STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
ASSOCIATED-TAGLINE, Inc.,	)	Case No. 99-RC-2-SAL
	)	
Employer,	)	25 ALRB No. 6
	)	
and	)	
	)	
GENERAL TEAMSTERS WAREHOUSEMEN & HELPERS UNION, LOCAL 890,	)	(December 22, 1999)
	)	
Petitioner.	)	

DECISION AUTHORIZING ELECTION

On February 26, 1999, General Teamsters Warehousemen & Helpers Union, Local 890 (Teamsters or Union), filed a petition with the National Labor Relations Board (NLRB or National Board) seeking to represent the employees of Associated-Tagline, Inc. (Tagline or Employer). The NLRB conducted an election on April 6, 1999, in which he Union received a majority of the valid votes cast and was certified by the National Board.

On April 1, 1999, the Teamsters filed a petition with the Agricultural Labor Relations Board (ALRB or Board) in which it sought to represent a bargaining unit comprised

solely of the agricultural employees of the same Employer, namely the so-called "application" employees. No election was held as the Regional Director of the ALRB's Salinas region dismissed the petition because he assumed that the NLRB's certification, which included the application employees, prevented the ALRB from asserting jurisdiction over any of their work.

Pursuant to the Union's request that we review the Regional Director's dismissal, we did so by first directing an evidentiary hearing in order to examine whether any of the work of the application employees, as the Union contends, constitutes employment in agriculture. Were that the case, they could not be covered under the National Labor Relations Act (NLRA or National Act) for that portion of their work and therefore an election should have been held under the authority of the Agricultural Labor Relations Act (ALRA or Act). On August 19, 1999, following the taking of testimony from all parties, Investigative Hearing Examiner (IHE) Douglas Gallop issued the attached decision in which he found that the application employees were engaged in agriculture when working in the fields of Tagline's grower-customers. The Employer timely filed exceptions to the

IHE's recommended decision with a supporting brief and the Teamsters filed a response brief.

The Board has considered the IHE's decision in light of the record and the briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the IHE, to the extent consistent herewith, and to direct the Regional Director to conduct an election should the Union again file a petition for certification seeking to represent the application employees to the extent they are engaged in field work in accordance with this decision.

Associated-Tagline, Inc. has been in operation since about 1940 with relatively no change in the overall method of production or services provided. The Employer blends fertilizer components, selling and delivering different formulas of fertilizer mixes to individual customers, including growers, and retail outlets. For this purpose, it employs mill and delivery employees as well as employees in the Consumer Products Division (direct sales of fertilizer). There is no contention that any of these employees are subject to the jurisdiction of the ALRA when so engaged.

In question here is the status of 16 additional employees the Employer dispatches to work in the fields of various grower-customers in and around the Salinas Valley.

Three of these are designated by the Employer as "spreader drivers" who spread soil amendments on the customer's bare land and the remaining 13 as "tractor drivers" who cultivate the land, create furrows, build up beds and later fertilize the growing plants. The Employer refers to all of them as application employees.

The spreader driver travels from the Tagline plant to the field of a grower-customer of Tagline in an empty truck pulling a trailer which carries the loader. The field is bare, not yet ready for plowing or planting. The driver disengages the trailer from the truck, unloads the loader, and then utilizes the latter to load the truck with the amendments which have been previously delivered at the grower's behest. He then drives the truck into the field where he spreads or disperses the combination of materials on bare ground.

During peak season (April through November), he will devote 100 percent of his work time doing the field work described above, including the time required to travel from the plant to the first job at the beginning of the day, to interim assignments, and back to the plant at the end of the day where, when necessary, he will adjust and maintain his field equipment. At this time of year, his normal work day is 10 to 12 hours long and he will often

work a seven-day week, or upwards of 80 hours a week. Depending on weather (rain and wind hinder spreading operations) and available daylight, he continues to perform the same work two to three days a week during the December through March off-season when he averages 40 to 50 hours of work per week.

