STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUTTER MUTUAL WATER COMPANY,	)	
Employer,	)	Case No. 05-RC-1-VI
and	)	
GENERAL TEAMSTERS LOCAL 137,	)	31 ALRB No. 4 (October 31, 2005)
Petitioner.	)	

DECISION AND ORDER

Introduction and Background:

On January 26, 2005, General Teamsters Local 137 (Petitioner or Union) filed a Petition for Certification of Representative to represent the employees of Sutter Mutual Water Company (Employer or Sutter). On February 2, 2005, an election was conducted with five votes in favor of the union and two votes in favor of "no union." There were no challenged ballots. The employer timely filed objections to the election, arguing that the Agricultural Labor Relations Board (ALRB or Board) lacked jurisdiction to conduct the election because Sutter's workers were not agricultural employees.

A hearing was held on the employer's objections on March 24 and July 12, 2005. On September 1, 2005, Investigative Hearing Examiner (IHE) Doug Gallop issued a decision finding that Sutter's workers were agricultural employees. He recommended that Sutter's objections petition be overruled and that the results of the election be

certified by the Board. The Employer timely filed exceptions to the IHE's decision arguing that the IHE improperly found Sutter's workers to be agricultural employees and that they should not be under the jurisdiction of the ALRB.

Factual Summary:

The Employer is a non-profit mutual water company that supplies water to its shareholders. Its shareholders are landowners in the company's service district which covers an area of approximately 50,000 acres. Some of the landowners/ shareholders also serve on Employer's Board of Directors. Almost all of the water distributed by Employer to shareholders is used for agricultural purposes.[1]

The Employer diverts water from the Sacramento River through its pumping stations, and directs that water into main delivery channels and then into a system of lateral canals and sublateral canals. When a shareholder wants water, he places a water order with Employer, and Employer's canal operators open gates (also called "turn outs") that allow water to be delivered to the shareholder's fields.

Employer's canals flow through land owned by shareholders in the service area, and Employer has easements on these properties that allow for the installation, maintenance, control and use of canals for the delivery of water. Employer itself owns between 10 and 20 acres of land in the service area. There are access roads maintained by Sutter along the canal system, and there are also crossings built by the company that

[1] Occasionally the water is sold to entities other than the shareholders, and most of that water is also used for agricultural purposes.

go across the canals perpendicularly, to allow farmers' access to their properties when fields are bisected by canals. The easements include the roads and crossings.

According to the payroll records provided by Sutter in response to the election petition, as of January 2005, there were five full time Operation and Maintenance (O & M) technicians,[2] a shop technician/ ditchtender (seasonal), a weed and maintenance technician (full time), a pump/ equipment operator (full time), a pump/ equipment operator (seasonal), and a pump plant operator (seasonal).

Most of the testimony about employee duties involved descriptions of work done by the O & M technicians/ canal operators. Former Sutter canal operator, Daniel Hicks testified that during the part of the year when water was running in the canals (about 9 months out of the year), his duties included delivering water to farmers and maintaining canals and canal water levels in the section of the district for which he was responsible (approximately 10,000 acres). Hicks testified that farmers in his district called him directly to request that he start or stop the flow of water by opening and shutting the field delivery gates. He also testified that he responded to farmers' requests to install "bleeders" and "seep ditches" to prevent their fields from being flooded by leakage from the canal banks and gate valves. He testified that he got between 15 and 30 calls a day from farmers making requests. Hicks testified that during times of the year when the water wasn't running (in the winter), he was responsible for maintaining the

[2] Operations Manager Schantz testified that Employer uses the job titles "O & M technician" and canal operator" interchangeably, the only difference being that O & M technicians are full time, while canal operators work seasonally. This decision will use the term "canal operator" when referring to workers with the above two job titles.

canals throughout the whole district, not just his specified area, and that his tasks included controlling weeds, maintaining roads along the levees, and performing maintenance in the pump houses and company shop.

Sutter's Operations Manager, Fred Schantz, testified that during a canal operator's typical day, the employee responds to farmers' water delivery orders in the morning, takes a break for lunch, and then goes back out in the afternoon to "recheck" everything in his district and see that the water is going where it's supposed to be going. Current Sutter canal operator Johannes Pedersen testified that he receives about 15 to 20 calls a day from farmers requesting that water delivery gates be opened, closed or adjusted. In addition, farmers make requests for weed control, road maintenance and repairs on water delivery gates that are obstructed or not functioning properly.

Employer's Exhibit 3 is a 2005 crop map of the service area showing that approximately two-thirds of the area is planted in rice. Schantz testified that the percentage of fields planted in rice was particularly high in 2005, and that usually approximately half of the fields in the district are planted in rice. Other crops include tomatoes, safflower and melons. Schantz testified that there are some crops grown in the winter such as wheat, alfalfa and carrots.

