (1990) 297 NLRB No. 157.

> defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, fur bearing animals, or poultry, 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." (Emphasis supplied.)

The emphasized language is important here because employees working in cooling operations are involved in the "preparation [of agricultural commodities] for market."

The entire section, including the emphasized portion, is drawn verbatim from Section 3(f) of the Fair Labor Standards Act, and has been used by Congress in establishing the limits of the jurisdiction of the National Labor Relations Board.[7] As such, it expresses the desire of the California Legislature to have state jurisdiction over agricultural labor relations pick up where federal regulation leaves off. That intention is reinforced in the second sentence of section 1140.4(b), which provides:

> "[N]othing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(e), Title 29, Unites States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, Unites States Code)."

Notice that under the "any practices" language of the ALRA, section 1140.4(a), and the FLSA, section 3(f), a worker who

[7] The exclusion of "agricultural laborers" in Section 2(3) of the NLRA does not mention the FLSA definition; however, ever since 1946, Congress has directed, in the annual rider to the NLRB's appropriation, that it be guided by the definition found of "agriculture" as set forth found in section 3(f).

is not directly involved in the cultivation, growing and harvesting of an agricultural commodity does not become an "agricultural employee" simply by performing work on it. More is required; namely that the work be performed "by a farmer or on a farm as an incident to or in conjunction with such farming operations." As the United States Supreme Court explained in Farmers Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755, 763-64:

> "As can be readily seen this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc, are listed as being included in this primary meaning. Second, there is a broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with "such" farming operations."

with this in mind, the test to be applied in determining whether operations, like cooling, which do not fall within the primary definition of agriculture, are nevertheless agricultural in nature, may be stated as follows: Is the work performed by a farmer? That is to say: Is Bud a "farmer"? If not, then those who work in its cooling facilities are not agricultural employees; if so, then they are agricultural employees if, in addition, their work is incidental to or performed in conjunction with Bud's primary farming work.

Bud argues that it ceased to be a farmer when it stopped using its own employees to grow the crops it cools and, instead, contracted with "growers". Beyond that, it argues that,

even if it were a farmer, enough of the commodities handled by its cooling employees come from outside sources such that—at least under the current NLRB standard (see Camsco Produce Company, Inc., supra)--the work done at the coolers is neither incidental to nor in conjunction with such farming operations.[8]

Notice that both the question of whether Bud is a farmer and the question of whether its cooling work is incidental to or in conjunction with its farming are mixed questions of law and fact. On the one hand, it must be determined what it means to be a farmer and, on the other, whether Bud, by virtue of the manner in which it operates, falls within that definition; next it must be determined what constitutes "incidental to" and "in conjunction with", and then whether the source and volume of commodities Bud cools are within or without those limits.

II. JURISDICTION HISTORY

A.

The outcome of the above inquiry will determine whether jurisdiction lies with the Agricultural Labor Relations Board. But this is not the only forum in which the matter has been addressed. Nor is it the first time the issue has been raised and dealt with. There is an historical dimension to the issue which needs telling, and not just as background. The General

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[8]Those commodities, known as "outside mix" are grown by farmers who operate independently of Bud's contractual growers. Bud purchases their produce, as needed or requested by its customers, and brings it to the coolers where it is commingled with Bud's own commodities. This customer service is known as "one stop shopping".

Counsel argues, and forcefully, that the historical behavior of the parties is a factor, possibly a crucial factor, which must be taken into account in determining where jurisdiction lies. Then, too, there is the possibility that the ALRB had jurisdiction, but lost it sometime during the course of events which led to the filing of the instant unfair labor practices. If sap it may be that the Board has the jurisdiction to consider some but not all, of the alleged wrongful conduct. It would be well, therefore, to begin with a history and chronology.

On January 22, 1976, not long after the enactment of the ALRA, the Board certified Locals P-78-A and P-7-B of the FFVW as the exclusive representative for all production, plant clerical and maintenance employees engaged in the receiving, refrigerating, handling and loading of fresh vegetable in the State of California.[9]

Since 1977, Bud and the FFVW have negotiated four collective bargaining agreements, every one containing a "Recognition" clause, in which union recognition is founded upon ALRB certification. (Charging Party Ex. U-42; Respondent' s Ex. E-22.) The most recent agreement--running from-April 1, 1986 to March 31, 1989--reads: coole

> "1.2 Scope of Union Recognition. Pursuant to 9, th certification under the California Agricultural Labor Relations Act, the Company recognizes the Union as the sole and exclusive bargaining agent for all its plant

[9]Around the same time the ALRB certified Local 890 of the International Brotherhood of Teamsters as the exclusive bargaining representative for Bud's farm workers and for its drivers.

employees engaged in handling commodities at the following plants...."[10]

In 1982, an FFVW member named David Earle filed a charge with the National Labor Relations Board asserting that the FFVW had failed to properly represent him in connection with a seniority dispute which arose while he was employed at Bud Antle. The matter proceeded to complaint, and the Union's attorney filed an answer in which he admitted the allegation alleging NLRB jurisdiction. (Respondent's Exs. E-23 & E-24.) The matter evidently proceeded no further. (See NLRB Tr. 258-266.)

In 1985, the FFVW filed a charge with the Agricultural Labor Relations Board alleging Bud Antle had refused to bargain. (Charging Party's Ex. U-27.) It was later withdrawn by the union when a parallel grievance was settled. (See Respondent's Ex. E-38.)

On March 31, 1989 the labor agreement between Bud and the FFVW expired and negotiations began for a new one. On June 6, 1989, Bud proposed, in writing, that Article I, section 1.2 of the previous agreement--providing for union recognition "pursuant to certification under the California Agricultural Labor Relations Act"--be included without change in any new agreement.

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[10]It should be noted, however, that the Federal Labor Management Relations Act is twice mentioned in the body of the contract. (Respondent's Ex. E-22, Art. II, Sec. 2.3, and Art. III. Sec. 3.4C(2).) This appears to have occurred because the drafters relied on portions of the FFVW's multi-employer agreement—covering employers who are subject to NLRB jurisdiction--in preparing the union security and grievance language for the Antle agreement. (See Respondent's Exs. E-25 and E-26.)

(Charging Party's Ex. U-21.) Shortly thereafter, the union expressed its concern that the corporate reorganization which was underway, involving Bud, Dole Fresh Vegetables, Dole Food Company, and Castle & Cooke, Inc., might adversely affect its representational rights. (Respondent's Ex. £-39.) To allay these fears, Bud prepared a Letter of Understanding, and submitted it to the Union on August 25, 1989. (Charging Party's Ex. U-24; see also Respondent's Ex. E-39, para. 3(h).) In it, the Company states:

> "Neither the Company organizational structure or the ' Dole' registered trademark have any effect on the Agricultural Labor Relations Board Certification which is binding between Bud Antle, and Fresh Fruit and Vegetable Workers Local P-78A and P-78B."[11]

Meanwhile, negotiations had begun to sour, and Bud--consistent with the position expressed in its proposal and its letter of understanding--filed a series of charges with the ALRB alleging that the FFVW was engaged in bad faith bargaining. (Charging Party's Ex. U-25.) The first, 89-CL-8-SAL, was filed in the Board's Salinas Office on June 30, 1989; on August 7, 1989, it was amended and refiled as 89-CL-8-1-SAL. It was followed on September 1, 1989 by 89-CL-11-SAL and on September 12, 1989, by 89-CL-12-SAL. All were eventually withdrawn or dismissed. (See Respondent's Ex. E-33.)

On August 28, 1989, the workers struck. Two weeks later, on September 11th, Bud implemented its "last and final

[11]It was not until May 30, 1990, that the Company proposed language, eliminating of any mention of the ALRA certification. (Respondent's Ex. E-34.)

offer" and then, on September 20th, locked out the striking employees and began hiring replacements.

On September 21st and October 2nd, Bud filed charges 89-CL-13-SAL and 89-CL-13-1-SAL, alleging that the FFVW picketing at the Port of Oakland constituted an illegal secondary boycott in violation of Labor Code, section 1154(d). In accordance with section 1160.6, the investigation was expedited and the Board sought preliminary relief in the Monterey Superior Court. In this connection, Bud's Acting Director of Industrial Relations, Danny Urbano, provided two declarations under penalty of perjury in which he specifically alleged the applicability of the ALRA. (See General Counsel's Ex. 162, paragraph 4, and Ex. 163, paragraph 4.)[12] The Court agreed and issued a Temporary Restraining Order. Thereafter, on November 2, 1989, the ALRB issued a complaint against the FFVW. Apparently as a result of the efforts of Federal Mediation and Conciliation Service, the matter was eventually settled and the court action withdrawn. (See Respondent's Exhibit E-19.)[13]

Meanwhile, the union had begun filing the charges which led to this complaint: 89-CE-36-SAL on September 1, 1989; 89-CE-37-SAL and 89-CE-38-SAL on September 12, 1989; 89-CE-41-SAL

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[12]General Counsel's Exs. 162, 163 and 169 are not yet admitted, either admit or take official notice.

[13]The complaint remained on file until March 1, 1991, when it was finally withdrawn. (See General Counsel's Exs. 165 through 169.)

on October 27, 1989; and 89-CE-43-SAL on November 30, 1989.[14]. The complaint which emerged from those charges alleges violations spanning the period from February 1989 through August 1990, with the bulk of the violations occurring or beginning before January 1, 1990; to wit: (1) surface bargaining from June 6, 1989 through August 30, 1989; (2) refusal to supply information necessary to bargaining requested March, May and June, 1989; (3) failure to bargain over subcontracting or diversion of cooling work in February and December 1989 and again in January 1990; (4) unilateral changes in benefit programs in October and November 1989; (5) implementation of contract proposals without impasse on September 11, 1989; (6) the illegal lockout of employees on September 20, 1989; and (7) the refusal to honor their unconditional offer to return to work beginning November 15, 1989.

Then, on January 18, 1990, Bud again filed charges against the FFVW alleging illegal secondary picketing at the Port of Oakland and bad faith bargaining. (Respondent's Exs. 17 & 31.) But this time the charges were filed not with the Agricultural Labor Relations Board, but with the National Labor Relations Board. The union responded claiming that the NLRB was without jurisdiction and that the matter had already been resolved by the settlement of the earlier ALRB complaint and charges. (Respondent's Exs. E-18 & E-19.) Eventually, the bargaining

[14]These were followed by new and amended charges: 89-CE-43-1-SAL on December 2, 1989 and 90-CE-31 through 33-SAL on February 22, 1990, and 89-CE-39-1-SAL on June 15, 1990.

charge was withdrawn (Respondent's Ex. 26) and the secondary boycott charge was settled in an agreement in which the union reserved its claim that the NLRB was without jurisdiction. (Respondent's Exs. E-20 & E-21.)

It was at this point—March 15, 1990--that the NLRB issued its decision in Camsco Produce Company, 297 NLRB No. 157, modifying the legal standard which it had previously utilized in deciding whether to exercise jurisdiction over workers engaged in secondary agricultural operations, such as packing and cooling. Before Camsco, the Board usually refused jurisdiction over those workers unless "a regular and substantial portion of their work effort" was performed on the crops of a grower other than the grower by whom they were employed (Employer Members of Grower-Shipper Vegetable Assn. (1977) 230 NLRB 1011).[15] In Camsco, the National Board abandoned the requirement of substantiality and held that it would assert jurisdiction "if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question." (Slip Opn., p. 11.)

One month later, on April 17, 1990, Bud's attorneys wrote to advise the Salinas Regional Director that the company had come to the realization that "none of the employees working at the Company's cooling facilities can be agricultural employees under the California Agricultural Labor Relations Act."

[15]I say "usually" because, prior to Camsco, there was a conflicting line of NLRB authority holding that secondary agricultural employees were subject to NLRB jurisdiction unless all of their work was performed on commodities grown or raised by their employer-farmer. (DeCoster Egg Farms (1976) 223 NLRB 884.)

(Respondent's Ex. E-32.) The Regional Director responded, indicating that the letter would be treated as a request to withdraw Bud's pending charges, but advising that, in doing so, "the regional office does not admit or agree...that the cooling facilities ...are outside the jurisdiction of the Agricultural Labor Relations Board". (Respondent's Ex. E-33.) Consistent with that position, the Region continued to pursue its investigation of the charges which the Union had filed against Bud. (pp. 15-16, above.)

Bud's response was to file a Unit Clarification Petition with Region 21 of the National Labor Relations Board, asking that it assert jurisdiction. (Respondent's Ex. 40.)[16] When the Region dismissed the Petition as inappropriate, Bud requested review by the Board in Washington and filed an Employer Representation (RM) petition raising the same issue. The RM petition was referred to Washington for advice. Meanwhile, the Chairman of the ALRB had written to the National Board seeking an advisory opinion on the issue. The NLRB declined to issue such an opinion and, instead, ordered that the Unit Clarification Petition proceed to hearing.

By that time, the Salinas Regional Director had issued the Complaint which is the basis of this proceeding. Bud

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[16]From testimony elicited from Respondent's counsel during the NLRB proceeding, it would appear that--during this same period--Bud also attempted, without success, to utilize what can only be described as "political" pressure to induce the General Counsel of the ALRB to relinquish jurisdiction in this matter. (NLRB Tr. 466, line 23, through 473, line 4.)

immediately requested that the ALRB take no further action pending the NLRB's decision in the unit clarification proceeding. The Board refused, holding that it was the proper forum to determine, in the first instance, its jurisdiction over charges which had been filed with it. Bud then went to the Federal Courts, seeking to enjoin the ALRB from exercising its primary jurisdiction, and was again rebuffed. It was then that the company requested and obtained bifurcation of this proceeding. (See p. 3, above.)