The other category of field work is assigned to the tractor drivers whose work consists of the plowing and shaping of raw land or the application of dry or liquid fertilizer in either of two distinct operations, "listing" and "sidedressing." Listing requires the tractor driver to carve out furrows and create (build-up) planting beds. Listing, like spreading, takes place prior to planting, but, on occasion, the drivers may groom (refine) the beds and fertilize at the same time. Sidedressing involves the application of either dry or wet fertilizer to growing plants. Loaded trucks deliver the fertilizer to the fields of the grower-customers with a tractor in tow for the purpose of applying the fertilizer.[1]

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[1]No application employees, neither the spreader drivers nor the tractor drivers, are involved in the mixing of chemical components for the production of fertilizer although, if otherwise idle during the slack season because of inclement weather or the lack of daylight, they may bag, label, and stack the premixed fertilizer. These latter assignments do not constitute work in agriculture, (See, e.g. Cornell University (1981) 254 NLRB 110; Rod McLellan Co. (1968 172

Section 2(3) of the NLRA excludes from its coverage "any individual employed as an agricultural laborer." Since 1946, Congress has annually reaffirmed the exclusion for agriculture under the National Act by adding a rider to the NLRB's appropriation measure providing that no part of the appropriation should be used in connection with bargaining units of "agricultural laborers" as agriculture is defined in section 3(f) of the Fair Labor Standards Act (FLSA, 29 U.S.C. section 203(f).) Section 3(f) of the FLSA, in part, defines "agriculture" as including:

> the cultivation and tillage of the soil...[and the] 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.... (29 U.S.C. section 203(f).)

In Farmers Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755, 762-763 [69 S.Ct. 1274, 1378], the United States Supreme Court broadened the FLSA definition of agriculture by explaining that agriculture consists of two branches, primary agriculture and secondary agriculture:

NLRB 1458; McComb v. Super-A-Fertilizer Works (1948) 165 F. 2d 824.)

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

There should be no dispute that when spreading amenities on bare ground, plowing the fields, creating planting beds, carving out furrows, and applying fertilizer to growing plants, the application employees are engaged in actual and direct farming activities – functions that are an established part of agriculture and necessary to the proper growth and development of the agricultural commodities produced by the grower-customer. The spreader drivers, in enriching the soil and preparing the soil for planting, as described above, are engaged in the "cultivation and tillage of the soil," clearly primary agriculture. (29 CFR section 780.110; Drummond Coal Co. (1980) 249 NLRB 1017; see, generally, 29 CFR section 780.106-780.127.) In addition, the creating of furrows and beds and the fertilizing of growing crops by the tractor drivers also is primary agriculture. (See 29 CFR section 780.112 and

For purposes of the National Act's agricultural exemption, it is immaterial whether Tagline is a "farmer" within the meaning of the FLSA. (29 CFR section 780.105 (b).) Thus while Tagline may be primarily a commercial enterprise, that fact does not alter the agricultural status of its application employees since it has been established that all of their field work is work which falls within the primary meaning of agriculture.[2]

In sum, we find that the application employees are agricultural laborers within the meaning of section 2(3) of the NLRA (29 USC §152(3) (1988)). The fact that they may perform nonagricultural work in the Employer's plant during the slack season (e.g., the bagging, labeling and stacking of premixed fertilizer and/or occasional assistance in the retail division) or the fact that the Employer also conducts a non-farming operation (the blending and sale of

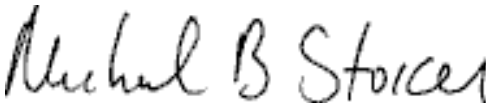
[2] As this Decision was being prepared, the Board received notice that the Regional Director of the NLRB for Region 32 issued a decision on a unit clarification petition filed by the Employer (Case No. 32-UC-367). The unit clarification before the NLRB addressed the identical issue addressed herein, i.e., whether the application employees engage in work which is agricultural in nature when working in the fields of their employer's customers and, thus, outside the jurisdiction of the NLRB. We note that the Regional Director's decision is consistent with our decision herein.

fertilizers), does not change the nature of their primary agricultural work.