Sutter shareholder and farmer, David Richter, testified about three different types of irrigation methods: flood irrigation, furrow irrigation and sprinkler irrigation. In flood irrigation, water flows directly from the water company's turn out gate into the field, and as it flows throughout the field it is directed passively with a series of levees or "checks" built in the soil. Furrow irrigation is when water is released from the gate into a

ditch on the farmer's property and then the farmer draws the water from the ditch into crop furrows using siphon pipes and gravity. Sprinkler irrigation is similar to furrow irrigation, in that the water is released from a turn out gate into the farmer's ditch or into seep ditches alongside the canals or laterals, but the farmer draws the water out of the ditch and disperses it on his field using a pressurized pump and sprinkler system. Manager Schantz testified that approximately 5 percent of the water Sutter delivered ended up in seep ditches that were then pumped by the farmers into sprinkler systems.

Schantz testified that flood irrigation is used on rice fields, and when water is requested for this crop it essentially flows directly from Sutter's canal or lateral into the field when it is released from a delivery gate. At the beginning of the rice growing season, a canal operator first delivers an initial "flood head" of water to cover the rice field to a depth of several inches. This water is later drained off, and over the course of the season, the farmer requests two or three more flood heads of water. During the time the rice is growing the canal operator adjusts the delivery gate to maintain a specified constant flow of water.

IHE's Decision:

The IHE concluded that Sutter is an agricultural employer and recommended that the Board certify election results. In reaching this conclusion, the IHE first cited an earlier National Labor Relations Board (NLRB) case involving this same Employer, *Sutter Mutual Water Company* (1966) 160 NLRB 1139, in which the NLRB held that Employer's workers were agricultural employees not covered by the National

Labor Relations Act (NLRA).[3] The IHE found that the present case was distinguishable from the primary case relied on by Employer, *Farmers Reservoir and Irrigation Company v. McComb* (1949) 337 U.S. 755, in which the Supreme Court found irrigation company workers to be non-agricultural.

The IHE's rationale for distinguishing the two cases was that in the *Farmers Reservoir* matter, the irrigation company owned the land on which the irrigation canals were located, while in the present case, the land is owned by the shareholders with easements granted to Sutter. Thus, the IHE reasoned, while the employees in *Farmers Reservoir* did not work "on a farm," but on land owned by the irrigation company, the employees in the present case did perform work on farms owned by the shareholders. In addition, the IHE found that the provision of water for crops was "in conjunction with such farming operations." The IHE therefore found that Sutter's operations met the definition of secondary agriculture as described in section 1140.4(a) of the Agricultural Labor Relations Act (ALRA).[4]

The IHE went on to say that even if the facts of the instant case were indistinguishable from those in *Farmers Reservoir*, "Congress ha[d] overruled that

[3] Title 29 United States Code sections 141 et seq.

[4] The Agricultural Labor Relations Act (ALRA) is found at California Labor Code section 1140 et seq. The language of section 1140.4(a) is identical to the definition in section 203(f) of the Fair Labor Standards Act, which was the provision construed in *Farmers Reservoir*.

decision by annually defining such employees as agricultural in the appropriations bill funding the NLRB." [5]

The IHE rejected the Employer's argument that the mandate in the NLRB's appropriations bill to treat such workers as agricultural has no effect on ALRB jurisdiction. The IHE pointed out that 1140.4(a) of the ALRA refers to and incorporates Title 12 [and Title 29] of the United States Code in determining the agricultural nature of employment, thus Federal legislation such as the appropriations bill is relevant in making the determination of employee status. The IHE held that a specific exclusion of such employees in the ALRA, rather than a specific inclusion in the statute would be required to exempt Employer from coverage by the ALRA.

Employer's Exceptions to IHE Decision:

Sutter contends that the ALRB does not have jurisdiction over any of the employees in the petitioned for unit. In arguing its position, Employer filed four exceptions to the IHE's decision.

First, Employer excepts to the IHE's conclusion that Sutter's canal operators work "on a farm" because Sutter merely has easements across the farmers' land. Employer argues that under well-established legal principles, the easements granted to Sutter create a property right in the land upon which its canal system operates

[5] The annual rider to the NLRB's appropriations bill, which will be discussed in more detail below, instructs the NLRB to consider employees engaged in the maintenance of irrigation ditches as excluded agricultural workers when those ditches are owned by a mutual non profit company and 95 percent of the water is used for agricultural purposes.

that is superior to the farmers' right to that land, therefore, the employees do not work on a farm, but on land under the water company's control.

Second, Employer argues that the IHE applied the wrong definition of agricultural employee when concluding that *Sutter Mutual Water Company, supra,* 160 NLRB 1139, was relevant in interpreting state law. Employer argues that the 1966 NLRB case found Sutter's employees to be agricultural workers only because they fit within the exclusion mandated by the annual rider to the appropriations bill. Employer reasons that this case is not applicable to the present situation because the Board is also required to determine if Sutter's workers are agricultural employees as defined in ALRA section 1140.4(a).