The NLRB hearing commenced on February 19, 1991 and concluded on March 6. On May 1st, while the jurisdictional operation of the ALRB hearing was underway, the NLRB Regional Director issued her Decision and Clarification of Bargaining Unit, granting the petition for clarification and holding that Bud's California cooling employees "are not agricultural employees within the meaning of Section 2(3) of the [NLRA]". (Respondent's Ex. 63, p. 20.).[17] However, in doing so, the Regional Director went on to say:

> "The clarification made herein is only as of the date of the hearing herein. I specifically decline to make the declaration requested by the Employer-Petitioner as to its status in 1989. The Employer-Petitioner cites no case authority which mandates such a finding by me, and I conclude that it is inappropriate in the present proceeding.
>
> "In addition, the record reflects that on November 2, 1989 [sic], the ALRB (which was granted amicus

[17]In a parallel proceeding involving Bud employees in a separate unit, represented by Local 890 of the International Brotherhood of Teamsters, the Regional Director for Region 32 of the NLRB reached a similar result. (See Respondent's Ex. 67.)

curiae status in the instant proceeding) issued a Notice of Hearing and Complaint, alleging that the Employer-Petitioner had engaged in certain unfair labor practices under the Agricultural Labor Relations Act of the State of California. Apparently, a hearing before the ALRB was commenced on April 16, 1991, in which the Employer-Petitioner contends that it is not under the ALRB's jurisdiction. The effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts. Thus, the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not appropriately addressed herein." (Id. at Footnote 15.)

A Request for Review was filed with the NLRB in Washington, D.C., but it was denied[18] Under the NLRB's regulations, "Denial of a request for review shall constitute an affirmance of the regional director's action...." (29 C.F.R. Section 102.67(f).)

B.

What is especially interesting about the Regional Director's Decision is her approach to the jurisdictional issue. Up until then, the focus of the dispute had been on the effect of Camsco,[19] and the issue had, for the most part, been framed around the question of whether cooling employees regularly handled commodities grown by independent growers. But, as has already been pointed out (Section I B, pp. 8-11, above), that question need only be asked in situations where the employer is a "farmer". In her Decision, the Regional Director acknowledged

[18]Pursuant to Respondent's Motion of August 27, 1991, that Denial is admitted into evidence as Respondent's Ex. 68.

[19]And, along with it, the question of retroactivity and the earlier viability of DeCoster Egg Farms, supra.

that and made Bud's status as a "farmer" the primary focus of her inquiry.

She concluded, based on long-standing NLRB precedent,[20] that Bud--by virtue of its change from "grower/shipper" to "shipper" (see pp. 5-6, above)--had ceased to be a "farmer". Hence, those of its employees who were not engaged in actual farming operations could not be agricultural employees, regardless of whether or not they regularly handled the commodities of independent growers (Respondent's Ex. 63, pp. 16-18).[21]

Despite the Regional Director's refusal to find NLRB jurisdiction prior to the date of hearing, her analysis suggests that the employees at the coolers may have lost their status as "agricultural employees", not upon the NLRB's final and unequivocal abandonment of the substantiality test in Camsco but, much earlier, when Bud ceased to be a farmer because it stopped using its own employees to grow the crops it cools.

C.

Before examining the legal precedents relied upon by the Regional Director in formulating her concept of who is and

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[20]Green Giant Company (1976) 223 NLRB 337, and, to a lesser extent, Employer Members of Grower-Shipper Vegetable Assn., supra.

[21]Only after reaching that conclusion, did she go on to find that, even if Bud were a "farmer", its cooling employees were not agricultural employees because they regularly handle "outside mix" from growers who are completely independent of Bud and its contractual growers. (Id. p. 18.)

who is not a "farmer" and before considering the complex factual relationships between Bud and its contractual growers, it would be well--for reasons which will later become apparent--to summarize, as clearly as possible, the historical degree of commitment which the parties manifested toward the ALRB as the arbiter of their legal relationship.

Prior to the labor dispute which gave rise to this proceeding, there was little to indicate that either the union or the company entertained any serious doubt that the bargaining unit was subject to the jurisdiction of the ALRB. Both appeared to be comfortable with their 1976 certification, and--to the extent that the matter even surfaced--were quite willing to acknowledge the ALRB's jurisdiction in the recognition clause of their several agreements and in the single unfair labor practice charge which one filed against the other in 1985.[22] The negotiations which followed the expiration of the most recent contract began in much the same vein with Bud proposing no change in the previous recognition clause. Then, as problems began to surface, the company reiterated its commitment to the ALRB certification in a proposed Letter of Understanding;[23] and,

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[22]The NLRB charge which was filed in 1982, and resulted in a complaint and answer, did not directly involve the company and, apparently, proceeded no further. The references to the LMRA in the union security and grievance portions of their contracts appear to have resulted from hastily borrowing language from another contract, and had nothing to do with any real dispute over jurisdiction.

[23]I simply cannot accept Bud's reading of its Letter of Understanding as nothing more than an affirmation of the unit which would be the subject of bargaining, without any

when it became evident that the problems were serious, both sides immediately turned to the ALRB, filing numerous charges and, in Bud's case, pressing the Agency to resort to the Courts to protect it from the secondary pressure which the union was exerting on its customers and shippers. If anything, the conduct of the parties during this period--June 1989 to mid-January 1990--evinces a stronger mutual commitment to ALRB jurisdiction than ever before.

Only after the ALRB had settled the secondary boycott charges with the Union, did Bud turn to the NLRB, on January 18, 1990, and file bargaining and secondary boycott charges. And only after it became apparent that the ALRB was going to press on with the charges which the union had filed against it, did the Company formally declare itself, on April 17, 1990, and, armed with the recently issued Camsco decision, petition the NLRB, on September 7, 1990, to assume jurisdiction over the unit.

III. THE RELATIONSHIP BETWEEN BUD AND ITS CONTRACTUAL GROWERS

A.

Bud made no secret of its motive in gradually shifting to the use of contractual growers, rather than its own employees, to grow the commodities it harvests, cools, packs, transports,

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acknowledgement of ALRB jurisdiction. If that was what Bud meant, it could easily have said so by reciting the unit description and avoiding any reference to the ALRB. [Indeed, it did just that, much later, after it had announced its new position. (See the final page of Respondent's Ex. E-34.)] I find that anyone reading that document in the context of the historical relationship of the parties at the time would, with good reason, understand it as an re-affirmation both of the unit and the ALRB's jurisdiction over the unit.

and markets. When Richard Bascou, the Vice-President responsible for overseeing Bud's "Grower Program", was asked why the company had phased out its direct growing operations, he answered:

> "Mainly because...we felt we couldn't be competitive with small growing companies as a corporation to compete. It was mo[re] cost effective to work with independent growers than it was for us to try to do our own farming. We're a union company; we pay union wages. Its hard to compete with those wages with independent growers. (Tr. IV: 36.) (emphasis supplied.)

B.

The mechanism which shippers like Bud use to define and regulate their relationship to the growers from whom they obtain agricultural commodities is knows in the trade as the "deal". In a deal, the grower and the shipper spell out their obligations with respect to financing a crop: planting, growing, and harvesting it; its delivery; the allocation of risks, responsibilities, and costs along the way; and, ultimately, the division of profits or losses. Some deals involve no more than a handshake; others are more elaborate and legalistic, and may include arrangements for cash and credit advances, timetables for planting and harvesting, quality guarantees, leasing property and equipment, recourse on default or breach, interim adjustments and modifications, and so on.

Bud's deals with its growers are among the most elaborate. They are embodied in detailed written agreements, drafted by Bud's attorneys, covering matters as diverse as Bud's intellectual property rights in the seeds it provides, Federal

Superfund and pesticide regulation, and equal employment opportunity. The agreements themselves are standardized in form and content, but each has attached to it an individual Addendum which spells out those arrangements which vary from grower to grower: the location and acreage of the farmland under cultivation, the crop and the growing season covered, the packing charges which Bud will levy against the proceeds, the fixed acre price, the payment schedule, the grower's percentage of net proceeds, any arrangements for Bud to provide special services or contributions, and any other unique agreement between Bud and the grower, such as arrangements to furnish equipment.[24] Typically, a new addendum is drawn up at the beginning of each new growing season and attached to the standard agreement.

Bud employs two standardized forms of agreement-- (1) Custom Farming and Crop Purchase Agreements (Respondent's Ex. E-l, General Counsel's Ex. 32.) which call for Bud to do the harvesting and, quite often, the planting as well, and (2) Marketing Agreements (Respondent's Ex. E-3), under which the grower does the harvesting.[25] The great majority--82% to 92%--

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[24]These individual Addenda make up the bulk of the employer exhibits introduced during the NLRB proceeding and incorporated into the Record of this proceeding. (Respondent's Exs. E-46a-ssss, E-47a-ss, E-48a-eeee, E-49a-x, E-50a-o, E-51a-k, plus exemplar E-2, see also Charging Party's Exs. U-33, U-34, & U-35.)

[25]Though, in practice, Bud appears not to have paid much attention to is distinction --See Charging Party's Exs. U-14 and U-36, and the Respondent Exhibits cited in footnote 51, below.

are Custom Farming and Crop Purchase Agreements.[26]

(Respondent's Exs. E-4, E-6, & E-7.)

Over time the agreements have become more standardized and more legalistic, and, recently, there have been two other significant changes--the Custom Farm Agreements no longer describe Bud as a "grower" (Compare, ¶ 1.2 of General Counsel Ex. 32, a 1981 agreement updated in January 1989, with ¶ 1.2 of Respondent's Ex. E-l, executed in December 1989), and Bud has been replaced by its fellow Castle & Cooke subsidiary, Dole Fresh Vegetables, Inc., as party to the Marketing Agreements (Compare General Counsel Ex. 31 with Respondent's Ex. E-3), which means that Bud will soon be harvesting all of the crops of the growers with whom it contacts.

In order to evaluate those agreements and--more importantly--to see how they are carried out in practice, it is necessary to understand the needs and interests which drive Bud's relationship to its contractual growers.

It has already been pointed out that Bud created its contractual grower system as a means of avoiding the labor costs attendant to unionization. Doing so, however, did not diminish its overwhelming need to insure that it could continue to supply

[26]Apart from these "deals", there is a third type of arrangement where Bud, as a service to its customers, purchases produce from outside growers, which is then delivered, already cooled and packed, to one of Bud's cooling facilities, where it is combined with other commodities ordered by the customer to create an "outside mix" of produce. This is the "one stop shopping" service described earlier. (See footnote 8, supra; see also footnote 21, supra, dealing with the legal implications of this arrangement.)

its customers with the produce they wanted, when they wanted it, and at the quality they demanded; nor did it alter Bud's natural drive to seek an ever increasing share of the market. The tension created by setting up an "independent contractor" system while still maintaining sufficient control to guarantee constant supply, adequate quality, and continued growth is evident both in the Agreements themselves and in the manner in which Bud deals, in practice, with its growers.

The Agreements begin, as all such agreements do, by affirming the independence and equality of the two parties:

> "...ANTLE and GROWER operate independent businesses, each acting for its own individual account and profit and not for any joint business of the Parties....The Parties do not intend to create and are not creating a partnership, syndicate, group, pool, joint venture, or other unincorporated organization for the purpose of carrying out any joint business, financial operation or venture....Except as expressly provided, neither party shall be responsible for the actions or agreements of the other, nor shall either party have any authority to create any obligation for the other, nor shall either party be responsible for any expenses or losses had by the other..." (See ¶1.3 of Respondent's Exs. 1&3 and of General Counsel's Ex. 32; and ¶1.4 of Charging Party's U-14.)

This is followed by a paragraph discussing need for "cooperation".

The agreement then moves on to describe the actual legal and financial structure of the relationship, and, in the course of doing so, makes substantial inroads on the independence of the grower. In its post-hearing brief (pages 19-21), the General Counsel accurately describes those inroads as follows:

> [U]nder the crop purchase agreements, Respondent has the power to:

1) increase the packing costs and/or the labor costs incident to harvesting and packing after execution of the agreement with the grower. (§ 2.13);

2) "direct in writing the specific times and manner of growing operations it determines necessary to insure the production of the Crop type and quality contemplated by the Agreement". {§ 3.7 (a));

3) require the parties to "consult with one another concerning crop planting dates, seed types, use of pesticides, procedures for cultivation, irrigation, fertilization and other major policy matters concerning the growing of the crop." (§ 3.7 (a));

4) "enter the Farmlands at any and all times for the purpose of inspecting the premises to determine whether GROWER is in compliance with its obligations under this Agreement and is properly caring for the improvements and equipment thereon and for the purpose of examining and supervising repairs to improvements and equipment ...." (§ 3.7(b));

5) "...enter the Farmlands, maintain the growing business operations, and perform growing functions; contract with and pay third parties to maintain such operations and perform such functions; contract with and pay third parties to maintain such operations and perform such functions; and pay or make Advances to GROWER to pay expenses incurred in production of the Co-Op, including without limitation, Farmlands charges described in ¶ 3.6 hereof, labor, equipment, and machinery costs..." should the grower not be complying with the Agreement. {§ 3.7(b));

6) protect its seed, seedlings or transplants. "... GROWER acknowledges that the intellectual property rights to reproduce or propagate such seeds, seedlings, or transplants are the property of ANTLE, and GROWER agrees that GROWER will not propagate such seeds, seedlings or transplants, directly or indirectly, except as necessary to produce the Crop required hereunder...." (§ 3.9);

7} inspect the grower's financial and accounting records regarding the Crops sold under the Agreement. (§ 3.10);

8) determine, in its sole discretion "...the method and timing of harvesting, packing, marketing, and shipping the Crop. ANTLE shall be the sole judge of Crop quality and market conditions and shall have the

right to discontinue harvesting, packing, marketing, and shipping of the Crop whenever, in ANTLE's sole opinion, any such discontinuance is justified by the Crop quality or market conditions. ANTLE in its sole discretion shall determine whether any such discontinuance is temporary or permanent...." (§ 4.3 (a)); and

9) have "... a security interest in the Crop and the proceeds (including insurance and condemnation proceeds) and products of the Crop securing ANTLE's rights under this Agreement, including without limitation, ANTLE's rights to repayment of any unreimbursed costs incurred by ANTLE pursuant to ¶ 3.7(b) thereof and any unreimbursed advances made by ANTLE...." (§ 7.3)[27]

The financial structure described in the Agreement, and tailored to the individual grower in the Addendum, calls for the grower to:

"...furnish and pay for all services, material, land, equipment, seed, herbicides and other items related to the planting, cultivating, irrigating, weeding, thinning, hoeing, dusting, spraying fertilizing and otherwise growing the crop to completion." (Section 3.1(b).)