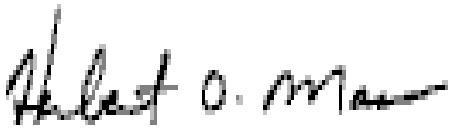
Accordingly, we conclude that a petition for certification[3] by which the petitioner herein may seek to represent a unit comprised of all the application employees of Tagline in the State of California, to the extent they are engaged in primary agriculture as set forth in this decision, will describe a unit appropriate for collective bargaining under our Act (Labor Code § 1156).[4]

Dated: December 22, 1999

GENEVIEVE A. SHIROMA, Chair



MICHAEL B. STOKER, Member



HERBERT 0. MASON, Member

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[3] We affirm the IHE's recommendation that the Union need not perfect a new showing of interest should it file a new petition for certification, but note that though the showing of interest submitted in support of the now-dismissed petition survives that petition, it is good only for up to one year from the date on which authorizations were signed. (Title 8, California Code of Regulations, Section 20300(h)(1).) In any event, the eligibility list for a new election will be measured by the payroll period immediately preceding the filing of a new petition. (Section 1156.3(a).)

[4]Unless otherwise specified herein, all section references are to the California Labor Code, section 1140 et seq.

MEMBER RAMOS RICHARDSON, Concurring:

I agree with the majority's finding that the application employees are agricultural laborers, at least when performing field work, and are therefore excluded from NLRA coverage, as well as with the appropriateness of the unit under our Act. I would like to take this opportunity to address the Employer's concerns that his policy arguments against jurisdiction by the NLRB and ALRB over employees that perform both agricultural and non-agricultural work have never been addressed by the Board (Page 7, Line 5, Employer's Exceptions to Decision of IHE).

On page 7 of his Exceptions brief the Employer stated the following:

> Finally, in its Post-Hearing Brief the Employer advanced several important policy arguments militating against a finding by this Board of joint or concurrent jurisdiction with the NLRB. For instance, the Employer noted that if there were two certifications, the possibility exists that unfair labor practice charges could be filed in both agencies, wreaking confusion and uncertainty in the workplace and the wasting of scant public agency resources. The Employer also noted that in the event of a labor strike, chaos and uncertainty would reign for employees, unions and companies if there were two certifications and two contracts. Mass confusion and uncertainty would further result if there were two unions with two contracts and one union went on strike but the other did not. Neither the strikers nor the employer would know which set of laws would apply, i.e. the NLRA or ALRA. The possibility exists that . employees would be on strike for only part of the day.

As it pertains to NLRA and ALRA jurisdiction over the same employees, the various scenarios portrayed by the Employer are theoretically possible and reflect the practical problems for the administration of labor relations. Beginning with the Camsco decision (Camsco Produce Co. (1990) 297 NLRB 905} and continuing with the Produce Magic (1993) 311 NLRB 173, and the U.S. Supreme Court decision in Holly Farms Corp. v. NLRB (1996) 517 US 392, 116 S.Ct. 1396, the ALRB engaged in discussions with the NLRB and/or submitted amicus curiae briefs in attempts to prevent potential problems associated with dual function employees.

The case before us presents a mixed work situation where the employees perform both agricultural and

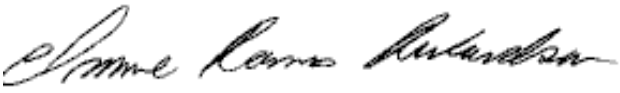
non-agricultural work. It is clear that the duties performed by the spreader drivers and truck drivers when in the field, fall within the definition of primary agriculture. The NLRB cannot protect these workers when performing their duties in the field. The NLRB decision in Olaa Sugar Co. (1957) 118 NLRB 1442 (cited by the Regional Director in Produce Magic) is dispositive. There the Board set forth the following rule regarding its jurisdiction over employees.who perform both agricultural and nonagricultural work:

> We now announce the rule that employees who perform any regular amount of non-agricultural work are covered by the Act with respect to that portion of the work which is non-agricultural.

In some cases the NLRB can decline jurisdiction. Under Section 14(c)(1) of the NLRA the NLRB can decline jurisdiction where it determines that the effect on commerce of the alleged unfair labor practice is insubstantial. The ALRB, on the other hand, is given no such discretion under the ALRA. To decline jurisdiction over employees who clearly perform agricultural work, including mixed work situations, would result in depriving

workers of protections embedded in both Congressional and Legislative policies.