Third, Employer excepts to the IHE's conclusion that the ALRB has jurisdiction over all employees unless a specific exclusion exists in the ALRA to prevent the ALRB from exercising jurisdiction. In support of this exception, Employer cites *United Farm Workers of America v. ALRB* (1995) 41 Cal. App. 4th 303 which held that "an administrative agency created by statute is vested only with the powers expressly conferred by the Legislature and cannot exceed the powers granted to it." Employer goes on to rely on *Farmers Reservoir, supra,* for that case's analysis of whether similarly situated workers were engaged in agriculture as defined in section 203(f) of the Fair Labor Standards Act (FLSA). Employer reasons that under *Farmers Reservoir,* Sutter is not a farmer, its workers are not engaged in primary agriculture, do not work on a farm, their work is not incident to or in conjunction with farming operations, and therefore, Sutter's workers are non-agricultural employees.

Finally, Employer excepts to the IHE's conclusion that the ALRB has jurisdiction over Sutter's pump station operators because those employees only perform services directly related to the operation and maintenance of pump station machinery and do not work in the field except under very limited circumstances. Employer reasons that the NLRB's annual budget rider does not exempt workers who perform the duties of pump station operators; therefore, these particular employees are actually covered by the NLRB, and federal law preempts the ALRB from exerting jurisdiction over them.

Petitioner's Reply to Employer's Exceptions:

The Union agrees with the IHE's conclusion that Sutter's employees work "on a farm," performing activities that are incident to and in conjunction with the shareholders' farming operations and that they are therefore engaged in secondary agriculture. In addition, the Union argues that the workers are engaged in primary agriculture when they open water gates directly over farmland planted in rice. The Union points out that two-thirds of the Sutter service area is planted in rice and therefore, the Union argues, Sutter's workers are engaged in primary agriculture a substantial amount of the time.

Analysis and Conclusions:

Under section 1140.4(b) of the ALRA, the ALRB only has jurisdiction over workers engaged in agriculture [6], as defined in section 1140.4(a), and can only assert jurisdiction over workers who are excluded from coverage by the NLRB.

Section 152(3) of the NLRA excludes from its coverage "any individual employed as an agricultural laborer." The NLRA does not define "agricultural laborer," however, since 1946, Congress has annually reaffirmed the exclusion for agriculture under the NLRA by adding a rider to the NLRB's annual budget appropriation measure providing that no part of the appropriation may be used in connection with bargaining units of "agricultural laborers" as agriculture is defined in section 203(f) of the FLSA. [7]

As mentioned previously, since 1954, the annual budget rider has also instructed the NLRB to include within its agricultural exemption "employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 percent of the water

[6] ALRA section 1140.4(a) provides that "The term 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 (including commodities defined as agricultural commodities in 12 U.S.C. § 1141j(g)), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including the preparation for market and delivery to storage or to market or to carriers for transportation to market."

[7] Title 29 United States Code sections 201 et seq.

stored or supplied thereby is used for farming purposes." Consolidated Appropriations Act, 2005 (Pub. L. No. 108-447 (Dec. 8, 2004) 118 Stat. 3159.)

It is clear that Sutter's employees are excluded from coverage of the NLRA because Congress has forced the NLRB to decline jurisdiction by the annual appropriations bill rider. The State of California may therefore properly assert jurisdiction without violating federal preemption principles. Therefore, the limitation imposed by ALRA section 1140(b) that the ALRB can only assert jurisdiction over workers who are excluded from coverage by the NLRB is not an obstacle in the present case. However, the Board must still determine whether the workers in question are agricultural employees as defined in section 1140.4(a) of the ALRA.

In *Farmers Reservoir & Irrigation Co. v. McComb*, *supra*, 337 U.S. 755, the United States Supreme Court, in interpreting section 203(f) of the FLSA, broke down the definition of agriculture into its primary agriculture and secondary meanings. As noted, section 1140.4 (a) of the ALRA uses the same definition of agriculture found in section 203(f) of the FLSA. To be covered under the ALRA, a worker must either be engaged in primary or secondary agriculture.

The IHE states on the bottom of page 6 of his decision that Congress has overruled the *Farmers Reservoir* decision by the language in the annual appropriations rider. However, courts have made it clear that *Farmers Reservoir* is still good law. In 1949, Congress amended section 213(a)(6) of the FLSA to exclude irrigation workers

from minimum wage and hour provisions.[8] Despite this amendment, courts have held that the legal effect of *Farmers Reservoir* has not been nullified, as section 203(f) has not been amended. (*Goldberg v. Crowley Ridge Fruit and Vegetable Growers Ass'n* (1961) 295 F.2d 7, 11; *G.L. Wright v. Salt River Valley Water Users Ass'n* (1963) 384 P.2d 104, 107; *Hodgson v. Ewing* (1971) 451 F.2d 526, 529.) Therefore, the Supreme Court's interpretation of 203(f) as to this type of employee continues to be controlling law, so it is appropriate to apply the *Farmers Reservoir* analysis to the present case.