And this is to be done on farmlands for which the grower has paid:

"...all charges...including all taxes, assessments, rents, liens, judgments, and similar payments and all lease mortgage, secured debt and similar payments, that are necessary for GROWER to maintain unrestricted rights to enter the Farmland, grow and harvest the Crop, and provide Crop title to ANTLE." (Section 3.6.)

In return for growing the crop, the grower receives a set amount

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[27]Thus ensuring that Bud will have a superior interest in the crop and effectively neutralizing the provision found in §7.1 vesting title in the grower except for the risk of crop loss which is mitigated elsewhere by the guaranteed fixed acreage price which Bud pays each grower. (See pp. 30-31, below.)

for each acre he grows (known as the Fixed Acre Price),[28] plus a fixed percentage--usually 50%--of the estimated proceeds which Antle receives from its eventual the sale of the crop reduced by the contractual packing charges set for in the Addendum,[29] by any advances it has made for "growing costs", and by any reimbursements to which it is entitled. The acreage price is established in the Addendum and is paid in installments, usually 1/3 at signing, 1/3 at thinning, and 1/3 at harvest; while the net sales proceeds will depend on later market conditions and are due within 45 days after Antle is paid.

Under this formula, the grower is not at risk for the fixed acreage price it receives,[30] but only for its share of net sales proceeds.[31] The way the formula is structured, that fixed price should--in the normal 50% deal--constitute the lion's share of the grower's proceeds (the "Purchase Price") because it

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[28]The fixed acreage fee appears to be calculated by taking the reciprocal of the grower's percentage and multiplying it by the anticipated per acre cost of growing the crop; i.e., if the grower's percentage is 25%, the acreage fee will be 75% of the expected cost; if the growers percentage is 50%, the acreage fee will be based on the other 50%; and so on.

[29]While the packing charges are set out in the Addendum, Antle may--and has--adjusted them upward while the season is in progress. (See Respondent's Ex. E-l, Section 2.13; General Counsel's Ex. 14; IV:145-147.)

[30]Except to the extent of any outstanding advances or reimbursement obligations. (Section 5.2(b).)

[31]That is the reason why Andrew Church, who testified for the Respondent as an expert on farming arrangements, characterized Respondent's Ex. E-l as a "hybrid" which combines the risk elements of a "joint deal" with the no-risk elements of a "contract growing agreement". (See NLRB Tr. 294, lines 15-21; 296, lines 5-24.)

is not subject to Bud's packing charges--those are confined to the Net Sales Proceeds portion of the purchase price.[32] In a 25% deal (e.g. Charging Party Ex. U-33), the grower would be, concomitantly, even less at risk. Furthermore, the capital investment which Sections 3.1(b), 3.6, and 3.5(a) appear to contemplate are illusory to the extent that Bud advances all or a significant portion of the funds required for growing, maintenance, equipment, and land costs. Any realistic analysis of Bud's power over its contractual growers must, therefore, take into account the fact that it has, as America's largest producer of fresh vegetables and as a subsidiary of a corporation whose annual revenues exceed 3 billion dollars, substantial capital available to it with which to finance their operations and needs. But, before describing how Bud uses its capital resources to assist its growers, it would be helpful to understand how the Grower Program works.

C.

It is in the actual operation of the Grower Program that the tension between Bud's desire to make its growers independent and its need to control them is most evident.

Responsibility for the Program--which includes between 50 and 60 growers, divided among three Regions--is vested in Bud's Vice President for Agriculture, Richard Bascou. Under him, are three Agricultural Managers, each responsible for the growers

[32]See Section 5.1, describing the components of the purchase price, and Section 2.12, providing that the net sales portion of that price can never be less that zero.

in his Region. In the Northern Region, covering Salinas, Watsonville, King City and Huron, there are 22 growers; in the Central Region, covering Santa Maria, Guadalupe, and Oxnard, there are 12 to 14 growers; and in the Southern Region, covering the imperial Valley, there are 20 to 25 growers. Each Regional Manager has two "Ag Supervisors" to assist him.

Each year, Bud's sales organization comes up with an overall "Marketing Plan" indicating, for each commodity, the volume which it hopes to market, allocated over discrete time periods extending throughout the year. It is then up to Mr. Bascou and his associates in the Ag Department to arrange with its growers to supply Bud with the produce it needs, at the level of quality it requires, in accordance with timetables established by the marketing organization. These arrangements are formalized in a "farming" or "sourcing" plan providing, for each grower, a series of deadlines aimed at insuring that, each week, the required volume of produce reaches the market. It is revealing that the deadlines are based, not--as one would expect--on the dates when specific amounts of the commodity are to be ready for harvest, but on the dates when they are to be planted. Bud wants its people, on site, from the very beginning to see to it that its interests are protected and its needs are met. Indeed, with two of its principal commodities, cauliflower and celery--and to some extent with lettuce and broccoli as well--Bud not only determines the planting dates, but it normally raises its own seedlings in nurseries it owns or manages until they are ready

for planting; then, using for the most part its own employees and equipment, it transplants them in the growers' fields.

Bud's Ag Managers and Supervisors are responsible for maintaining direct and continuing contact with growers. They spend their time going from farm to farm, documenting crop progress and checking to make sure that the farming plans are being followed and that the crops are properly cared for. Mot infrequently, they are called upon to re-adjust planting and growing schedules due to shifting demand, changing weather, or other unforseen circumstances.[33] They discuss problems, give advice, and make suggestions. And, finally, they are the ones who decide when the crop is to be harvested.

It would be a mistake, therefore, to characterize their role, even when they are only suggesting or advising, as passive. The Custom Farming and Crop Purchase Agreements give Bud the "right to direct in writing the specific times and manner of growing operations it determines necessary to ensure the production of the Crop type and quality contemplated...."[34] While Bud has seldom found it necessary formally to exercise that right, there can be little doubt that a "suggestion" coming from an Ag Manager or Supervisor must--by virtue of that ultimate power--carry considerable force with the grower who receives it. It would be fair to conclude, therefore, that Bud's represent-atives control production scheduling and have a substantial role

[33]See, for example, IV:58.

[34]Respondent's Ex. E-l, Section 3.7(a)

in overall quality control.

Sending its supervisors to the fields is not the only way that the Ag Department relates to its contractual growers. Bud strives for a "family" relationship with its growers. Mr. Bascou holds bi-monthly luncheon meetings which most growers attend. At those meetings, information is passed on about such things as the marketing and sales program, and matters of common concern are discussed. Topics have varied from water issues to political issues to the possible sale of Castle & Cooke. In each Region, Bud also maintains a regular program of written communication with its growers covering a wide range of topics--the availability of new transplant machinery, consumer pesticide releases, announcements of increases in packing charges, the budget for the Salinas Transplant Company, arrangements for pesticide reporting, invitations to group social events, and requests for volunteers and donations for charitable causes. Bud has also communicated with its growers in connection with the subpoenas which were issued and the settlement arrived at in the unfair labor practice proceedings involving Local 890 of the Teamsters. All growers receive Bud's in-house newsletter, "Que Pasa". Finally, members of the Ag Department frequently correspond with individual growers about matters unique to their operations.

D.

As one examines the arrangements which exist to provide growers with the farmland they need to grow the crops Bud wants,

the significance of Bud's involvement as a source of production capital begins to emerge. When it ceased using its own employees to farm the land it owned or leased, it did not divest itself of its farmland; it simply leased or subleased the land to its contractual growers. Since then, Bud--along with its fellow subsidiary, Dole, and their parent, Castle & Cooke[35] — has continued to acquire farmland by purchase and by lease for the use of its growers.[36] Of the 30 to 40,000 land acres under cultivation in its Grower Program, Bud owns 1,232 acres outright, and holds the leases to another 8,632 acres (Respondent's Ex. E-8 & Charging Party's Ex. U-32).[37]

When Bud leases its own land to a grower, it does so using its own written lease forms. (See Respondent's Exs. E-9 & E-ll.) Rent remains fixed for three year periods and is calculated into the deal as a "growing cost".

In leasing farmland from outside landowners for use in

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[35]ln 1985, Castle & Cooke took over the very substantial farming operations of Hansen Farms (VI:93-94); in 1989 or 1990, Dole acquired Ocean View Produce, and in 1990 it acquired 5000 acres of farmland when it purchased Royal Packing Company (III: 21-22).

[36]Richard Bascou explained the impetus which drives Bud's land acquisition policy this way, "...the reason we like to lease ground is it keeps [it] in[to] our program....So if a grower on a piece of ground that we lease said he didn't want to grow crops for us anymore and he's going to grow for the competition, we'd put another--we'd ask another grower to farm on that piece of ground." (IV:43.) [The "put", at once corrected to "ask", is a revealing slip.]

[37]It is impossible to tell whether the exhibits describing Bud's owned and leased land include the Royal Packing (5000 acres), Ocean View, and Hansen Farms acquisitions.

its grower program, Bud does not enjoy the dominance which marks its arrangements with its own growers. The outside landowners often have their own forms, their own attorneys, and their own notions of what their lease should include. The leases are, therefore, more varied.

And there is something else about them which is revealing. They normally include either an outright prohibition on subleasing or a requirement that there be prior written consent; and they frequently include a promise that the lessor—Bud--farm the land.

Mr. Bascou testified then when Bud, in turn, "subleased" the land, no written agreement was obtained from the grower and none of the required written permissions and/or waivers were sought from the landowner. When he was asked why, he explained:

> "All the landowners we deal with know that we're not the growers. They know that we're not doing the farming. It's understood that we're going to have a grower on that ground at the time that we make the lease. We're harvesting and marketing product, so it's a standard format that they're comfortable with and we're comfortable with." (IV:15.)

The obvious reason both Bud and its outside landlords are "comfortable" in dispensing with the legal requirements and protections found in the leases is that they share a realistic appreciation of Bud's power of control over its growers. And that is consistent with the arrangements which Bud has with its growers: Their "subleases" are never in writing. No term is specified. The rent and the other major components of the

"sublease" are identical to those found in the master lease. And, for accounting purposes, rent is considered a growing cost, not independently paid, but factored into the deal.

E.

There is yet another area in which Bud--by virtue of its ability to finance large capital outlays--has gone beyond its role as a "shipper" and undertaken a new and a significant function for its growers. As a result of its acquisition of Hansen Farms, Castle & Cooke acquired control over 10 million dollars of farm equipment.[38] That equipment was pooled and then made available for use and eventual acquisition by Bud's growers, all on terms which were painlessly factored in to their deals.

As with the subleasing of land, the way in which the transaction was structured is revealing. Control over the equipment had vested in a Castle & Cooke subsidiary called Vegco. Vegco entered into a sublease agreement with Bud.[39] That agreement, however, contained an absolute prohibition on further subleasing. (General Counsel's Ex. 48, para. 3.) Yet, in spite of that prohibition, Bud turned around and provided the equipment to its growers. When Vegco's General Manager, Steven Lasley, was asked how that could be, he explained:

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[38]The equipment included sprinkler pipe, tractors, disks, trucks, tilling equipment, blades, and cultivator.

[39]It is here unnecessary to delve into the full complexity of the so-called "Vegco Deal". The details are described in Mr. Lasley's testimony. (VI:91-100.)

> "...Bud was going to turn around and rent it to the growers, it was a close as to whether it could be done or not, and it had to do more with the legal -- with the nature of the document....
>
> "...There's a question on it as to whether we could do this within the context of the lease.
>
> "It was decided that while it was a rather gray area, that we could, and it was a business decision mainly to try to stem the loses from the Vegco operation to go ahead and do this and recover some of the money through rentals, whatever you want to call them, from the growers to cut the losses on the Vegco operation.
>
> "It is a gray area as to whether....
>
> "...there's a question as to whether it's a sublease or rental or what...." (VI:133-134.)

The obvious implication is that, when faced with financial considerations, Bud, Vegco, and Castle & Cooke were willing to embark upon a course of conduct which could only be justified legally by considering Bud and its growers to be so interrelated that the one could use the equipment of the other without creating a sublessor/sublessee relationship. Consistent with this, there were no formal sublease agreements; instead, the arrangements were handled by an equipment schedule attached to each farming agreement which described the equipment to be "furnished", the rent to be paid, and the manner in which it was to be factored into the deal. (General Counsel's Ex. 50.) Each schedule appears to have been followed by a confirming letter. (Respondent's Ex. 62.)