DATED: December 22,'1999



IVONNE RAMOS RICHARDSON, MEMBER

MEMBER BARRIOS, Concurring:

I join fully in the result which my colleagues have reached in the lead opinion as it comports precisely with the holding of the National Labor Relations Board (NLRB) that the application employees are engaged in primary agriculture when performing duties in the fields of their Employer's grower-customers. In view of this determination, it is unnecessary to comment on the off-the-farm duties of the application employees because I recognize that we are bound by the NLRB's ruling. However, as guidance for future cases, I am compelled to write separately in order to cite authority for the proposition that certain non-field duties of the same employees may also be subject to the NLRB's exemption for agriculture.

It is now well established that both the NLRB and this Board are required by their respective legislative bodies to follow the definition of agriculture as set forth in section 3(f) of the Fair Labor Standards Act (29 U.S.C. section 203(f), FLSA) and that both labor boards have historically looked to the regulations of the United States Department of Agriculture (DOL; Title 29, Code of Federal Regulations section 780 et seq., CFR) when construing and applying the FLSA. (See Wegman's Food Market, Inc. (1978) 236 NLRB 1062.)

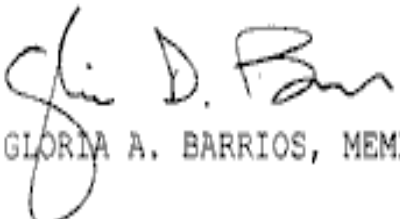
Briefly summarized, the facts which are pivotal to my examination are as follows. Upon completion of their initial assignments for the day, the spreader drivers contact the Employer's plant in order to learn whether they will fill other field assignments in the same manner that same day. They need not return to the plant between jobs as all the equipment required to perform the duties is an empty truck and loader. At the end of the day, they return to the plant in order to store the truck and trailer, clean the equipment, make adjustments to the equipment as necessary, and perform any maintenance that may be required. They will also be responsible for paper work relative to their field duties. The same routine holds true for the tractor drivers.

On similar facts, DOL would consider the application employees to be engaged in agriculture even though they move from farm to farm, since their work is performed entirely on farms "save for an incidental amount of reporting to their employer's plant." (CFR 780.136.) Thus, even though an employee may work on several farms during a given work week, he is regarded as employed "on a farm" for the entire workweek if his work on each farm pertains solely to farming operations on that farm. (CFR 780.136.) Moreover, "the fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion." (Id.) Accordingly, DOL's exemption for agriculture under the national act will apply even though "an employee may spend a small amount of time within the work week in transporting necessary equipment for work to be done on farms." (CFR 780.131; 780.136.)

Based on the authorities discussed above, it would appear that in addition to performing actual field work, duties related to that field work (traveling to and from the Employer's plant and servicing equipment used in the field work) also fall within the national act's exemption for agriculture. The fact that the application employees may incidentally perform nonagricultural work in

the Employer's plant during the slack season (e.g., the bagging, labeling and stacking of premixed fertilizer and/or occasional assistance in the retail division) or the fact that the Employer also conducts a non-farming operation (the production of fertilizers for sale to wholesale and retail customers) does not change the nature of their work in agriculture.

DATED: December 22, 1999



GLORIA A. BARRIOS, MEMBER

CASE SUMMARY

ASSOCIATED-TAGLINE, Inc.
(Teamsters Local 890)

Case No. 99-RC-2-SAL
25 ALRB No. 6

Background

Teamsters Local 890 (Union) filed a petition with the National Labor Relations Board (NLRB or national board) seeking to represent the employees of Associated-Tagline, Inc. (Tagline or Employer). The NLRB conducted an election and certified the Union as exclusive representative for purposes of collective bargaining under the National Labor Relations Act (NLRA or national act). Meanwhile, the Union had filed a petition for certification with the Salinas Region of the Agricultural Labor Relations Board (ALRB)'in order to represent Tagline's agricultural employees, namely the so-called "application" workers. Although Tagline is a commercial producer of fertilizer products for sale to retail outlets and others, including growers, the Company also provides personnel and equipment to perform field work for grower-customers such as the application of soil amendments and fertilizers as well as the development of irrigation furrows and planting beds. The Salinas Regional Director of the ALRB dismissed the latter petition because it appeared that the national board had asserted jurisdiction over all Tagline employees and the Union appealed the dismissal. The ALRB directed that an evidentiary hearing be held in order that it may examine the actual work of the application'employees. Following the hearing, the Investigative Hearing Examiner (IHE) concluded that, as the application employees were engaged in agriculture, the ALRB had jurisdiction and therefore the petition should have resulted in an election among those employees. The Employer filed exceptions to the IHE's decision.