Farmers Reservoir addressed the question of whether employees of a mutual irrigation company were agricultural workers and thus exempt from coverage under the FLSA's wage and hour rules. In concluding that the workers in question were not engaged in agriculture (and were therefore covered by the FLSA), the court determined that the employees were not engaged in primary agriculture because they simply delivered water to the irrigation ditches located on the farmers' property while the farmers themselves controlled the actual application of water to the fields. The court also found that the employees were not engaged in secondary agriculture because the water company's workers did not work for a farmer nor on a farm. In finding the water company not to be a farmer, the Court emphasized that, despite its ownership by farmers, it was separately organized as an independent productive activity.

[8] In 1966 congress repealed section 213(a)(6) and replaced it with section 213(b)(12) which resulted in irrigation workers being excluded from the FLSA's overtime provisions but not its minimum wage provisions.

Despite the IHE's statement that Congress has overruled *Farmers Reservoir* decision by the language in the appropriations rider, his decision actually turns on the holding that the facts of the instant case can be distinguished from those of *Farmers Reservoir*, namely that Sutter, unlike the employer in *Farmers Reservoir*, does not own the land under the canals. Due to this distinction, the IHE reasoned, Sutter's workers actually do work "on a farm," and therefore, unlike *Farmers Reservoir's* employees, Sutter's workers can be found to be engaged in secondary agriculture.

The easements do not transfer ownership of the land to Sutter, however, the Company has a significant interest in and almost exclusive control of the property on which the easements sit. While it is a close question whether the existence of easements truly distinguishes this matter from *Farmers Reservoir*, in light of the discussion immediately below, we find we need not rule on the IHE's conclusion that Sutter's employees actually work on a farm.

Assuming for the sake of argument, it could be found that Sutter's employees did work on the shareholders' farms via the easements, due to developments in the law over the last ten years or so, it still would be very difficult to conclude the workers were engaged in secondary agriculture.

In *Produce Magic* (1993) 331 NLRB No. 173, the NLRB found that workers who were employed by a custom harvester were not engaged in secondary agriculture when they were wrapping and boxing lettuce in the field (field packing). On the other hand, workers (employed by the same custom harvester) were engaged in primary agriculture when they were actually severing the lettuce heads from the ground.

Placing great emphasis on the employment relationship rather than the nature of the work, the NLRB reasoned that the field packing was incidental to the custom harvester's operation, not the farming operation.

Similarly in *Holly Farms Corp. v. NLRB* (1996) 517 U.S. 392, a case involving an integrated poultry operation, the NLRB found that workers whose job was to catch chickens on the farms of independent growers and put them on trucks to take to the employer's processing plant were not engaged in secondary agriculture and were therefore covered under the NLRA. The Court approved of the NLRB's focus not on the nature of the work (which was being done on a farm), but on the nature of the employment relationship (the workers were not employed by a farmer). Here, we know Sutter's workers are not employed by farmer, so even if workers are working on the farms via the easements rather than on property owned by the company, under *Produce Magic and Holly Farms*, their work would not be found to be incidental to the farming operations. Indeed, in this case, at least in relation to the facts in *Holly Farms*, the work is more central to the employer's operations. Therefore, we conclude that they are not engaged in agriculture unless they are engaged in primary agricultural activities.

The Board finds that Sutter's canal operators do engage in tasks involved in the cultivation and tillage of the soil for at least part of their working hours, and finds merit in the Union's argument that the workers are engaged in primary agriculture when they open water gates directly over farmland planted in rice. The Union is correct that workers who are engaged in practices that fall within the primary meaning of agriculture are within the jurisdiction of the ALRA even if their employer is not a farmer.

In *Associated Tagline, Inc*. (1999) 25 ALRB No. 6, the Board found that employees of a fertilizer company who applied fertilizer directly to the fields of grower customers were engaged in primary agriculture and were within the jurisdiction of the ALRB for the portion of the time they spent spreading fertilizer.

Application of water to farmland is considered to be an operation included in the "cultivation and tillage of the soil" and within the primary meaning of agriculture. (29 C.F.R. §780.110.) In the flood irrigation of rice crops, canal operators open the company's turn out gates directly into the fields. Although the farmer is responsible for creating the levees and checks that control where the water goes once it is in the field, Sutter's canal operators are directly involved in the application of water to the rice fields throughout the crops' growing cycle. The rice fields are flooded as many as three times during the year. As the rice grows, canal operators maintain a constant flow of water into the field to ensure the water remains at the proper level throughout the entire field. Unlike furrow and sprinkler irrigation where the farmer alone decides when and where to direct water onto crops, when rice fields are irrigated, Sutter's employees are directly involved in controlling the amount and rate of water flow onto the crops.