When the master lease expired Bud, Vegco, and Castle & Cooke decided that, rather than have the equipment returned, it would be more feasible to sell it to the growers in possession.

(General Counsel's Ex. 43.) They were told to submit bids, and their bids were then consolidated into a single package and presented to Vegco, who accepted. Payments appear to have handled--like almost everything else--by factoring them into each deal.

Currently, Bud is renting sprinkler pipes and booster pumps to its growers in the Imperial Valley. It has been involved in financing substantial equipment purchases--$113,800 for HiHo Farms in 1988--and then recouping those "advances" from the proceeds of its deals with HiHo. (See General Counsel's Ex. 174 and Joint Ex. 1.) It has also sold tractors to its growers and factored the price into their deals. And it has, at times, advanced money to its growers to purchase land and to pay growing costs.

F.

In addition to needed capital, Bud is able to provide support services and expertise far beyond the reach of any individual grower. For instance, it has an Engineering Department which designs farm equipment, does engineering studies, and runs tests on equipment. As a result of its efforts, Bud has secured patents for a transplant machine (see General Counsel's Ex. 7) and for harvesting equipment.

There is also a Research Department. It was instrumental in developing Bud's own legally protected varieties of lettuce and celery seed and is presently at work on finding and developing new, disease resistant strains of lettuce, celery,

and cauliflower for use by its growers. Should a grower's crop develop a disease, Bud has a plant pathologist available to determine what it is and how to treat it. (See General Counsel's Ex. 38.) Bud also does soil testing for its growers. (General Counsel's Ex. 35.)

As pesticide use has become an increasingly sensitive issue, Bud has developed a pesticide program which has provided monitoring services, residue testing, and the like for its growers. (See General Counsel's Exs. 33, 34 & 36; see also General Counsel's Ex. 8.) It would appear that, in at least one instance, a pesticide application permit was obtained in Bud's name by one of the principal labor contractors used by growers in the Northern Region. (See General Counsel's Ex. 37.)

G.

Perhaps the best way to gain an overall sense of Bud's relationship to its growers is to examine a full crop cycle--from planting to marketing--and describe, at each step along the way, their respective roles.

Planting. Bud decides when crops are to be planted based on its marketing department's anticipation of customer needs. That power is spelled out in its grower agreements, along with its power to re-adjust those planting schedules to meet shifting demand and other unforseen circumstances. While the grower normally prepares the farmland for planting, Bud personnel are available to perform necessary soil testing and analysis. Anywhere from 1/4 to 1/3 of the land available for planting is

either owned or leased by Bud and rented to its growers. Usually the grower will purchase his own seed, but Bud recommends varieties which it believes will perform well and, on occasion, will buy seed lots that are in short supply and resell them to its growers at cost. Bud keeps track of the seed used by its growers.

Two of Bud's four principal crops--celery and cauliflower--are primarily grown from seedlings planted and raised in nurseries managed or partially owned by Bud,[40] and then transplanted, under Bud's supervision and with its own employees and equipment, on the growers' acreage.[41] It would appear that Bud also plants and transplants some lettuce and some broccoli. (General Counsel's Ex. 17.) As with direct seeding, Bud fully documents its transplanting operations.

Cultivation. Once the planting or transplanting is finished--and up until the harvest--the work to be done is not especially labor intensive. The crop is usually thinned once. Hoeing for weed control will be done one to three times; an irrigator will regularly attend to the field; and some time may

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[40]The Salinas Transplant Company grows most of the celery and cauliflower transplanted by Bud in the Salinas area. It is a partnership made up of Bud and a number of local growers, and managed by Mr. Bascou.

[41]A11 celery in the Salinas area is handled in this manner, as is 50% of the cauliflower. In other areas the Bud also grows and transplants an unspecified percentage of celery and cauliflower. Occasionally, transplanting will be done by grower or contractor crews. It was stipulated that Bud directly paid the bills from labor contractor Manriquez & Acuna for transplanting celery and cauliflower in the Santa Maria area.

be spent on tractor work and fertilizer application. Depending on the time of year and the circumstances, there may also be some pesticide application; that, however, is most often handled by outside pesticide companies.

During this period, Bud's Ag Supervisors will regularly visit the fields to insure that quality is maintained[42] and that the crop will be ready to harvest on schedule. In the course of their visits, they will be in contact with the growers themselves, their supervisors and foremen, and their labor contractors. And they will be present while field workers, tractor drivers, and irrigators are performing their duties. They will discuss problems, offer advice, make suggestions, and document the progress of the crop. Because of the power given them in the Grower agreements, one would expect their advice and recommendations to have considerable force.

Much of the work during cultivation is done for the growers by labor contractors. Bud's relations with some of those contractors is especially close. Richard Escamilla, a contractor who performs thin and weed work and some irrigation services for most of Bud's largest Salinas growers,[43] is a former "Ag

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[42]Beyond their general concern to see to it that quality is maintained, there are specific instances where, pursuant to the farming agreement specific standards have been established. (Respondent's Ex. E-l, section 3.7(a).) Asparagus is one crop where this is true (General Counsel's Ex. 40); strawberries are another (General Counsel's Ex. 39).

[43]Richard del Piero, Willoughby, Fuji, Higashi, Hobco, Mine, RC Farms, Ikeda, Yamaoka, and Jensen.

Supervisor".[44] Most of his bills are sent directly to Bud, and Bud, in turn, pays him directly. Should he have a payment problem, he contacts the Ag Department directly, and the Ag Department, in turn, contacts him directly when it has a problem with his billings. When Escamilla submits billings he includes all of the detailed information which labor contractors are legally required to provide to the parties who actually contract for their services. Escamillia's former partner, Erin Moreno, testified that, up until he left the business at the end of 1985, he would often receive orders from one of Bud's Ag Supervisors concerning work he wished done on growers' ranches. Escamilla denied the practice, but he also claimed that he had instituted a policy of having growers first sign off on the billings he submitted to Bud for work done on their behalf; yet, when copies of those billings were produced, no such "sign-offs" were to be found.

The parties stipulated that two other labor contractors in the Northern Region submit their bills directly to Bud for payment.[45]

In the present climate of public opinion, Bud is especially sensitive to the need to protect itself from problems involving the misuse or misapplication of pesticides and herbicides. Its newer agreements contain detailed provisions

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[44]He used the title "field man" in describing the Ag Supervisor position.

[45]Denecio Castillo for work done for Fuji, and Raul Ramirez for work for Willoughby. (VIII:68.)

requiring full compliance by each grower with all governmental regulations relating to their use, application and monitoring, including Bud's right inspect all documentation and a conclusive presumption of breach should illegal residues be found. (Compare Section 3.8 of Respondent's Exhibit E-l with General Counsel's Ex. 32.) And, according to Mr. Bascou:

> "[W]e have a random testing program and we'll take samples of products out of the fields at a random basis and send them into an independent lab for testing to see what chemical residues are on the crops.
>
> "And we'll communicate some of that information to the growers on what type of residues we're finding from the random samples from the labs." (IV:94; see also V:38)

It also has a "clear date system" (see General Counsel's Ex. 34)[46] under which, before harvesting a field, Bud contacts:

> "...the P[esticide] c[ontrol] O[fficer] or PCA or the grower that is involved in that field, and double checks to make sure that field is going to be clear before we go in and harvest it. And then the harvest supervisor, before he goes in, he's supposed to check with that person to make sure that the field has been cleared for entry." (V:41.)

Because of the "Vegco Deal" and other equipment arrangements (see section E, above), much of the work performed by growers during the period of cultivation will be done with equipment obtained through Bud.

As harvest time approaches, Bud's Ag Supervisors take an increasingly active role. They may be called upon to adjust or readjust harvest schedules to correspond with shifts in market

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[46]Originally Bud planned full scale "pesticide reporting program" but abandoned it because of the paperwork problems it created for its growers. (See V:39-40.)

demand. They are responsible to make sure that the last watering, the last irrigation, and the last pesticide application have been completed. Finally, they determine when the actual harvest is to begin.

Harvest. Bud itself harvests and packs the crops of all of the growers party to "Custom Fanning and Crop Purchase Agreements". It doing so, it uses its own supervisors and employees, its own materials and supplies, and its own harvesting equipment and trucks. At peak, Bud employs between 3000 and 3500 workers to harvest, field pack, and transport its four principal crops.

For the minority of growers who are party to "Marketing Agreements" and do their own harvesting and field packing, Bud determines when their crops are to be harvested and uses its own employees to transport the crops from the fields to its coolers.[47]

Transporting, Cooling, Packing, Shipping and Selling. Growers have no role in any of these functions; the sole responsibility rests with Bud.

H.

While the Custom Fanning and Crop Purchase Agreements and the Marketing Agreements spell out the basic structure of Bud's relationship to its growers, they are not especially helpful in conveying the financial reality of the situation.

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[47]Since late 1989, Dole Fresh Vegetables has been replacing Bud as party to those Marketing Agreements. (See pages 25-26, above.)

What they leave out is Bud's willingness to use its own, very substantial capital resources to finance the needs and operations of its growers--and not just their capital needs for such things as land and equipment, but the day to day costs of their growing operations as well.

The mechanism is simple. All of a grower's capital and operational costs are classified as "growing costs"; this includes labor, pesticides, fertilizer, thin and hoe, pesticide application, irrigation, cultivation, plants, seeds, utilities, and rents for land and equipment (IV:44-45)--in fact, everything except the "packing charges" (which actually include both harvesting and packing and are charged separately to the grower). Bud maintains an account for each grower which reflects the terms of its particular deal. As growing costs accrue, they are simply charged to that account, and the actual proceeds accruing to the grower are reduced by those charges. For growing costs due directly to Bud (e.g., for rent on land or equipment which it has furnished), no funds need change hands. Where they represent obligations to third parties, such as labor contractors or suppliers, billings may be forwarded to Bud by either the third party or the grower, and Bud will pay them, either by direct payment to the third party or as a reimbursement to the grower; in any case, they are then charged against the grower's account, reducing the proceeds which he will eventually receive.

Not all growers handle their accounts this way. Some pay their own costs and wait until the close of the deal to

settle up. The choice, however, appears to be left pretty much up to the individual grower. (See IV:48, lines 3 through 9.) As Mr. Bascou testified, when asked how irrigation equipment rentals were handled:

> "You know, the pipe costs, sprinklers and those things are part of your overall growing cost in many crops. So we'll pretty well take our money any way the grower -- if he wants to pay us a check, fine. If he wants us to take it out of dollars owed him in our contractual agreement, we'll apply it against that deal in dollars that we owe him -- or he owes us on that agreement." (IV:151.)

In other words, Bud is ready and willing to fully finance the operations of its growers. And Bud protects itself, just as any financier would, by obtaining a security interest in the crop pursuant to the provisions of the California Uniform Commercial Code. (IV:91; see General Counsel's Ex. 175.)

I.

Such, then, are the economic realities of Bud's relationship to its growers: The attempt to cut labor costs by creating an independent contractor structure while at the same time preserving--at every juncture and by every means, both formal and informal--the power and control which it had always enjoyed; and, along with that, a marked willingness--in its dealings with land, with equipment, and with labor contractors--to ignore the legal niceties of that structure whenever they come into conflict with its need to maintain its position as America's leading producer of fresh vegetables.

IV. IS BUD A FARMER?

A.

If an employer performs secondary farming practices, such as cooling, on commodities it has grown, it is a "farmer"; if, on the other hand, it those practices are performed on the produce of others, it is not. (Farmers Reservoir & Irrigation Co. v. McComb, supra, 337 U.S. at 762-63; see discussion in Section I B at pp. 8-11, above.) The distinction, according to the National Labor Relations Board and the Federal Courts, turns on whether the grower or growers are independent of the employer over whom jurisdiction is asserted. As the NLRB said in Norton & McElroy Produce, Inc. (1961) 133 NLRB 104, 107:

> "...Section 2(3) of the Act categorizes an employee in the position of the truck drivers...as an agricultural laborer to the extent he is engaged in regularly hauling farm produce for his employer from his employer's own farm, but not an agricultural laborer to the extent he regularly hauls the produce for his employer from an independent grower's farm."

In NLRB v. Olaa Sugar Company (9th Cir. 1957) 242 Fed.2d 714, 718, the Court said:

> "Our view, however, is that this hauling from the fields of the independent growers must be treated differently from the hauling from Olaa's own fields."

(See also NLRB v. Hudson Farms (8th Cir. 1982) 681 Fed.2d 1105.) The ALRB, following the lead of Olaa Sugar, has drawn the same distinction. (Sunny Cal Egg & Poultry (1988) 14 ALRB No. 14, p. 8-9.)

In determining who is and who is not an "independent" grower, the ALRB, early on, adopted the criterion which the NLRB

and the Federal Courts had traditionally used in determining whether two or more entities should be treated as a single integrated enterprise: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. (Louis Delfino (1977) 3 ALRB No. 2, citing Radio & T.V. Broadcast Technicians v. Broadcast Service of Mobile. Inc. (1965) 380 U.S. 255 (per curiam).) Down through the years, our Board has continued to apply that fourfold test. (Abatti Farms. Inc. (1977) 3 ALRB No 83, IHE Decision p. 18, citing Sakrete of Northern California. Inc. v. NLRB (9th Cir. 1964) 332 Fed.2d 902, cert, denied, 379 U.S. 961 (1965), affirming 137 NLRB 1220; Pioneer Nursery (1983) 9 ALRB No. 38; Ben and Jerry Nakasawa (1984) 10 ALRB No. 48; Andrews Distribution Company. Inc. (1988) 14 ALRB No. 19, citing Parklane Hosiery Co. (1973) 203 NLRB 597.) In Rivcom Corp. v. ALRB (1983) 34 Cal.3d 743, 769, the California Supreme Court accepted that approach.

