Pescadero, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SILVER TERRACE NURSERIES , INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 93-RC-2-SAL 19 ALRB No. 12 (September 16, 1993)

DECISION AND ORDER ON CHALLENGED BALLOTS

This matter is before the Agricultural Labor Relations Board (ALRB or Board) on exceptions filed by Silver Terrace Nurseries, Inc. (Employer or Silver Terrace) to a Report on Challenged Ballots issued by the Salinas Regional Director (RD) on June 17, 1993. The election in this matter was conducted at the Employer ' s Pescadero and South San Francisco facilities on March 18, 1993. All votes at both locations were challenged on the grounds that the voters were not engaged in agriculture. In his report, the RD relied on the uncontradicted declarations of employees at the Employer's Pescadero site, who stated that they worked in the planting, transplanting, growing and cultivation of flowers.[1] He concluded that the declarations

[1] The RD properly considered the employee declarations to be uncontradicted because, despite two opportunities, the Employer failed to provide declarations or other supporting documentation to support its claim that its employees spend at least part of their work time engaged in non-agricultural work. While the Employer was given only a short time to file its first response, it was given several weeks to file its second response.

established that the employees were engaged in primary farming activities and thus were agricultural employees within the meaning of section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. section 203(f), and California Labor Code section 1140.4(a). The fact that the Employer obtained some carnation seedlings from outside growers did not compel a different finding, the RD noted, since thereafter the carnations were grown and cultivated by the Pescadero employees just like all other flowers. Further, although occasionally outside flowers which were already packed and ready for sale were brought in by trucks and stored for later shipment to the Employer's South San Francisco facility, no Pescadero employees worked on this product other than occasionally loading it onto the Employer's trucks for shipment.

The RD concluded that a decision on the challenged ballots could be made strictly on the basis of the work performed at the Pescadero site. Since there were 51 voters at the Pescadero site and only 27 voters at the South San Francisco site, resolving the vote at Pescadero could very well be outcome determinative. The RD therefore concluded that all Pescadero challenges for lack of ALRB jurisdiction should be overruled and the ballots counted.

In its exceptions, the Employer argues that this matter should be held in abeyance until the National Labor Relations Board (NLRB or national board) has resolved the representation issue pending before the national board in Case No. 20-RM-2785. The Employer also argues that no decision should be made to count

the Pescadero ballots until after the appropriate scope of the bargaining unit is determined.

The NLRB hearing in Case No. 20-RM-2785 began on May 4, 1993, and was suspended that same day. At the outset of the hearing, counsel for the United Farm Workers of America, AFL-CIO (UFW) disclaimed any interest in representing any workers who were not within the agricultural exemption of the National Labor Relations Act (NLRA) . The hearing officer suspended the hearing, stating that she was going to recommend that the petition be dismissed based upon the UFW's representation. The matter has not been rescheduled, apparently because the transcript of the hearing has not yet been prepared. The employees' declarations herein indicate that they are engaged in agriculture (see discussion, infra), and there is no reason to believe that the NLRB would find them to be statutory employees under the NLRA. We believe that this Board has jurisdiction to determine whether it has jurisdiction over these employees.

The Employer argues that it is an integrated employer with employees who have sufficient contact with outside products to place them within the definition of employees under the NLRA.

Under the Fair Labor Standards Act definition of agriculture (which also appears in Labor Code § 1140.4(a), 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 . . . 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. § 203(f).)

According to employee declarations submitted to the RD herein, Silver Terrace employees at the Pescadero site plant all of the flowers, except for carnations, from seedlings started at Pescadero, and transplant the seedlings to flower beds in the Employer's greenhouses. As the flowers grow, the employees support them with string, irrigate, weed, prune, and spray them with pesticides, and then cut (i.e., harvest) the flowers. The mature flowers are cut and bunched with rubber bands or string according to variety and color. These activities clearly constitute direct farming under the FLSA definition of agriculture, and thus the employees performing those duties are engaged in "primary" agriculture. (Farmer's Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755 [69 S.Ct. 1274].)