As we find that Sutter's employees are engaged in primary agriculture for only a portion of their work hours, we also must evaluate whether they are engaged in such agricultural work a substantial amount of the time in order to assert jurisdiction.

The Union cites *William Warmerdam Packing Co*. (1998) 24 ALRB No. 2, which held that if the agricultural work performed by employees is substantial, the ALRB has jurisdiction. The Union argues that because two-thirds of the service area is planted

in rice, and the rice fields are directly flooded by the canal operators, the employees are engaged in a substantial amount of agriculture.

The Board has refrained from specifying a minimum percentage required to find work substantial, however, the NLRB has held that workers who spent less than 15 percent of their time doing the tasks in question could not be said to be engaged in the work a substantial amount of the time. (*NLRB v. Kelly Bros. Nurseries,* (2d Cir. 1965) 341 F.2d 433, 438; *Light's Tree Co.*, (1971) 194 NLRB 229.) Nonetheless, it is also not required that workers spend a majority of their time doing agricultural duties for the work to be considered substantial. (*Associated Tagline, supra*, 25 ALRB No. 6, ALJ Decision at p. 9, citing *Bud Antle, Inc. d/b/a Bud of California* (1993) 311 NLRB 1352.)

In the instant case we know that between half to two-thirds of the fields in Sutter's district is typically planted in rice. For the nine months of the year that water is running in Sutter's canals, the canal operators spend up to half of each day responding directly to farmers' water order requests. We believe the record establishes that a substantial number of the water order requests are for delivery gate operation in conjunction with the cultivation of rice. While we find we cannot arrive at a specific percentage of time spent by canal operators in relation to opening gates for one of the three seasonal "flood heads", or closing or adjusting gates to maintain the rice fields' proper water level, it is clearly a substantial amount. Therefore the Board concludes that it will assert jurisdiction over the canal operators for the portion of time they spend irrigating rice fields.

On page 8 of his decision, the IHE concluded that given his finding that the workers were engaged in agriculture, the ALRB has jurisdiction over them absent a specific provision in the ALRA excluding them. The Employer's third exception takes issue with this conclusion. An administrative agency created by statute is vested only with the powers expressly conferred by the Legislature and cannot exceed the powers granted to it. (*United Farm Workers of America v. ALRB* (1995) 41 Cal.App.4th 303). *United Farm Workers of America*, *supra*, provides guidelines for determining statutory construction:

> A court's first task in construing a statute is to ascertain the intent of the legislature so as to effectuate the purpose of the law. In determining such intent, the court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.

As the IHE points out, legislative history indicates that the ALRA was intended to cover agricultural workers who had been excluded from federal law and to give them the collective bargaining rights that almost all other employees in the private sector possessed. However, the definition of agriculture in section 1140.4(a) of the ALRA, which is identical to the definition in section 203(f) of the Fair Labor Standards Act and therefore was the language construed in *Farmers Reservoir*, does not include the type of workers involved in the present case. Nor is there language in the ALRA

indicating that the Board's jurisdiction also encompasses, in addition, any employees excluded from NLRB jurisdiction as "agricultural," regardless of the source of that exclusion. Rather, the Board's jurisdiction is limited to those who fall within the definition of agriculture contained in section 1140.4(a) and are excluded from NLRB coverage, the latter limitation constituting an acknowledgement of federal preemption principles.

On the other hand, the Board strongly believes that the partial jurisdiction that results from this decision creates an unfair situation for water company employees and does not comport with the spirit of the Act. In other “mixed work” situations, such as that in the *Produce Magic* or *Associated Tagline* cases, the NLRB has jurisdiction of workers for the portion of time they are not engaged in primary agriculture. Here, however, Congress has instructed the NLRB to exclude “employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 percent of the water stored or supplied thereby is used for farming purposes.” The result is that Sutter’s canal operators are covered by the ALRA for their flood irrigation work, but find themselves in a “no man’s land” without coverage of another collective bargaining statute for the remainder of their working hours. Moreover, the other Sutter employees enjoy no collective bargaining rights at all.

As mentioned above, the State of California is not preempted from acting to extend coverage to all workers of mutual water companies excluded by the NLRB.

The California Legislature could easily amend the ALRA to make it clear that so long as the NLRB's budget rider contains the above language, such workers will be considered within the ALRA's definition of agriculture.

ORDER

As this election was conducted among all of Sutter's employees and the Board has determined that the proper unit consists only of those employees whose duties include a substantial amount of primary agriculture, we find we must set aside the election conducted on February 2, 2005.[9]

Accordingly, we conclude that the petitioner may file a new petition for certification seeking to represent a unit comprised of the canal operators/ O & M technicians and any other employees with similar duties employed by Sutter Mutual Water Company to the extent the employees are engaged in primary agriculture as set forth in this decision.