In applying the test, the ALRB, again following the NLRB and the Federal Courts, has stated, "...that while no one factor is controlling, neither must all four factors be present to find single employer status." (Andrews Distribution Company, Inc., supra, p. 5). And it has cautioned that each case "must be considered in its total factual context...we do not intend to apply a mechanical formula in determining whether companies are single or separate employers." (Pioneer Nursery, supra, pp. 5-6.)

Because of the nature of agricultural employment, the

ALRB appears to be somewhat more flexible in assessing the importance to be given to the third factor, common control over labor relations. In Rivcom Corporation and Riverbend Farms (1979) 5 ALRB No. 5"5, it pointed out that:

> "[A]lthough the NLRB considers common control of labor relations to be an important factor in determining whether certain entities operate as a single, integrated enterprise...the absence of common labor-relations policy does not preclude finding single employer status. Abatti Farms. Inc., supra; Canton, Carp's Inc., 125 NLRB 483, 483-484, 45 LRRM 1147 (1959). This is especially true in cases arising under the ALRA. Labor contractors who supply agricultural labor may exert a substantial amount of direct control over the wage and working conditions of the employees, and yet are excluded from the statutory definition of an agricultural employer. Labor Code Section 1140.4(c). The result is that in agriculture the statutory employer may not exercise direct control over wages and working conditions of the employees. In view of the unique role of the farm labor contractor in agricultural employment, less weight is accorded to the factor of direct control over labor relations than in the industrial setting." Opn. pp. 6-7.

On review, the California Supreme Court agreed. (Rivcom Corp. v. ALRB, supra, 34 Cal.3d at 769.

B.

When Bud's relationship to its contractual growers is analyzed in the context of the four factor test, one is drawn to the conclusion that it and its growers are not truly independent of each other, but constitute interdependent parts of a single, highly integrated enterprise.

Interrelation of Operations. The high degree of integration which exists between Bud operations and those of its growers is best seen in the description of the crop cycle in Section III G at pages 40 to 45, above. At every stage--

production planning and scheduling, soil testing, seed selection, planting, transplanting, the selection and payment of labor contractors, quality control, pesticide monitoring, readying the crop for harvest, scheduling and re-scheduling harvest dates, harvesting, field packing, transporting, cooling, packing, shipping and selling--Bud is actively involved. In many instances, it takes full control; in others, it regularly and effectively recommends, suggests, oversees, and monitors its growers to insure that its needs for a constant and adequate supply of quality produce are met.

The accounting procedures which Bud employs in its dealings with its growers--making advances, reimbursing them or directly paying their bills, factoring every conceivable cost into the deal--result in a close, interdependent, and integrated system of financial management. (See Section III H at pp. 45-47, above.)

By going beyond its role as a "shipper" and providing its growers with much of the land they farm and the equipment they use, Bud has further integrated its operations into theirs. (See Sections III D & E at pp. 34-39, above.) And the same is true of the manner in which it provides expertise and unique services to its growers, such as seed research, plant pathology, and soil testing. (See Section III F at pp. 39-40, above.)

Common Management. In Section III C at pages 31 to 34, above, the role of Bud's Ag Department in formulating and implementing the farming plans created for each grower is

described in detail. In carrying out their functions Mr. Bascou, his Managers and Ag Supervisors set, document, check, adjust and re-adjust production schedules and regularly consult with growers about matters of mutual interest and concern. Their suggestions and recommendations carry--by virtue of Bud's contractual rights--substantial force. It also appears that Ag Supervisors maintain direct contact with the labor contractors hired by the growers, and may, if circumstances warrant, discuss problems, offer advice, and make suggestions. And there is credible testimony indicating that they have, at times, actually given orders to contractors.

Bud is a partner, together with a number of growers, in the Salinas Transplant Company, and Mr. Bascou is its manager. It grows and transplants celery, cauliflower, lettuce, and broccoli for growers in the Northern Region. (Section III G at p. 41, above.)

Control of Labor Relations. Control over employees is not jointly shared by Bud and its growers, but is integrated in the sense that it shifts back and forth from one to the other during the course of the crop cycle. (See Section III 6, pp. 40-45, above.) Planting will normally be done by the grower, but transplanting will be done by Bud employees. During the growing stage, the grower will either use its own employees or those of labor contractors; but, when the harvest comes, the work will be done, in most instances, by Bud employees.

It has already been pointed out the Bud's relationship

to some of the labor contractors utilized by its growers is especially close. (See Section III 0, pp. 42-43 above.) Billings are often sent directly to Bud for payment, and they are accompanied by the detailed employee information which the Department of Labor requires contractors to submit to their principals. And there is the evidence, mentioned above, that labor contractors have, at times, taken orders directly from a Bud Ag Supervisor. (See Rivcom Corporation and Riverbend Farms, supra, 5 ALRB No. 55, at pp. 6-7.)

Finally, it must be remembered that Bud's primary motivation for using growers, instead of its own unionized employees, is to avoid the higher labor costs which they command. (See Section III A, at p. 24, above.) That means for its grower program to work--and it appears to do so--the financial terms which Bud secures from its growers must be such that the amount available for wages is less than what Bud would have had to pay its own employees to do the work. In that sense, at least, it can be said that Bud "controls" or "limits" the wages paid by its growers.

Common Ownership. The existence of some kind of property interest in the land under cultivation is a hallmark of farming. Here, Bud holds ownership or leasehold interests in anywhere from 1/4 to 1/3 of the land which its growers farm. It "puts" those growers on that land (see Fnt, 36, at p. 35, above), using either lease or rental arrangements, the terms of which it dictates (see Section III D, at p. 35, above). The third-party

owners of the land leased by Bud recognize this and look to Bud as the controlling entity. (See Section III D, at p. 36, above.)

Castle & Cooke acquired $10,000,000 worth of farm equipment and then used one of its subsidiaries, Vegco, to funnel it to another subsidiary, Bud, which furnished that equipment to its growers and eventually arranged for it to be sold to them. (See Section III E at pp 37-39, above.)

Bud entered into a partnership with its principal growers in the Northern Region to create the Salinas Transplant Company, which, as described above, grows and transplants celery, cauliflower, lettuce, and broccoli for those growers. (See Section III G at p. 41, above.)

Finally, under the terms of its Custom Farming and Crop Purchase Agreements and its Marketing Agreements, Bud and its growers have a shared proprietary interest in the profits of the enterprise.

c.

The four factor test for a single, integrated employer works best in situations where the entities involved share in controlling the enterprise. Its application--particularly with respect to the factors of common management and common ownership--is much less satisfactory where the relationship is not so much one of "shared control" as it is of "dominance". In those situations the National Labor Relations Board and the Federal courts shift to what has been described as the "right to control" test. "Under this test various aspects of the relationship

between the alleged principal and agent are considered in determining under the totality of the circumstances whether a person is an agent or independent contractor". (Packing House & Industrial Services v. NLRB (8th Cir. 1978) 590 Fed.2d 688, 699; NLRB v. O'Hare-Midway Limousine Service (7th Cir. 1991) 924 Fed.2d 692, 695.) The California Supreme Court, following the lead of Federal Courts in their interpretations of the Fair Labor Standards Act, recently held that the remedial purposes of the statute should be taken into account in making such determinations. (S.G. Borello & sons. Inc. v. Department of Industrial Relations, (1989) 48 Cal.3d 341)[48]

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[48]In NLRB v. Hearst Publications (1944) 322 U.S. 111, the Supreme Court held that "Whether... the term "employee" includes [particular] workers...must be answered primarily from the history, terms and purposes of the [NLRA]". A short while later, it held that the same approach should be taken in cases arising under the Fair Labor Standards Act. (Rutherford Food Corp. v. McComb (1947) 331 U.S. 722; and see United States v. Silk (1947) 331 U.S. 704, and Bartels v. Birmingham (1947) 332 U.S. 126 (Social Security Act).) Congress was unhappy with the holding in Hearst; and so, when it enacted the Labor Management Relations Act of 1947, it amended the definition of "employee" found in §2(3) of the NLRA to exclude "any individual having the status of an independent contractor;" and in NLRB v. United Insurance Co. (1968) 390 U.S. 254, 256 the Supreme Court held that, "The obvious purpose of this amendment was to have the Board and the courts apply general agency principals in distinguishing employees and independent contractors under the Act....the proper standard here is the law of agency." The courts, however, have continued to consider legislative purpose in interpreting the term "employee" in cases arising under the FLSA. (See Real v. Driscoll Strawberry Associates (9th Cir. 1979) 603 Fed.2d 748, 754.)

The definition of an "agricultural employee" found in §1140.4(b) of the ALRA does not include the "independent contractor" language from $2(3) of the NLRA [though it does incorporate the "agricultural laborer" language from that Section]; it goes beyond the NLRA's definition of "employer" and provides: "The term agricultural employer shall be liberally construed to include any person acting directly or indirectly in

The ALRB appears to have accepted the "right of control" test. (See Andrews Distribution Company Inc., (1988) 14 ALRB No. 19; Sahara Packing Company (1985) 11 ALRB No. 24.) And it has indicated that the issue of control is to be resolved by "viewing the total situation and avoiding mechanical application of any rule or percentage," (Grow Art (1981) 7 ALRB No. 19; see also Napa Valley Vineyards. Co. (1977) 3 ALRB No. 22, p. 12.) It likewise appears to have accepted the importance of looking to the "economic realities of the relationship." (Sahara Packing Company, supra, 11 ALRB No. 24 at fn. 6; cf. Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 318-319.)

The courts have identified a number of factors which are useful in applying the "right of control" test. (S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra, 48 Cal.3d at 351; Real v. Driscoll Strawberry Associates (9th Cir. 1979) 603 Fed.2d 748, 754.) No one factor is controlling, rather its is "the circumstances of the whole

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(Footnote 47, cont.) the interest of an employer in relation to an agricultural employee...." In Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 318-319, the California Supreme Court held that this language allowed for a more expansive view of traditional agency concepts.

Moreover, it is by no means clear that the NLRB and the Federal courts must confine themselves to traditional agency principles in interpreting the "agricultural laborer" exception to the NLRA; for Congress, in its annual appropriation bills, directs the NLRB to apply the definition of "agricultural laborer" found in §3(f) of the FLSA. And, as has been pointed out, that definition goes beyond traditional common law notions of agency. (Real v. Driscoll Strawberry Associates, supra.)

activity". Id. at 754.[49]

When those factors are used to analyze the situation here, it again appears that Bud and its growers are not truly independent.

1. Control Over the Manner in Which the Work is Done.

This is an important factor. (Morish v. U.S. (Ct. Cl. 1977) 555 Fed.2d 794.) But, "[i]t is, of course, the rights to control and not the actual exercise that right which is decisive." (NLRB v. Sachs (7th Cir. 1974) 503 Fed.2d 1229, 1233 (emphasis by the court); NLRB v. Cement Transport Inc. (6th Cir. 1974) 490 Fed.2d 1024, 1027.) Furthermore, as the Ninth Circuit explained in McGuire v. U.S. (1965) 349 Fed.2d 644, 646:

> " The absence of need to control should not be confused with the absence of right of control. The right to control contemplated by the...common law...requires only such supervision as the nature of the work requires." (emphasis supplied.)

(See also S.G. Borello & sons. Inc. v. Dept. of Ind. Rel., supra, 48 Cal.3d at 356-357, where the employer retained "all necessary control".) Nor are direct orders necessary. Advice and

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[49]Because the "right of control" test has its origin in the law of agency where it is used to determine the existence of any kind of principal/agent relationship, it is applied both in situations where the adjudicative body is attempting to determine if the agent is actually an employee (NLRB v. O'Hare-Midway Limousine Service, supra; S.G. Borello & Sons. Inc. v. Department of Industrial Relations, supra; Donovan v. Gillmor (N.D. Ohio 1982) 535 F.Supp. 154) and in situations, like the one at hand, where the alleged agent is itself an employing entity and the question is whether it and its employees are truly independent of the alleged principal (Packing House & Industrial Services v. NLRB. Supra: NLRB v. Sachs, supra. Real v. Driscoll Strawberry Associates, supra: Andrews Distribution Company, supra; Sahara Packing Company, supra).

suggestions which are followed because of an employer's dominant position of dominance are enough to establish control. Seven-Up Bottling Co. v. NLRB (1st Cir. 1974) 506 Fed.2d 596, 600; Yellow Cab Company (1977) 229 NLRB 1329

In Section III B, at pages 28 to 31, above, the many contractual provisions which give Bud ultimate control over the growing process were described. In Section III C, at pages 31 to 34, above, the ways in which that control is expressed in practice were examined, and it was pointed out that there are a number of areas where Bud's Ag Managers and Supervisors exercise direct control, but even in those areas where they only advise or suggest, their advice and suggestions carry--by virtue of Bud's ultimate contractual powers--substantia force. Finally, Section III G, at pages 40 to 45, above, recounts in detail the manner in which that control is experienced by growers at each stage in the crop cycle.