The carnations grown at Pescadero are started from small seedlings which are brought in from the outside. In the Employer's greenhouse, the carnations are transplanted into beds, grown, cultivated, fertilized, supported by string, then cut, bunched and placed in buckets of water. As the RD noted in his report, in a case where an employer purchased small rose plants from growers and placed them in cement containers in greenhouses, and its employees then performed such tasks as watering, cutting, spraying and tying the roses, such employees were found by the NLRB to be agricultural laborers. (In the Matter of William H. Elliott S Sons Company (1948) 78 NLRB 1078 [22 LRRM 1344].)

Similarly, in Rod McLellan Co. (1968) 172 NLRB 1458 [68 LRRM 1546], greenhouse workers and general laborers who cultivated, watered, fertilized and cut flowers were found to be agricultural workers. Thus, the activities performed with the carnations at Silver Terrace also constitute primary agriculture, since after purchase of the seedlings the carnations are grown and cultivated by the Employer's employees just like all other flowers.

"Secondary" agriculture is defined as work performed by a farmer or on a farm as an incident to or in conjunction with the agricultural activities of the employer, including preparation for market and delivery to storage or to market. (Farmer's Reservoir & Irrigation Co. v. McComb, supra, 337 U.S. 755.) The Pescadero employees' activities of boxing, wrapping and preparing flowers for shipment to the Employer's South San Francisco location are a necessary incident to production of crops and/or the preparation of the flowers for market, and thus should be considered as incident to or in conjunction with the primary farming operation and not as a separate commercial enterprise. Therefore, these activities constitute secondary agriculture.

The outside flowers which, on occasion, come in on other companies' trucks, are already packed and ready for sale. They are simply stored temporarily in the Employer's shed and Silver Terrace employees do no work on them except for loading them onto trucks. Since the Employer's employees do not pack or prepare these outside flowers for market, the minimal "handling"

of the flowers is not sufficient to make the packing operation nonagricultural under Camsco Produce Company, Inc. (1990) 297 NLRB 905 [133 LRRM 1225].[2]

The circumstances in this case are similar to those in Bud Antle, Inc. (1992) 18 ALRB No. 6, in that the "outside mix" is no more than a service which the employer provides as a convenience for customers and is peripheral to the employer's agricultural operation.[3] The situation herein is also akin to that in Wirtz v. Jackson & Parkins Company (2d Cir. 1963) 312 F.2d 48, in which the court applied the agricultural exemption to employees of a nursery who worked in a warehouse on stock purchased from outside sources when necessary to compensate for temporary shortages in the company's own output.

We reject the Employer's argument that no votes should be counted until the scope of the unit (i.e., whether the

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[2] Since the employees here are engaged in primary agricultural for part of their work time, even if the packing operation were nonagricultural, this would result in a mixed work situation in which this Board would retain jurisdiction over the primary agricultural work. (See Olaa Sugar Company, Ltd. (1957) 118 NLRB 1442 [40 LRRM 1400].)

[3] Such a service is not only peripheral to the central agricultural operation, but is most accurately viewed as a distinct and separable operation. While such operation may technically be of a nonagricultural nature because it involves products from a different farmer or farm, it does not affect the agricultural nature of the central operation. Thus, such operation may create a mixed work situation (i.e., where employees do both agricultural and nonagricultural work), but does not constitute "outside mix" which is fully and regularly commingled with the commodities handled in the central operation. In mixed work situations where the amount of nonagricultural work is not substantial, the NLRB will not assert jurisdiction over such work. (Camsco Produce Company, Inc., supra, 297 NLRB at p. 908, fn. 18.)

Pescadero and South San Francisco facilities should be included in the same unit) is determined. The Notice and Direction of Election described the unit as consisting of all agricultural employees of the Employer in the State of California. In its Response to Petition for Certification, the Employer acknowledged that it employed agricultural workers at both the Pescadero and the South San Francisco locations, and stated further that the appropriate unit should be comprised of all agricultural employees, excluding only those employees subject to NLRB jurisdiction. Thus, no party contended at the time of the election that the unit was incorrectly defined.