Dated October 31, 2005

GENEVIEVE SHIROMA, Chair

CATHRYN RIVERA-HERNANDEZ, Member

DANIEL ZINGALE, Member

[9] The Board has taken administrative notice of the eligibility list used during the election showing which seven employees voted in the election. At least three of the seven voters are not properly part of the bargaining unit in light of the Board's decision, and since it is impossible to know how the remaining four secret ballots were cast, it cannot be determined that the union won a majority of votes.

CASE SUMMARY

SUTTER MUTUAL WATER CO. Case No. 95-RC-1-VI
(General Teamsters Local 137) 31 ALRB No. 4

Background:

On January 26, 2005, General Teamsters Local 137 (Petitioner or Union) filed a Petition for Certification of Representative to represent the employees of Sutter Mutual Water Company (Employer or Sutter). The Employer is a non-profit mutual water company that supplies water to its shareholders. On February 2, 2005, an election was conducted with five votes in favor of the union and two votes in favor of "no union." There were no challenged ballots. The employer filed objections to the election, arguing that that the Agricultural Relations Board (ALRB) lacked jurisdiction to conduct the election because Sutter's workers were not agricultural employees.

IHE Decision:

The Investigative Hearing Examiner (IHE) found that Sutter's workers were agricultural employees. He recommended that Sutter's objections petition be overruled and that the results of the election be certified by the Board.

In reaching his conclusion, the IHE found that the present case was distinguishable from the primary case relied on by Employer, *Farmers Reservoir and Irrigation Company v. McComb* (1949) 337 U.S. 755, in which the Supreme Court found similar workers to be non agricultural. The IHE's rationale for distinguishing the two cases was that in the *Farmers Reservoir* matter, the employer irrigation company owned the land on which the irrigation canals were located, while in the present case, the land is owned by the shareholders with easements granted to Sutter. Thus, the IHE reasoned, while the employees in *Farmers Reservoir* worked not "on a farm," but on land owned by the irrigation company, the employees in the present case did perform work on farms owned by the shareholders. In addition, the IHE found that the provision of water for crops was "in conjunction with such farming operations." The IHE therefore found that Sutter's operations met the definition of secondary agriculture as described in section 1140.4(a) of the Agricultural Labor Relations Act (ALRA).

The IHE also rejected the Employer's argument that the mandate in the National Labor Relations Board (NLRB)'s appropriations bill to treat such workers as agricultural has no effect on ALRB jurisdiction. The IHE reasoned that 1140.4(a) of the ALRA refers to and incorporates Title 12 [and Title 29] of the United States Code in determining the agricultural nature of employment, thus Federal legislation such as the appropriations bill is relevant in making the determination

of employee status. The IHE held that a specific exclusion of such employees in the ALRA, rather than a specific inclusion in the statute, would be required to exempt Employer from coverage by the ALRA.

Board Decision and Order:
The Board concluded that it could assert jurisdiction only to the extent that Sutter employees engaged in primary agriculture. Because the votes of those not properly in the unit could not be segregated without potentially affecting the result, the Board dismissed the petition for certification and set aside the election. The Board held that the petitioner could file a new petition for certification seeking to represent a unit comprised of employees engaged in primary agriculture, as set forth in the Board's decision.

The Board concluded that Sutter's canal operators and operations and maintenance technicians were engaged in primary agriculture when they performed the practice known as "flood irrigation," e.g. opening water delivery gates directly onto a farmer's field as is done when irrigating rice. The Board reasoned that Sutter's employees were directly involved in applying water to the rice fields and ensuring that the water remains at a proper level during the growing season, tasks considered to be included in the "cultivation and tillage of the soil." The Board also concluded that the above named employees performed primary agricultural work a substantial amount of the time. Therefore, the employees fell under the jurisdiction of the ALRA when they engaged in work of this nature. The Board did not rule on the IHE's conclusion that Sutter's employees worked "on a farm" via the easements. The Board concluded that even if it could be said that the employees worked on farms, due to recent developments in the law, their work could not be found to be incidental to the farming operations. Therefore, the Board declined to find the employees were engaged in secondary agriculture.

The Board also declined to construe sections 1140.4(a) and (b) of the ALRA as giving the ALRB jurisdiction over all employees excluded from NLRB jurisdiction as "agricultural." Rather, the Board's jurisdiction is restricted to those who fall within the definition of agriculture contained in section 1140.4(a), with the further limitation that they also must be exempt from NLRB jurisdiction. The Board pointed out that the fundamentally unfair situation faced by employees who work for mutual water companies could be remedied by the California Legislature, as the states are not preempted from acting to extend collective bargaining rights to employees of this type.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case No.** 05-RC-1-VI
	)	
SUTTER MUTUAL WATER COMPANY,	)	
	)	
Employer**,**	)	
	)	
and	)	
	)	
GENERAL TEAMSTERS LOCAL 137,	)	
	)	
Petitioner**.**	)	