Board Decision

As a threshold matter, the ALRB noted that since "agricultural laborers" are exempt from the coverage «of the NLRA, the California Legislature had enacted the Agricultural Labor Relations Act in order to provide farm workers in this State with virtually the same protections

afforded their counterparts in the industrial sector. The issue, therefore, was whether the application employees were engaged in agriculture and thereby within the jurisdiction of the ALRB.

Both the NLRB (by Congressional action) and the ALRB (by Legislative direction) are required to define agriculture in accordance with the Federal Fair Labor Standards Act (29 USC) and the interpretive bulletins of the United States Department of Labor. (Title 29, Code of Federal Regulations). On the basis of such authorities, the ALRB found that the application employees, at least when working in the fields of Tagline's grower-customers, were engaged in actual and direct farming (e.g., cultivation and tillage of the soil, fertilizing, and the preparation of seed beds) activities which the U.S. Supreme Court has designated' "primary" agriculture. Employees engaged in primary agriculture are exempt from the NLRA regardless of whether their employer is a "farmer." Accordingly, the ALRB affirmed the IHE's finding that the application employees are agricultural employees and directed that an election be held should the Union again file an appropriate petition for certification.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ASSOCIATED-TAGLINE, INC., Employer, and GENERAL TEAMSTERS UNION, LOCAL 890, Petitioner	)	Case No. 99-RC-2-SAL

Appearances:

James K. Gumberg
Fitzpatrick, Patane & Giffen
Salinas, California
For the Employer

Michael D. Nelson
Beeson, Tayer & Bodine
San Francisco, California
For the Petitioner

DECISION OF THE INVESTIGATIVE HEARING

DOUGLAS GALLOP: A hearing was conducted before me in the above-captioned matter on July 7, 1999, at Salinas, California, pursuant to Administrative Order No. 99-4, issued by the Agricultural Labor Relations Board (ALRB or Board), in order to determine whether the Board has jurisdiction over any portion of the work performed by application employees of Associated Tagline, Inc. (hereinafter Employer). General Teamsters Union, Local 890 (hereinafter Union) seeks to represent these employees under the Agricultural Labor Relations Act (Act) for that portion of their work which falls within section 1140.4. Based on the testimony of the witnesses, the documentary evidence and upon due consideration of the parties' briefs, I make the 'following findings of fact and conclusions of law.

FINDINGS OF FACT

The Employer, based in Salinas, California, is engaged in the blending/manufacture and distribution of fertilizer and other soil amendments, and provides fertilizer and pesticide application services to various growers throughout Monterey County. The Employer does not grow, harvest, pack, transport or sell agricultural products, does not own or have a financial interest in any land used to grow crops and does not finance any agricultural operation.

The Employer employs about 62 persons, including 16 application employees, whom the Union seeks to represent for the agricultural component of. their work, in its petition filed with the Board. Pursuant to a certification issued by the National

Labor Relations Board (NLRB) following an election won by the Union, the Union currently represents about 42 bargaining unit members, including the application employees, at least to the extent they perform non-agri cultural work.[1] The parties are currently negotiating a first collective bargaining agreement for the unit employees, including the application employees.

Application employees consist of two sub-classifications, tractor drivers and spreader drivers. As of the hearing, there were 13 tractor drivers and 3 spreader drivers. The application component of both sub-classifications significantly varies in quantity, depending on the season. The peak, or dry season, which also varies, depending on the weather, typically lasts from March or April until November. This is when the bulk of the Employer's application services are performed. During the off-peak, or rainy season, substantially less application work is performed, due to the rain. Application employees work fulltime throughout the year, but put in significantly more hours during the peak season.