2. The Opportunity for Profit or Loss Depending on Managerial Skill. In Section III B, at pages 29-31, above, the degree of risk undertaken growers was examined, and it was demonstrated that--in the normal 50% deal--growers were not truly 50% at risk [and, even less so, in the 25% deal].[50] But, more important, what risk they do face is not that of true entrepreneur, for it depends, not so much on their skill in managing the growth process, but primarily on Bud's skill in

[50]Due primarily to the way in which the "fixed acreage fee" is defined and guaranteed.

marketing the product—something over which they exercise no control. (Real v. Driscoll Strawberry Associates, supra, 603 Fed.2d at 755.) Profit-sharing is not enough; to be independent, a grower must have an actual role in determining the profit. (See Donovan v. Gillmor, supra, 535 F.Supp. at 162.)

3. Capital Investment. In Sections III D & E, at pages 34 to 39, Bud's continual and substantial role in providing land and equipment for its growers is described. But, even more significant, is its willingness to use the substantial capital it commands to finance--through a pervasive system of advances and reimbursements--the day-to-day expenses which its growers encounter. (See Section III H, pp. 44-47, above.)

Added to this are support services and expertise, such as seed research, plant pathology, and soil testing, which are beyond the means of individual growers, but which Bud provides for them. (See Section III F, pp. 39-40, above.)

4. Degree of Special Skill Required. This factor, mentioned in Driscoll, did not receive much emphasis during in the hearing. Day to day farm work does not, by and large, call for a skilled work force. Supervision of the work force does require a degree of managerial skill. Also, the growers must do some planning, although the ultimate planning decisions--what to grow, how much to grow, when to plant, and when to harvest--are made by Bud, and the Ag Supervisors and Managers are involved--at least to the extent of advising and suggesting--in much of the short term planning. Again, the best way to get "a feel" for the

skill required is to follow the grower through the crop cycle. (See Section III G, pp.39-44, above)

5. The Degree of Permanence of the Wording Relationship. The Custom Farming and Crop Purchase Agreements and the Marketing Agreements are open ended; however, the Addenda are negotiated season by season. From the evidence, it appears that there is very little turn-over from season to season. Mew growers are added as Bud expands, but few leave or are terminated once they have become part of its grower "family." (See Ringling Bros.-Barnum & Bailey Combined Shows. Inc. v. Higgins (2nd Cir. 1951) 189 Fed.2d 865, 869; Ben v. U.S. (N.D.N.Y. 1956) 139 F.Supp. 883, aff'd 241 F.2d 127 (2nd Cir. 1957).)

6. Whether the Service Rendered Is an Integral Part of the Alleged Employer's Business. The high degree of integration which characterizes almost every aspect of the relationship between Bud and its growers has already been examined and evaluated. (See Section IV B, at pp. 50-51, above.) Given the nature and scope of that integration and given the extent to which Bud exercises dominance over them, it is difficult to consider the growers to be "stand alone" operations, capable of functioning independently of Bud. Indeed, it is difficult to imagine how they would survive or what they would be like without the transplanting, the harvesting, the scheduling, the day-to-day financing, the support services, and the land and equipment, which come from and through Bud.

D.

Viewing the relationship between Bud and its growers in its entire factual context and recognizing that no one circumstance is in itself controlling and that some circumstances indicate otherwise, I conclude that under both the "single integrated employer" test and the "right of control" test Bud's growers--both those party to Custom Farming and Crop Purchase Agreements and those party to Marketing Agreements--are not separate and independent.[51] They are integral and interdependent parts of a single, highly integrated enterprise shaped, financed, and controlled by Bud. That being so, Bud is a "farmer" as that term is defined in § 1140.4(a) of the California labor Code.

That conclusion does not, however, end the matter. Even if Bud is a "farmer", the employees who work in its coolers are subject to the ALRB jurisdiction only if their work is "incidental to" or performed "in conjunction with" the primary

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[51]As a "fall back" argument, Bud asserts that, even if it were determined that the growers for whom Bud does the harvesting are not independent, the growers who do their own are. These growers accounted for 12.84% of the cartons marketed in 1988, 18.42% in 1989, but only 8.43% in 1990. (Respondent's Exs. E-4, E-6 & E-7; see also Bud's attempt to show the 1990 percentage to be unrepresentative—NLRB Tr. 337-340; Ex. E-28.) The evidence indicates that those growers are subject to all of the same obligations and privileges as the other growers. Moreover, their harvest costs appear to be guaranteed, thereby avoiding any risk to them of not being reimbursed for those costs if the market is poor. (See, for example, Charging Party's Ex. U-36; Respondent's Exs. E-48(aaa), E-48(bbb), E-48(ww), and E-48(w) (Barioni 7/87).) I therefore conclude that there is no basis for treating them differently from Bud's other growers.

farming operations carried on by Bud and its growers. (Farmers Reservoir £ Irrigation Co. v. McComb, supra; see Section I B, at pp. 8-11, above.)

But before taking up that issue, it is necessary to consider the potential conflict with NLRB jurisdiction created by its Regional Director's Unit Clarification Decision. (Respondent's Ex. 63.) She held that, as of the date of the unit clarification hearing, Bud was no longer a "farmer"; but, in doing so, she relied on circumstances which had occurred long before that date and cited as precedent a series of NLRB decisions which utilize a legal test different from the two considered above, thus suggesting--despite her specific refusal to so find--that NLRB jurisdiction may have accrued earlier. (See Section II B, at pp. 20-21, above.)

V. NLRB JURISDICTION

A.

One way to explain why my conclusion that Bud is a farmer differs from that of the NLRB's Regional Director is to point out that I had the benefit of much more extensive record--one which included not only the full transcript and exhibits of the NLRB proceeding, but six additional days of testimony and approximately seventy-five additional exhibits. There was additional evidence of the day-to-day involvement of Bud's Ag Department in the operations of its growers, more precise testimony on the manner in which Bud finances their operations, and much more detailed testimony concerning Bud's involvement in

providing them with equipment, with land, and with support services.

But there is another reason as well: The Regional Director relied on a series of NLRB cases which apply to "independent grower" determinations a standard different from that which it normally applies where two or more entities are alleged to constitute a single employer.

One would have expected the National Board to have utilized the traditional four factor, "single integrated employer" test. After all, that is the test which it and the Federal Courts have traditionally applied in almost every other situation where the independence of two or more employing entities is called into question. (NLRB v. Carson Cable T.V. et al. (9th Cir. 1986) 795 Fed.2d 879; Sakrete of Northern California, Inc., supra; Parkline Hosiery Co., supra.) Or, in the alternative, that its analysis would have been conducted in accordance with agency notions of "right of control". (See Packing House & Industrial Services v. NLRB, supra; NLRB v. Sachs, supra.)

But the NLRB has taken a different approach in dealing with agriculture. Though not required to do so," it has chosen to read the language in its annual appropriation bills, which provides that, "No part of this appropriation shall be available to organize or assist in organizing agricultural

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[52]See discussion of NLRB v. Olaa Sugar Company at page 66 to 67, below.

laborers...as defined in section 3(f) of the [FLSA]",[53] as a directive to adopt the different, more mechanical standard utilized by the Secretary of Labor in enforcing the Wage and Hour Law. (Waldo Rohnert Company (1958) 120 NLRb 152; Victor Ryckenbosch. Inc. (1971) 189 NLRB 40, 45; Adams Egg Products. Inc. (1971) 190 NLRB 280; Green Giant Company (1976) 223 NLRB 377; H-M Flowers, inc. (1977) 227 NLRB 1183, fn. 6.)[54] Under that standard, instead of focusing on the actual relationship at issue and then delineating and weighing--in the overall context of that relationship--each circumstance indicating integration, control, or ownership, the Secretary has developed an detailed set of regulations,[55] or Official Interpretations, as they are called, which specify that certain circumstances--mo matter how pronounced they may be and no matter how they exist in combination with other circumstances—are insufficient to render an employer, a "farmer". A good illustration of this approach is to be found in the very regulation relied up by the Regional Director in her Unit Clarification Decision (Respondent's Ex. 63, p. 17):

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[53]See Bayside Enterprises Inc. v. NLRB (1977) 429 U.S. 298, fn. 6.)

[54]There is something almost schizophrenic about the NLRB's deference to the Department of Labor's regulations for determining who is a "farmer" and its lack of deference toward the Department's regulations for determining whether work is "incidental to" or performed "in conjunction with" fanning. (Camsco Produce Company, supra, slip opn. pp. 7-10.)

[55]See 29 C.F.R. $780.100 through §780.158, (1990), pp. 627-647.

> "It does not necessarily follow, however, that any employer is a farmer simply because he engages in some actual farming operations of the type specified in section 3(f). Thus, one who merely harvests a crop of agricultural commodities is not a ' farmer' although his employees who actually do the harvesting are employed in 'agriculture' in those weeks when exclusively so engaged. As a general rule, a farmer performs his farming operations on land owned, leased, or controlled by him and devoted to his own use. The mere fact therefore, that an employer harvests a growing crop, even under a partnership agreement pursuant to which he provides credit, advisory or other services, is not generally considered to be sufficient to qualify the employer co engaged as a ' farmer'. Such employer would stand, in packing or handling the product, in the same relationship to the produce as if it were from the fields or groves of an independent grower." (29 C.F.R. S 780.131.)

Having found those arrangements descriptive of Bud's operations, the Regional Director felt no need to go further--as she would under the traditional "single integrated enterprise" and "right of control" tests--to examine their impact in terms of integration and control or to consider them in combination with other significant factors, such as Bud's involvement with and relationship to the land being farmed, the equipment used, the contractors hired, or the role of its Ag Department in the day-to-day growing operations.

Using the Department of Labor's approach, the NLRB has found growers to be independent of the employers over whom jurisdiction is asserted in situations where the crops were grown under the employer's direction (Waldo Rohnert Company, supra); where the employer provided feed and follow up services for poultry as well as retaining ownership and the risk of loss (Strain Poultry Farms. Inc. (1966) 160 NLRB 236, rev'd 405 Fed.2d

1025); where the employer held ownership interests, ranging from 88% to 100%, in two of the growers whose flowers it packaged and shipped and where its president was their president (H-M Flowers, Inc., supra); where the employer supplied the seed, determined the time for planting and harvesting and the need for weed and insect control, did the spraying, and harvested the crop (Green Giant Company (1976) 223 NLRB 377); where the employer did some of the thinning and hoeing, harvested the crop, and owned a 1/3 interest in the grower and in the corporation which owned the grower's land (Norton & McElroy Produce, Inc., supra); and where employers entered into "joint deals" to share profits, made advances to growers, consulted with them regarding pesticide use, arranged for its application, preformed or arranged for hoeing and thinning, and harvested the crop. (Employer Members of Grower-Shipper Vegetable Association, supra.) In fact, there appears to be no NLRB cases--no matter what the circumstances--which find growers to be anything but independent. The only conceivable exception would be if the agricultural laborers used by the grower were hired and paid by the employer.[56]

At this point, it should be emphasized that the NLRB is not required to follow the Department of Labor's interpretations of Section 3(f). The two statues have different functions and different purposes. What may be a good interpretation under one

[56]In Norton & McElroy, supra, the Board went so far as to say that it would be enough so long as the "Employer...set up a separate entity which, with its own employees, cultivated the crop." (Id. at 107 emphasis by the Board.)

is not necessarily a good interpretation under the other. As the 9th Circuit said, in NLRB v. Olaa Sugar Company, supra, 242 Fed.2d at 719:

> "It must not be overlooked that although the Fair Labor Standards Act definition of agricultural employment has been imported by the appropriations bill riders into the machinery to be used by the Labor Board in carrying out its functions, yet the Board does exercise and is required to exercise wide discretion which is not available to a court when it is called on to enforce the provisions of the Labor Standards Act. That exercise of discretion by the Board is appropriate for an administrative agency which is charged with effectuating a general Congressional policy."[57]

And, in fact, a number Circuits refused to accept the NLRB's approach. (NLRB v. Strain Poultry Farms Inc. (5th Cir. 1969) 405 Fed.2d 1025, reversing 160 NLRB 236, supra; NLRB v. Ryckebosch. Inc. (9th Cir. 1972) 471 Fed.2d 20, reversing 189 NLRB 40, supra; Abbott Farms. Inc. v. NLRB (5th Cir. 1973) 487 Fed.2d 904; and

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[57]The NLRB itself made the point nicely in Camsco Produce Company, supra:

> "It is also well to keep in mind that the DOL regulations that the Board has typically followed, including the one we follow in this case, are simply interpretive rules, representing the labor Department's view of how the statute should be construed, rather than regulations that Congress had directed it to promulgate in order to implement the statute. As such they are entitled to deference as the views of an expert agency, but deference also depends on the ' validity' of the 'reasoning' underlying them. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Accord; General Electric Co. v Gilbert, 429 U.S. 125, 141-142 (1976) ....[A]lthough the reasoning underlying §3(f) may be perfectly valid in the FLSA context, different considerations arise under the NLRA. (Slip Opn. p. 9, fn. 15.)

The ALRB has taken the same position. (Sunny Cal Egg and Poultry Company (1988) 14 ALRB No. 14, pp.11-14.)

see H-M Flowers. Inc., supra in fn. 6 indicating a similar refusal by the Third Circuit.) All involved poultry raising, and, in each, the eggs were hatched at the employer's own hatchery, and the chicks were delivered, by the employer's drivers, to ranches operated by outside growers, who then raised them to maturity, using feed and other services provided by the employer. When the chickens were ready to market, they were caught by contractors hired by the employer and transported to outside processing plants by its own drivers. Title and risk of loss remained, at all times, with the employer. The Courts held, in each instance, that the employer's operation, taken as a whole, was a poultry raising venture within the primary meaning of agriculture. The involvement of outside growers--whose "independence" the Courts did not directly question--was not enough to defeat that conclusion.