Appearances:

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Cook Brown, L.L.P.
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For the Employer

John Provost
Beeson, Tayer & Bodine
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For Petitioner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: On January 26, 2005, General Teamsters Local 137 (hereinafter Petitioner) filed a petition in the above-captioned matter to represent the agricultural employees of Sutter Mutual Water Company (hereinafter Employer). An election was conducted on February 2, 2005, with the Tally of Ballots showing five votes for Petitioner and two for no union. The Employer filed a timely objection to the election, denying the jurisdiction of the Agricultural Labor Relations Board (ALRB or Board) over its employees. After an investigation, the Board's Executive Secretary set the objection for hearing, which was conducted on March 24 and July 12, 2005, at Woodland and Sacramento, California. Subsequent to the hearing, the parties filed briefs, which have been duly considered. Upon the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and the record as a whole, the undersigned submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Employer is a California non-profit mutual benefit corporation. The Employer's Articles of Incorporation state that its purpose is to provide irrigation services for its shareholders. The shareholders are limited to landowners in the Employer's service area, who either farm the land, or are landlords to tenant farmers. The Employer itself owns one or two small parcels of land in the service area,[1] about 10-20 acres of land along its canals, and the land where its office is located. The Employer's sole business is collecting water from the Sacramento River, and diverting it to users through

[1]Two witnesses referred to a parcel being owned by the Employer. One stated it is farmed by a tenant, while the other said the use is non-farming.

canals and laterals owned and maintained by the Employer. The overwhelming majority of the water is distributed to farmers in the service area.

Occasionally, extra water is sold to outside sources. The Employer's position has been that all of the water is used for agricultural purposes. In one instance, however, the Employer sold 17,000 acre feet of water to the Southern California Municipal Water District in 2003, out of 267,000 total acre feet distributed that year. Although the record does not establish this as a certainty, it is possible that this water (6.367%) was at least partially used for residential and commercial purposes.

The Employer operates pumping stations to divert water from the Sacramento River. A witness testified that the Employer owns the pumping stations, but the record does not establish who owns the land upon which the stations are situated. The diverted water travels through 200 miles of canals, and is distributed to the shareholders by opening gates on the laterals, which are owned by the Employer. The land through which the water flows is owned by the landowners in the service area, some of whom serve on the Employer's Board of Directors. The Employer has an easement on the titles of the landowners that restricts the use of their land in the areas of operation. The landowners pay a fee for the Employer's services, based on the crop and acreage.

The employees operate and maintain the pumping stations, weir regulators, canals, seep ditches and laterals, and release water onto the shareholders' property through turnouts and field delivery gates. They also perform some maintenance-related duties at a shop rented by the Employer from Reclamation District 1500, an independent entity responsible for collecting unused water from the fields. An important crop grown in the

service area is rice. Water released into rice fields by the Employer's workers essentially flows directly from the canals over the fields. With other crops, the initial water release is often directly over the fields. Later in the growing season, the farmers' own irrigation systems, including sprinklers and furrows, further divert the water in the fields for these crops. The shareholders or tenants, and/or their employees perform this function.

Even with the restrictive provisions of the easements, there is some shared usage between the Employer and its shareholders. Many of the canal banks have roads on them, which are used by the Employer's employees and shareholders or tenant farmers, and/or their employees. Sometimes, crops will grow up onto the canal banks and roads. In maintaining the laterals, employees will sometimes go onto the perimeter of the fields, and on rare occasions, projects will be conducted further into the cultivated areas. Occasionally, employees will use the farmers' equipment in performing maintenance and repairs. With the Employer's permission, a shareholder may operate the gates to cause water to be released onto his property, instead of waiting for an employee to perform this function.

ANALYSIS AND CONCLUSIONS OF LAW

Section 1140 of the Agricultural Labor Relations Act (Act) defines agricultural employees as those engaged in agriculture as defined by section 1140.4(a), which provides:

> The term "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 (including commodities defined as agricultural commodities in section

> 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as it is incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

The National Labor Relations Board (NLRB) has found the Employer's employees to be agricultural workers. *Sutter Mutual Water Company* (1966) 160 NLRB 1139 [63 LRRM 1108]. The testimony of witnesses with long-term associations with the Employer shows that there have been no changes in the operations that would materially affect the issue raised in this case, and the Employer does not so contend. Section 1148 of the Act directs the Board to follow applicable precedents of the NLRB. The Employer contends that the NLRB representation case is not applicable precedent, because the United States Supreme Court has held that employees with similar job duties are not agricultural employees and, absent specific inclusion of its employees under our Act, that ruling still applies.