The tractor drivers usually report to the Employer’s facility at the beginning of the day, clock in and inspect their

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[1]The NLRB certification includes the application employees in the bargaining unit, but does not specifically refer to any distinction between the agricultural and non-agricultural components of the application employees' job duties. The Employer contends that the NLRB certification nullifies any claim of ALRB jurisdiction, and sets forth arguments concerning the non-suitability of having the same employees represented in two bargaining units. Inasmuch as the Board has set this matter for hearing, it has apparently "considered and rejected those arguments.

trucks. During the peak season, and on some dry days in the off-peak season, they will perform application and/or bed-shaping duties for the Employer's customers. If they do not already know their first assignment of the day, they, receive this from their supervisor by telephone, radio or in writing. Once they receive the order, they form a line to load up their trucks with dry and/or liquid fertilizer and/or pesticides. These products are mixed by the Employer, usually pursuant to instructions from the customers. The fields serviced by the application employees vary in distance from 15 minutes to 1 1/2 hours driving time from the plant. Generally, at least with dry fertilizer, the tractor driver with the longest drive to his assignment will be the first in line to be loaded. Orders calling for liquid fertilizer generally require less time for the truck to be loaded, since it is pre-mixed, and the driver may load his truck himself, instead of raiting for other employees to do this. The driver may fuel his truck before he leaves. It was estimated that it takes one-half to two hours before the loaded truck leaves the plant, but no average time was provided.

Tractor drivers normally apply soil amendments to fields where small plants are growing and/or shape the rows in which the plants are growing. Once they arrive at the customer's fields, they meet with the person in charge to receive instructions as to the work location. The tractors, which are towed behind the trucks, are unloaded and the shoes are set for the type of work to be performed. The shoes may have to be re-

set if more than one f-unction is performed. The tractors are loaded with material carried in the truck and, depending on the job, may have to be reloaded. In addition, some time is spent taking the tractors on and off the trailers and cleaning the equipment when the job is completed or terminated.

Frequently, tractor drivers will complete more than one order in. a day, at different locations, either because they complete the first job, or it has to be terminated due to wind. The drivers may complete as many as five assignments in a day. The Employer maintains a bonus system for different types of application/row shaping work.

When more than one assignment is completed, this entails additional non-application time for driving, instructions from customers and shoe setting. If a tractor driver's application assignments are completed before 5:00 p.m., for whatever reason, he reports back to the Employer's facility. In such cases, the driver is usually assigned other duties, such as truck maintenance/fueling, the completion of paperwork and delivering materials to other drivers in the fields. Tractor drivers frequently work 12-hour days, 6 or 7 days per week during the peak season.

The spreader drivers' duties during the peak season differ in the following significant respects. They perform application work on fields with no plants above the soil, do not perform row shaping arid do not apply pesticides. Instead of tractors, they tow loaders behind their trucks, and use the

trucks to perform the application work.[2] Instead of loading (or having their trucks loaded) at the plant, spreader drivers load their trucks at the fields, using the loaders, with materials manufactured and delivered to the fields by other companies. Thus, they typically leave the plant after about IS minutes to one hour at the start of the day. It does not appear that spreader drivers are paid a bonus based on the type of application work being performed.

As with the tractor drivers, spreader drivers spend varying amounts of time consulting with the customers' representatives, loading material (in this case from the ground into the truck, using the loader), cleaning and moving equipment (including taking the loader on and off the trailer) and driving to other jobs once the first is completed or terminated due to wind. Spreader drivers also typically work twelve-hour days during the peak season, 6 or 7 days per week. On days when their application work ends early, they perform other duties similar to the tractor drivers, although they are separately supervised, and may be released before 5:00 p.m.

One spreader driver, called as a witness by the Union, estimated that both spreader and tractor drivers spend 60% to 70% of their time "in the fields" during the peak season. This witness, however, did not break down his estimate between the time spent actually applying materials and row building (for

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[2]Both tractor drivers and spreader drivers must possess Class A drivers' licenses.

tractor drivers), with other duties performed in the fields, including consultation, cleaning, loading and unloading equipment, loading fertilizer (for. spreader drivers) and shoe setting (for tractor drivers). Thus, it would appear that taken alone, the actual application of materials to fields, and row building (by tractor drivers) would account for a somewhat lower percentage of their working time, but would still approach or exceed a majority, during the peak season.