When the First Circuit reached the opposite result on much the same facts, the Supreme Court granted certiorari to resolve the conflict. In Bayside Enterprises, Inc. v. NLRB (1977) 429 U.S. 298, the Court upheld the NLRB and rejected the argument that "all of the [primary] farming activity which took place on the contract farm should be regarded as agricultural activity of an integrated farmer such as Bayside."

On the face of it, the Bayside decision appears to have placed the Court's imprimatur on the approach taken by the NLRB in its interpretations of who is and who is not a "farmer"; for, although the Court did not actually have before it the issue of

whether the contractors who raised the chickens were truly independent, it announced that it would adopt a policy of deferral to NLRB expertise, and it cited with approval the NLRB's decision in Norton & McElroy Produce, Inc., supra. (Id. at fn. 9.)--a case factually very close to the one at hand.

In considering the potential conflict which exists in the instant case between the Regional Director's 'approach and the conclusions I have reached, the line of reasoning followed by the Court in Bayside is critical. Justice Stevens began by saying:

> "This conclusion by the Board is one we must respect even if the issues might 'with nearly equal reason be resolved one way rather than another.'" (Id. at 302.)

And then went on to explain in a footnote:

> "This is an instance of the kind contemplated by Mr. Justice Frankfurter in his concurrence in Farmers Reservoir & Irrigation Co., supra, 337 U.S. at 770: ' Both in the employments which the Fair Labor Standards Act covers and in the exemptions it makes the Congress has cast upon the courts the duty of making distinctions that often are bound to be so nice as to appear arbitrary in relation to each other. A specific situation, like that presented in this case, presents a problem for construction which may with equal reason be resolved one way rather than another.'" (Id. at fn 10.)

And then concluded:

> "Moreover, the conclusion applies to but one specific instance of the ' [m]yriad forms of service relationship, with infinite and subtle variations in the terms of employment [which] blanket the nation's economy,' and which the Board must confront on a daily basis. Accordingly, regardless of how we might have resolved the question as an initial matter, the appropriate weight which must be given to the judgement of the agency whose special duty is to apply this broad statutory language to varying fact patters requires enforcement of the Board's order." (Id. at 303-304.)

The decision in Bayside thus stands for the proposition that

courts, when confronted with a problem of statutory construction calling for the application of broad statutory language to varying fact patterns, should not independently scrutinize the statutory language to determine its meaning, but should defer to the experience of the administrative agency charged with its enforcement.[58]

But this case involves something more, something which the Supreme Court was not called upon to take into account when it deferred to the NLRB and decided to employ a lesser degree of scrutiny to the Labor Board's conclusion that Bayside was not a "farmer". This is a situation where a State administrative agency--with its own statutory mandate, its own expertise, and its own "special duty to apply broad statutory language to varying fact patterns"--has entered the picture and asserted jurisdiction. In other words, the issue here is one of Federalism, and issues of federalism are to be resolved, not by simply deferring—as the Court did in Bayside--to the federal agency, but by careful, independent scrutiny of both the federal and the state statutory schemes to determine whether there is a necessary conflict. (California Federal Savings and Loan Assn. v. Guerra (1987) 479 U.S. 272.) The expertise of the federal agency will be taken into account, but it will not be given controlling weight where a significant state interest is involved. (Bill

[58]Probably the best, and certainly the most forthright, discussion of the deferral doctrine is to be found in the Third Circuit's decision in Hi-Craft Clothing Co. v. NLRB (1981) 660 Fed.2d 910, interpreting the exclusion of supervisors from the definition of "employee" in Section 2(3) of the NLRA.

Johnson's Restaurants, Inc. v. NLRB (1983) 461 U.S. 731, 742-743.)

The ALRB, in Rigi Agricultural Services (1985) 11 ALRB No. 21, described that interest--and its consequences--as follows:

> "In De Canas v. Bica, the U.S. Supreme Court noted the ' ...States posses broad authority under their police powers to regulate the employment relationship to protect workers within the State.' The Court noted that similar to child labor laws, minimum and other wage laws, laws affecting health and safety, and workers' compensation laws, California attempt, by means of Labor Code 2805(a), to prohibit knowing employment... of undocumented aliens...was 'certainly within the mainstream of such police power regulation.' (96 S.Ct. at 937.) Through enactment of the ALRA, California has exercised its police power to regulate the employment relationship between agricultural employers and employees so as to protect workers and bring peace and stability to the State's fields. (See Preamble to ALRA.) Thus, the U.S. Supreme Court has often stated where the challenged state law or regulation involves exercise of a state's police power, ' ...[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of the Act.' (Rice v. Santa Fe Elevator Corporation (1977) 331 U.S. 218, 230. See also Jones v. Rath Packing, 97 S.Ct. 1305, 1309; and Bill Johnson's Restaurants, Inc. v. NLRB, supra, 103 S.Ct. 2161.)" (Id. at p. 13.)

In enacting the NLRA, Congress intended to exercise the full range of its powers under the Commerce Clause to regulate the relationship between labor and management in the industrial setting. (Guss v. Utah Labor Relations Board (1957) 353 U.S. 1, 3; Meat Cutters v. Fairlawn Meats. Inc. (1957) 353 U.S. 20; San Diego Building Trades Council v. Garmon (1957) 353 U.S. 26.) But it went on, in the clearest language possible, to exempt agriculture from the comprehensive scheme it had fashioned for

industry (29 U.S.C.A. Sec. 2(3)); thereby "explicitly disclaim[ing] any intent categorically to pre-empt state law or to occupy the field" of agricultural labor relations. (See California Federal Savings and Loan Assn. v. Guerra, supra, 479 U.S. at 281.)

Because the Supreme Court, in Bayside, found the NLRB's interpretation of the term "farmer" to be one which "might with equal reason be resolved one way rather than another" and accepted it only out of deference to agency expertise, without engaging in the careful and independent scrutiny required where, as here, a significant state interest is asserted, it cannot be said that the ALRB's determination is clearly and manifestly in conflict with Federal Law. (Rice v. Santa Fe Elevator Corporation, supra.) Indeed, with Bayside--so to speak--"on the sidelines", what is left is a clear difference of opinion between three Circuits and the Board over the meaning of the term. In those circumstances, the ALRB has every right to offer and abide its own definition.

B.

Moreover, since Congress has explicitly disclaimed any intent to pre-empt the field of agricultural labor relations, even if one were to accept the Regional Director's assumption of jurisdiction as of the date of the KLRB hearing,[59] there can,

[59]Here, it is important to note that I am assuming, for the purpose of argument, the correctness not only of the Regional Director's finding that Bud became a "farmer" but also of her "fall back" determination that the cooling employees' work was not "incidental to" or performed "in conjunction with" the

under California Federal Savings and Loan Assn. v. Guerra, supra, be no pre-emption unless the ALRB's earlier assertion of jurisdiction intruded into the area of which she eventually reserved to the NLRB to a point where "compliance with federal and state regulation is a physical impossibility," (Florida Lime & Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 142-143) or to the extent that state enforcement would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Hines v. Davidowitz (1941) 312 U.S. 52, 67.)[60]

In order to apply these two criteria, it is important first to understand the exact nature of the conflict--if it can truly be called a conflict--between the NLRB and the ALRB. After all, the NLRB has made no attempt to assert jurisdiction over the alleged unfair labor practices; indeed, its Regional Director specifically declined to involve herself with them by refusing Bud's request to determine its status in 1989. That being so,

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primary farming operations carried on by Bud and its growers--something which, for the reasons explained in Section VI A, pages 81-85, below, I do not believe can be sustained under the circumstances here presented.

[60]What distinguishes this case from the "classic" NLRA preemption cases, like Guss and Garner, is that there the Court was concerned with direct incursions by states into the area of interstate commerce which Congress intended fully to occupy; whereas, here, Congress did not intend to occupy the field of agricultural labor relations, and so the state is entitled to assert its own substantial interest to the extent that Congressional purposes and objectives are not defeated by incidental intrusions of the sort described in the following paragraph, above. That is why the pre-emption analysis of California Federal Savings. Florida Lime and Hines is applicable and Guss and Garner are not.

the only "conflicts" are: (1) the theoretical one created by the Regional Director's reliance on pre-1991 circumstances in determining that Bud's cooling employees became subject to the NLRA in 1991; (2) the remedial one created by the fact that losses sustained as a result of the alleged unfair labor practices may have continued on into 1991 and may still be accruing; and (3) the consequential one created by the fact that some of the alleged violations may be continuing in nature and therefore can be said to extend down to the present.

The first criteria--physical impossibility--is easily disposed of. Since the NLRB has made no attempt [and, in fact, has declined] to assert jurisdiction over any of these alleged unfair labor practices,[61] there is no "inescapable" conflict between the enforcement of the statutory scheme created by the ALRA with that of the NLRA. (See Florida Lime and Avocado Growers, Inc. v. Paul, supra, 373 U.S. at 142-143.

The second criteria requires consideration of the "full purposes and objectives of Congress" in enacting the NLRA in order to determine which, if any, of the three areas of "conflict" described above "stand as an obstacle to the[ir] accomplishment and execution." (Hines v. Davidowitz, supra, 312 U.S. at 67.)

In creating a labor relations law for the industrial--or, more accurately, the non-farm--sector of the economy,

[61]And, according the Respondent, could not consider them because of the lapse of the 6 months limitation period established by Section 10(b) of the NLRA. (II:12, lines 18-25.)

Congress had as its primary purposes and objectives: First, to guarantee the right of collective bargaining by providing a forum in which alleged violations of the duty to bargain and of the rights of employees to engage in such bargaining may be resolved and, if there be a violation, redressed. Second, to create a comprehensive and consistent body of federal law governing those rights and duties, thereby avoiding the burden on interstate commerce likely to result from "a variety of local procedures and attitudes toward labor controversies." (Garner v. Teamsters (1953) 346 U.S. 485, 490.) And third, to create a climate in which labor and management can voluntarily resolve their differences without the intervention of governmental bodies. That policy, which I here refer to as "voluntarism", permeates American labor law. It is the policy which informs the unique concept of "good faith bargaining", and it is the policy which underlies the respect which the Congress, the Board, and the Courts have accorded to the collective bargaining agreement and to arbitration as the preferred method of dispute resolution.

Let me take those considerations, one by one, and ask to what extent each is jeopardized: (1) by the Regional Director's reliance on pre-1991 circumstances in finding that NLRB jurisdiction attached in 1991, or (2) by the fact that losses sustained as a result of the pre-1991 unfair labor practices may have continued on after 1991, or (3) by the fact that some of those alleged unfair labor practices nay be continuing in nature.

The first--providing a forum for the resolution of issues involving the duty to bargain and the protection of employees subject to the bargaining process--can, in the circumstances here presented, only be guaranteed if the ALRB does proceed in this matter. The reason for this paradox is that Bud, while arguing that the NLRB has exclusive jurisdiction, has—at the same time--taken the position that it has no authority to hear and consider the alleged unfair labor practices because the 6 month limitations period found in Section 10(b) of the NLRA has elapsed.[62] At hearing the Bud's counsel made it quite clear:

> "The Union could've well filed their charges with the NLRB at that time and protected their 10(b) period. They did not do so." (II:13, lines 23-25.)

The second--providing a uniform and consistent body of federal law--is protected both because the ALRA uses language identical to that of the NLRA in describing the prohibited conduct and because the ALRB is required to apply federal law in determining whether a violation occurred:

> "The Board shall follow applicable precedents of the National Labor Relations Act, as amended." (Labor Code, section 1148.)

While section 1148 does not extend to procedure, ALRA procedures for adjudicating unfair labor practices are, for all practical purposes, identical to those found in the NLRA. (Compare Chapter 6 of the ALRA, Labor Code, sections 1160-1160.9, and Section 10

[62]Because the charges were filed with the ALRB within the 6 month period and promptly investigated, the "purposes and objectives of Congress" in creating a 6 month statute of limitations have been fulfilled as well.

of the NLRA, 29 U.S.C.A. Sec. 160(a)-(m).)

The third--the policy of encouraging and honoring the conduct and commitments which labor and management have made to each other, and which I have called "voluntarism"--is also better served by allowing the ALRB to proceed. The conduct of the Bud and the Fresh Fruit and Vegetable Workers during the critical period in which the alleged violations occurred was examined in detail in Section II A, pages 11 to 20, below; and, in Section II C, I concluded that: "If anything the conduct of the parties during this period—June 1989 to mid-January 1990--evinces a stronger mutual commitment to ALRB jurisdiction than ever before." (See p. 23, above.) And that mutual commitment manifested itself not simply in their reliance on ALRB procedures but, more importantly, in their conduct at the bargaining table[63] --the very arena where the Congressional policy of fostering candor and commitment between labor and management is the strongest.[64]

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[63]That conduct is described in Section II A, at pages 13-14, below; especially, see Charging Party's Ex. U-24.