The case cited by the Employer, *Farmers Reservoir and Irrigation Company v. McClone* (1949) 337 US 755 [69 Sup.Ct. 1274] was an attempt to gain benefits for employees under the Fair Labor Standards Act, such as overtime pay, but the company asserted it was exempt as an agricultural employer. The Supreme Court found the employees were not agricultural. While the operation described in *Farmers Reservior* was similar to the Employer's business, there is one important difference. In *Farmers Reservoir*, the employer owned the land upon which it transported the water. See *McComb v. Farmers Reservoir & Irrigation Company* (C.A 10, 1948) 167 F.2d 911.

In this case, while the Employer has an easement over the use of the land, it is owned by the shareholders, who themselves or their tenants all conduct agricultural operations.

Thus, the employees in *Farmers Reservoir* did not work "on a farm," as set forth in the Fair Labor Standards Act, or section 1140.4(a) of our legislation. Given the ownership of the land by the shareholders, it is apparent that at least some of the employees in this case do perform much of their work on farms. It is immaterial that they perform many of their job duties on portions of the farms that are not cultivated. If this were required, for example, an employee whose work entailed baling hay in a barn on the farm, to feed the farm's animals, would not be considered agricultural.

Since these employees perform much of their work on farms, it is appropriate to determine whether their work is "in conjunction with such farming operations." The providing of water used for growing crops, often directly onto the fields, would appear to be in conjunction with farming operations. Thus, the Employer's Articles of Incorporation describe its purpose as providing irrigation services to the farmer shareholders (or their farmer tenants). Therefore, it is concluded that the Employer's operations meet the secondary definition of agriculture.[2]

Nevertheless, even if the facts in this case were indistinguishable from those in *Farmers Reservoir*, Congress has overruled that decision by annually defining such

[2] Petitioner cites Department of Labor Regulations in its brief. CFR section 780.144 provides, in part, "Generally, a practice performed in connection with farming operations is within the statutory language [of section 3(f) of the Fair Labor Standards Act] only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business." Petitioner then argues that the Employer meets all of these criteria. Without agreeing or disagreeing with Petitioner's contention that the Employer is not an independent business, the undersigned believes these general criteria are inapplicable to the Employer, because Congress has specifically designated such operations as agricultural. In addition, under our Act, the independent business

employees as agricultural in their appropriations bills funding the NLRB, provided the "employees [are] engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, non-profit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes." In the year prior to filing of the petition herein, 100% of the water taken by the Employer was used for agricultural purposes, and there is only one year in which that percentage may have gone below the required level. Therefore, under the Federal legislation, at least the five canal operators are agricultural employees. [3]

The Employer, however, contends that the NLRB decision and Federal Legislation only apply to workers covered under the National Labor Relations Act, and absent specific inclusion under our legislation, they have no effect. The undersigned does not agree. Section 1140.4(a) of the Act specifically refers to and incorporates Title 12 of the United States Code in determining the agricultural nature of employment. Thus, Federal legislation on this subject is considered relevant in making determinations of agricultural employee status.

Furthermore, the undersigned has reviewed the transcripts of the State Assembly Labor Relations Committee Hearing (May 12, 1975), the State Senate Industrial Relations Committee Hearing (May 21, 1975), and the Ways & Means Committee

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requirement is clearly inapplicable, because employees of farm labor contractors are specifically defined as agricultural.

[3] The Employer contends that the five employees working in the service area constitute a small minority of its workforce. This is difficult to understand, since only seven employees voted in the election. It is noted that none of the voters was challenged. The NLRB representation case did not segregate out such employees as the pumping station operators, and the undersigned believes all of the job classifications described in the record perform job functions related to the Congressional mandate. Nevertheless, the Employer may file a unit clarification petition, based on where the employees work, unless the Board chooses to decide the issue at this point.

Hearing (May 27, 1975), conducted prior to passage of the Act. While no mention was made of employees with these job duties, the statement of co-sponsor, then State Assemblyman Howard Berman, in introducing the legislation before the Assembly Labor Relations Committee (at page 2) is instructive:

> Assembly Bill 1533 is an effort to correct an egregious omission of 40 years standing. In 1935, the Congress excluded agricultural workers from the protection of the National Labor Relations Act. As a result, farm workers in contrast to nearly every other employee in the private sector have been unable to use existing federal machinery to enforce their rights to bargain collectively, to obtain secret ballot elections, and to receive protection from interference and coercion by either employers or unions in the free selection of a bargaining representative.

The Employer has cited no policy reason why these particular employees should not be entitled to collective bargaining rights, and the policy behind the Act is clearly in favor of their inclusion. The Act lists specific exclusions among employees who might otherwise be covered. Given the agricultural nature of their work, the undersigned believes that a specific exclusion, rather than inclusion, would be required to exempt these employees. Based on the foregoing, it is concluded that the employees are agricultural. Accordingly, it is recommended that the Employer's objection be overruled and the election results certified by the Board.

Dated: September 1, 2005

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DOUGLAS GALLOP
Investigative Hearing Examiner, ALRB