Tractor and spreader truck drivers engage in similar duties in the off-peak season when not performing application work. As noted above, they work substantially fewer hours (although still 40 to 50 per week) and have substantially less application work. Equipment maintenance and repair is a major component of their off-peak duties. Other non-application duties include driving trucks to another shop, filling boxes with fertilizer, labeling, stacking, cleaning and making deliveries.

Based on the number of acres fertilized, average time to fertilize one acre (and/or prepare rows) and total hours worked, the Employer estimates that tractor drivers spent 40.5% of their working time performing application work in 1998, but due to time spent reloading materials from their trucks to ciaocurs (about 20% of the time the tractors are running), only about 32% was spent actually applying soil amendments and building rows. The percentage varied substantially from employee to employee, apparently due to differences in employee skills and the work assignments. The Employer concedes that the percentage

of application work was slightly lower in 1998, due to an unusually long rainy season. Although the Union's witness testified that tractor and spreader drivers spend the same percentage of time in the fields, it may be that spreader drivers work a slightly higher percentage of such time, primarily because they do not have to wait in line to be loaded with dry fertilizer.[3]

ANALYSIS AND OONCLUSIONS OF IAW

In Administrative Order No. 99-4, the Board, citing the Department of Labor Regulations and NL'RB precedent, held that the application of fertilizer inarguably constitutes primary agriculture. Clearly, the building and shaping of plant rows constitutes tillage of the soil, and is also within the definition of primary agriculture. The Board indicated that if a "substantial" portion of the application employees' work fell within the definition of primary agriculture, it would assert jurisdiction over that portion of the work.

The Employer contends that all of the other duties performed by the application employees are either non-agricultural, or constitute secondary agriculture which, under the circumstances of the Employer's operations, fall outside the

[3]It is difficult to calculate the effect on percentage of worktime spent actually applying materials to plants and soil, and row building created by loading at the plant as opposed to loading in the fields. It is also difficult to calculate the effect of the possibly earlier release time of spreader drivers when they return to the plant from the fields before 5:00 p.m. since, assuming this does occur, no estimate was given as to the frequency.

jurisdiction of the Act. The Union contends that in addition to the actual application of materials to the fields, those activities related to that work, including the pre-trip inspection, loading equipment and clean-up, also constitute primary agriculture. For the purposes of this Decision, only the actual application of materials and row building will be considered inarguably primary agriculture.[4]

The evidence establishes that, on an annual basis, the percentage of inarguably agricultural work performed by the application employees is much lower than contended by the .Union in its moving papers, primarily due to its failure to account for the rainy season. Nevertheless, while 10% and 14% have been found to not satisfy the substantiality test, the case law does not require a majority of the time be spent performing the defined duties, in order to assert jurisdiction. See Bud Antle, Inc. d/b/a Bud of California. Employer-Petitioner and General Teamsters. Warehousemen & Helpers Union. Local 890. affiliated with International Brotherhood of Teamsters. AFL-CIO. Union-Petitioner (1993) 311 NLRB 1352, at pages 1353-1354, and cases cited therein. Indeed, if both the NLRB and ALRB may assert jurisdiction over the same employees, based on a split in agricultural and non-agricultural, job duties, at least one agency

[4]The Union does not contend that driving to, from and between the fields constitutes agricultural employment. The Employer cites Holly Farms v. NI#B (1996) 517 U.S. 392 [152 LRRM 2001] to support its contention that the application employees are not agricultural laborers, Holly Farms, however, dealt with the issue of whether the employees were engaged in secondary agriculture and is inapposite to the facts of this case.

would have to be asserting jurisdiction over a non-majority portion of the work, and both would be doing so if the duties were split 50% to 50%.

It is concluded that inasmuch as the application employees, even in a below-average year, spent about one-third of their time performing duties which are inarguably agricultural in nature, and for seven or eight months of that year performed such duties approaching or exceeding 50% of the time, said employees are within the jurisdiction of the Act for those duties. That the Employer may voluntarily be negotiating with the Union concerning all aspects of these employees' terms and conditions of employment does not prevent the Union from seeking a formal ALRB certification. Since the employees work year-round, and no reason has been shown to proceed otherwise, it is recommended that an election be conducted at the present time, and without the need for a new showing of interest.

Dated: August 18, 1999

DOUGLAS GALLOP
Investigative Hearing Examiner