[64]Let me be absolutely clear about this: I am not here talking about jurisdiction by estoppel. Although two federal courts have supported the concept (The Careau Group v» United Farm Workers (C.D. Cal. 1989) 716 F.Supp. 1319; Newspaper Drivers & Handlers, Local #372 v. NLRB (6th Cir. 1982) 606 Fed.2d 116, and, after remand, 735 Fed.2d 969 (1984)} but see Truck Drivers Local Union No. 807 v. NLRB (2nd Cir. 1985) 755 Fed.2d 5, 10), it creates serious conceptual problems and has been repudiated in this State. (Fleice v. Chualar Union Elementary School Dist. (1988) 206 Cal.App.3d 886. 893; see DeTomaso v. Pan American World Airways. Inc. (1987) 43 Cal.3d 517, 520, fn. 1.)What I am saying is that in determining, for the purposes of pre-emption doctrine, whether state enforcement stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,

I therefore conclude that, even if one were to accept the Regional Director's assumption of jurisdiction as of the date of the NLRB hearing in 1991, there is no pre-emption of the ALRB's jurisdiction to hear and remedy the alleged unfair labor practices.

C.

Before taking up the second part of the, jurisdictional Test--whether the work of Bud's cooling employees is "incidental to" or performed "in conjunction with" its farming operations, several arguments raised by the Respondent are deserving of comment.

Bud argues that the doctrine of collateral estoppel requires that preclusive effect be given to the Regional Director's determination that Bud was subject to NLRA jurisdiction.

To begin with, there is, no such finding covering the period prior to 1991. More fundamentally, however, collateral estoppel--or issue preclusion as it is now known--will not be found where:

> "A new determination of the issue is warranted...by factors relating to the allocation of jurisdiction

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the fact that one of those purposes is to encourage and respect the mutual commitments of the parties must, just like any other Congressional purpose, be taken into account in deciding--in the particular factual situation presented--whether State enforcement should be pre-empted. Unlike the jurisdiction by estoppel theory, mutual agreement of the parties is not controlling, but is entitled to weight concomitant to the importance attached to the Congressional purpose which it manifests.

between [adjudicative bodies]". (Rest.2d Judgments, §28(3).)

In the comment e to that section, the drafters use patent litigation to illustrate the rule.

> "...[I]n a federal court action for patent infringement, a determination that the patent is invalid would be conclusive on that issue in a subsequent state court action on a license agreement. See Article VI, Clause 2, of the U.S. Constitution (the Supremacy Clause). On the other hand, a determination in a state court action on a patent license agreement upholding the defense that the patent was invalid for want of invention would not be held binding in a subsequent federal court action for patent infringement if the Congressional grant of exclusive jurisdiction in patent infringement cases to the federal district court is construed [as not extending to such a defense]". (Id. §28, com. e.)

The comment then goes on:

> "The question in each such case would be resolved in the light of the legislative purpose in vesting exclusive jurisdiction in a particular court." (Emphasis supplied.)

And the same is true of administrative tribunals. (Rest.2d Judgements, §83.) In other words, where the issue is one of jurisdiction, then the analysis called for in determining whether collateral estoppel, or issue preclusion, applies is the very pre-emption analysis just undertaken in Sections V A and V B, above.[65] Since, under either analysis, the interpretation of ALRB jurisdiction found in Section IV is not "pre-empted", neither is it "precluded"--for it comes to the same thing.

Bud next argues for so-called Garmon pre-emption; that is, if a reasonable argument can be made that an activity is

[65]And the analysis which will be undertaken in Section VI A, pp. 81-85, below.

either protected or prohibited by the National Labor Relations Act, then the NLRB has exclusive jurisdiction and state action is pre-empted. (San Diego Building Trades Counsel v. Garmon (1959) 359 U.S. 236.)

Garmon pre-emption relates to the conduct engaged in, not to the parties engaging in the conduct. If those parties are not subject to the NLRA, one never reaches the question of protected or prohibited conduct. In Wilmar Poultry Co. v. Jones (D.Minn. 1977) 430 F.Supp. 573, 96 LRRM 2523, 2526-2527, the Court rejected the very argument Bud makes here:

> "State regulations of labor relations activity including agricultural laborers is not preempted on the ground that such activity is either protected or prohibited by the NLRA because the NLRA's protections and prohibitions do not apply to agricultural laborers. Section 2(3) of the NLRA, excludes agricultural laborers form the definition of 'employees'. Therefore, it follows that provisions of the NLRA employing that pivotal term would cease to operate where agricultural laborers are the focus of concern. Most obviously, §7 of the NLRA, which bestows rights upon employees, does not bestow upon agricultural laborers the right to engage in self-organization, collective bargaining and other concerted activities. Accordingly, activity designed to secure organization or recognition of agricultural laborers cannot be protected by §7. (Citations omitted.) Correspondingly, §8(b) of the NLRA, which defines labor organization unfair labor practices prohibits no conduct carried on by organizations composed exclusively of agricultural laborers....Because agricultural laborers are not 'employees', no activity of an organization composed exclusively of agricultural laborers is prohibited by §8(b). (Citation omitted.) Therefore, because the NLRA neither protects nor prohibits labor relations activity by agricultural laborers, preemption based on NLRA's protections and prohibitions does not apply."

The above quotation is a paraphrase of the language used by United States Supreme Court in Hanna Mining Co. v. District 2.

Marine Engineers Beneficial Assn. (1965) 382 U.S. 181, 188, in holding that Garmon pre-emption does not apply to the conduct of "supervisors".

Finally, there is the recurrent argument that the ALRB is somehow bound by Labor Code $1140.4(b) and S1148 to follow NLRB precedent, as distinguished from NLRA precedent. That is not what those sections say. Both refer to the Act, which means that, in the cases which come before them, the federal courts are the final arbiters of what it means.[66]

VI. IS THE WORK OF BUD'S COOLING EMPLOYEES "INCIDENTAL TO" OR "IN CONJUNCTION WITH" ITS FARMING OPERATIONS?

A.

Finally, there is the issue of what the cooling employees do; for, even though Bud is a "farmer", they are subject to ALRB jurisdiction only if their work is "incidental to" or performed "in conjunction with" the primary farming operations carried on by Bud and its growers. (Farmers Reservoir & Irrigations Co. v. McComb, supra; see Section I B, at pp. 8-11, above.)

At issue is the work done by those employees on "outside mix". (See Respondent's Ex. 63, p. 18, discussed in fn. 21, above.) That "mix", it was pointed out earlier, is the

[66]Bud also relies heavily on the decision by the Regional Director of the NLRB's Region 32, in a case involving Bud and the Teamsters Local 890. (Respondent's Ex. 67, Attachment E.) That decision is no more binding on the NLRB [and, consequently, the ALRB] than the Baillie decision, discussed in footnote 3, above, is binding on the ALRB.

produce which Bud--in order to provide a "one stop shopping" service for its customers—purchases from independent outside growers, and brings, already cooled and packed, to one or another of the cooling facilities, where its combined with commodities grown, cooled, and packed by Bud (and its growers) to create a "mix". When Richard Bascou was asked whether the "mix" is processed at the coolers, he replied:

> "No, it's not. Usually -- it's not even our label. It is just we receive it, hold it and reload it. (NLRB Tr. 81.)

The volume of outside mix is tiny; analysis of Bud's production figures for 1988, 1989 and 1990 shows that of 71,099,628 cartons of produce moving through its coolers, there were only 417,042 cartons of "outside mix"--.0059, or 6/10 of 1% of total volume.[67] (Respondent's Exs. E-4, E-6, 6 E-7.) And even that overstates the matter because cooling employees perform almost no work on the mix.

Up until March 15, 1990, when the NLRB issued its decision in Camsco Produce Company, supra, there is little doubt that the ALRB would have regarded the volume of outside mix as far too insignificant to have affected its jurisdiction. (Sunny Cal Egg & Poultry. Inc., supra, Sequoia Orange Company (1985) 11 ALRB No. 21; Oshita. Inc. (1979) 5 ALRB No. 69; and Carl Joseph Maggio. Inc. (1976) 2 ALRB No. 9.) And the NLRB would have, in all likelihood, reached the same result. (Garin Company (1964)

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[67]In 1990, the most recent year for which figures were available, it made up only .0039 of total volume.

148 NLRB 1499; Employer Members of Grower-Shipper Vegetable Association, supra; but see DeCoster Egg Farms, supra.)

But, in Camsco, the National Board abandoned the requirement that the outside work be "substantial" and held that it would assert jurisdiction "if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question." (Slip Opn., p. 11., emphasis supplied; and see Section I B, p. 17, above.) In Camsco the percentage of outside commodities amounted to 2.26% [55.5% of 4.07%]. (See Slip Opn. p. 2.) However, in Campbells Fresh, Inc. (1990) 298 NLRB Mo. 54, the NLRB upheld its Regional Director's assertion of jurisdiction where the volume of outside mushrooms regularly processed was .001.

In deciding Camsco, the NLRB considered and weighed a number of factors: The need to reconcile conflicting NLRB precedents; the extent to which the NLRB is bound by Department of Labor interpretative regulations; the desire of Congress that the collective bargaining obligation extend to employers who have departed from the traditional model of a farmer who grows and processes his own commodities; and the need for a feasible and predictable jurisdictional standard. What it did not consider--because the issue was not presented by the facts in Camsco--was the effect of the abandonment of the "substantiality" requirement on cases where a state had, in the exercise of its police power, stepped into the vacuum created by the agricultural laborer exception and enacted a collective bargaining statute for

agriculture. Where that is the case, and especially where, as here, the State has actually assumed jurisdiction, the elimination of the substantiality requirement invites the worst sort of forum shopping. The ALRB, in Sunny Cal Egg & Poultry, Inc., supra, described the problem:

> "[W]here all an egg processor would have to do to make its operation commercial would be to [regularly] purchase a dozen eggs for processing from an independent producer... an employer could clip in and out of jurisdiction of first the ALRB and then the NLRB by continually adjusting the quantity of eggs it accepted for processing from other producers. (Id. at p. 14.)

Even where there is no deliberate scheme to adjust the quantity accepted for processing, the danger of forum shopping persists. To appreciate that, one need only examine Bud's behavior between September 1989 and March 1990. (See Section II A, pp. 14-18, above.) There is also the danger that one statute will be played off against another, so as to render both impotent. Bud's claim that Camsco strips the ALRB of jurisdiction while, at the same time, arguing that 510(b) of the NLRA deprives the NLRB of jurisdiction is a good example. That, too, was made possible by the elimination of the substantiality test. At root, all of these are the generic problems one can expect to encounter when the "de minimus" principle is abandoned; for, when that happens, results begin to occur which defy common sense and basic fairness.

Had the NLRB, in Camsco, been faced with those risks, it might well have fashioned a different rule for situations where a state had enacted an agricultural collective bargaining

statute.[68] But that case has yet to be presented to the NLRB or the federal courts; until it is, the ALRB should continue to follow its long standing policy of asserting jurisdiction where there is no substantial volume of outside commodities. (Sunny Cal Egg & Poultry. Inc., supra; Sequoia Orange Company, supra; Oshita. Inc., supra; and Carl Joseph Maggio. Inc., supra.)

B.

Even if one were to accept the NLRB Regional Director's reliance on Camsco, there is still no pre-emption of the ALRB's jurisdiction to hear and remedy the alleged unfair labor practices. It has already be pointed out that, under classic pre-emption doctrine, her assumption of jurisdiction as of the date the NLRB hearing does not foreclose ALRB jurisdiction. (Section v B, pp. 72-78, above.) That reasoning applies equally to her reliance on Camsco as a "fall back" argument. (See Fn. 59, p. 72, supra.) In addition, there is the issue of whether the Camsco decision, which did not issue until March 15, 1990, should be given retroactive effect. In Chevron Oil Company v. Huson (1971) 404 U.S. 97, 106-107, the Supreme Court stated the test to be applied in determining retroactivity/nonretroactivity:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied non-retroactively must establish a new principle of law....Second, it has been stressed that 'we must

[68]Campbells Fresh. Inc., supra, involved California agriculture, but there the ALRB had not asserted jurisdiction over the employees in question and so the issue was not presented to the NLRB.

> ...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' ...Finally, we have weighed the inequity imposed by retroactive application."

This test has been repeatedly applied to NLRB determinations. Local Union 953 v. Mar-Len of Louisiana. Inc. (5th Cir. 1990) 906 Fed.2d 200, 203; Consolidated Freightways v. NLRB (D.C.Cir. 1989) 892 Fed.2d 1052, 1058-1059; NLRB v. W.L. Miller Co. (8th Cir. 1989) 871 Fed.2d 745, 748-749.)

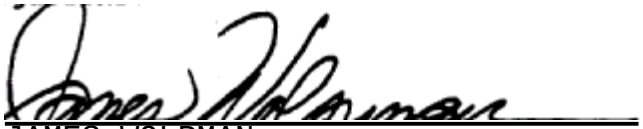
Here, Camsco specifically overruled both Employer Members of Grower-Shipper Vegetable Assn. (Slip Opn. p.7) and DeCoster Egg Farms (Slip Opn. p. 11, fn. 17), thereby establishing a new principle of law. Second, retroactive application of the Camsco rule would have the effect of destablizing labor relations by depriving the ALRB of jurisdiction while, at the same time, creating a situation where the NLRB litigation would be time barred, thus preventing the operation of the policies underlying both statutory schemes, as more fully described in Section V B, at pages 75-77, above. Finally, the result would be inequitable because it would deprive the Union of any forum to vindicate rights created under a statute which was enacted to protect the public interest; whereas, no similar prejudice would accrue to Bud.

VII. CONCLUSION

Upon the basis of the entire record before me, the findings of fact which I have made, and my legal analysis of those findings, I conclude that the ALRB has jurisdiction over

all aspects, both substantive and remedial, of the unfair labor practices alleged in the Complaint, and I recommend that it proceed to hearing on those allegations.

Dated: December 16, 1991



JAMES WOLPMAN
Chief Administrative Law Judge