Moreover, the Employer acknowledged in its pre-election response to a Board agent's questions that the work performed at the Pescadero and South San Francisco locations was identical, i.e., the growing, cutting, packing and selling of cut flowers. The Employer further stated that the employees' wages and benefits were similar, and that the employees at both locations were employed year-round. Both locations have a shed and cooler, although all of the Pescadero product is shipped to South San Francisco for distribution. The Employer also acknowledged that the two company owners supervise both locations, so that if one owner is away from the business, the other oversees both operations simultaneously. The two owners are in constant contact with each other and make business decisions on a joint basis. The employee handbook is identical for both locations,

and on occasion there is interchange between employees at the two sites.

We believe that the above facts adequately establish that a single unit is appropriate. Further, in the event that the unit is certified, the Employer will thereafter have the option of filing a petition for unit clarification pursuant to the Board's regulations (Cal. Code Regs., tit. 8, § 20385).

The Employer also argues that several employees who voted in the election should not have been allowed to vote, and asserts that its election observers were not permitted to assert challenges on any other basis than lack of jurisdiction. These claims are in the nature of election objections. We note that the Employer's election objections, all of which were dismissed as untimely, made no mention of these issues. We conclude that since the Employer failed to raise these matters in a timely manner as election objections, it has waived the objections and it would be inappropriate for the Board to consider them at this time. (Lab. Code § 1156.3(c); Cal. Code Regs., tit. 8, § 20365(a) and (b).)

Since we find that all of the employees who voted in the election are engaged in agriculture and that a single unit is appropriate, we conclude that all Pescadero and South San Francisco challenges for lack of ALRB jurisdiction should be overruled and the ballots of both locations counted. The RD will be directed to keep the Pescadero and South San Francisco ballots separate in case a unit clarification petition is later filed.

However, we will direct the RD to report the total tally of ballots without separating the votes of the two locations.

ORDER

All challenges to ballots cast at the Pescadero and South San Francisco locations for lack of Agricultural Labor Relations Board (ALRB or Board) jurisdiction are overruled. The Salinas Regional Director (RD) is directed to complete a tally of all ballots cast without separating the votes of the two locations. However, the RD is directed to keep the Pescadero and South San Francisco ballots separate in case a unit clarification petition is later filed by any party.

DATED: September 16, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

SILVER TERRACE NURSERIES, INC. (UFW)

19 ALRB No. 12
Case No. 93-RC-2-SAL

Background

Silver Terrace Nurseries, Inc. (Employer) conducts floral nursery operations at two non-contiguous sites, Pescadero and South San Francisco. On March 18, 1993, an election was conducted at both locations. All 78 voters in the election were challenged by the Employer as being non-agricultural employees.

On June 17, 1993, the Salinas Regional Director (RD) issued his Report on Challenged Ballots, in which he found that, at least as to the Pescadero site, the Employer's employees were agricultural employees. He recommended that all Pescadero challenges be overruled and those votes counted, as the vote at Pescadero could well be outcome determinative.

The Employer filed exceptions, asserting that the matter should be held in abeyance until the National Labor Relations Board (NLRB) had resolved the same representation issue in a case pending before the national board. The Employer argued that the Pescadero ballots should not be counted until the appropriate scope of the bargaining unit was determined. The Employer also asserted that its employees were subject to the jurisdiction of the NLRB.

Board Decision

The Board concluded that the Employer's employees at both the Pescadero and South San Francisco sites were engaged in primary and secondary agriculture, and were thus subject to the Board's jurisdiction. The Board found that the employees at the two sites performed identical work with common supervision and similar wages and benefits, and concluded that a single unit was appropriate. The Board directed the RD to open and tally all ballots cast at both sites, but to keep the ballots of each site separate in case any party later filed a unit clarification petition.