STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HENRY HIBINO FARMS, LLC[1]	)	
	)	Case No. 2009-RD-001-SAL
Employer,	)	
	)	35 ALRB No. 9
and	)	
	)	(December 16, 2009)
JOSE LOPEZ MARRON,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Certified Bargaining Representative.	)	
_____	)	

DECISION AND ORDER CERTIFYING ELECTION RESULTS

Introduction

This case raises the issue of who is the statutory employer for purposes of collective bargaining under Section 1140.4(c)[2] of the Agricultural Labor Relations Act (Act)[3]. The Investigative Hearing Examiner (IHE) held that Henry Hibino Farms, LLC (Hibino Farms) is not the statutory employer of the thin and hoe employees of

[1] The caption in the Investigative Hearing Examiner's decision omitted the Limited Liability designation.

[2] All statutory references are to the California Labor Code unless otherwise stated.

[3] California Labor Code Section 1140 *et seq.*

Oasis Agricultural Services, which contracts with Nunes Vegetables, Inc., (Nunes) to provide thin and hoe services for Nunes' crops grown on lands cultivated by Hibino Farms. Accordingly, the thin and hoe employees were properly excluded from the decertification election among the agricultural employees of Hibino Farms.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached IHE's decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings and conclusions of the IHE and to adopt his recommended order certifying the election results. However, we take the opportunity to clarify the analytical role of the factors set forth in *Tony Lomanto* (1982) 8 ALRB No. 44, which were relied upon in part by the IHE.

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The factors cited in *Tony Lomanto*[4] are principally used to differentiate between labor contractors, who are excluded from being considered statutory employers by operation of Section 1140.4(c), and custom harvesters or similar entities that fall outside that exclusion. As the IHE pointed out, "[i]f an employer is something more than a mere labor contractor, and could be considered a statutory employer, the Board then determines, based on policy grounds, which

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[4] Those factors include:

1) Who exercises managerial control over the various farming operations? Who has day-to-day responsibility?
2) Who decides what to plant, when to irrigate or harvest, which fields to work on?
3) Who is responsible for performing the farming operations?
4) Who provides the labor? Does the provider also supervise the labor?
5) Does someone provide equipment of a costly or specialized nature?
6) Who is responsible for hauling the crop to be processed or marketed?
7) Who owns or leases the land?
8) On what basis are any contractors compensated and who bears the risk of crop loss?
9) Do the parties have any financial or business relationships with each other, outside of the relationship at issue in the case? What form of business organization is each party to the case?
10) How do the parties view themselves, i.e., does the grower/landowner consider the contractor a custom harvester? If other growers enter into similar arrangements with the contractor, what are their views?
11) How long has each party been entering into arrangements of the kind at issue in the case? What is each party's investment in the line of business and how easily could that investment be liquidated?
12) What continuity of employment relationship exists between any of the parties and the agricultural employees involved in the case, e.g., did harvest employees also work before or after the harvest for one of the parties?
13) Ultimately, who is the "employer" for collective bargaining purposes and what is the correct legal status of each of the parties?

Tony Lomanto, 8 ALRB No. 44 at pp. 5-6.

of the two entities is the more appropriate for stable collective bargaining purposes." (IHE Decision at p. 10). The touchstone of this subsequent inquiry is the determination of which entity has "the more substantial long-term interest in the ongoing agricultural operation." (*Rivcom Corporation v. Agricultural Labor Relations Board* (1983) 34 Cal.3d 743, 768.)

Many of the factors cited in *Tony Lomanto* are also relevant to determining which of two possible statutory employers has "the more substantial long-term interest in the ongoing agricultural operation," and were properly utilized by the IHE in the present case. Complicating the analysis in this case is the fact that the record evidence shows that Nunes is not the prototypical "labor contractor plus," but much more a farm operator in its own right. In that sense, this case is more factually similar to *San Justo Farms*, (1981) 7 ALRB No. 29. In *San Justo Farms*, the Board had to decide which of two entities should have collective bargaining responsibility. One was responsible for providing, preparing and planting the seed; providing pesticides and fungicides; harvesting; packing; and marketing. The other was responsible for preparing the land, irrigating, fertilizing, hoeing, weeding, and cultivating .

The Board looked at the "whole activity" of each of the parties to decide which should assume the collective bargaining responsibilities, referring to both as "growers." (*San Justo Farms* (1981) 7 ALRB No. 29 at pp. 1-7.)

In the present case, the IHE utilized similar considerations in finding that, *inter alia*, Nunes' substantial control over, and responsibility for, the farming

operation, coupled with Hibino Farms' complete lack of control over the work of the thin and hoe employees, compels the conclusion that Hibino Farms is not the statutory employer of those employees and that, based on the evidence in the record, Nunes is the entity to which any bargaining obligation would attach vis-à-vis those employees.[5]

ORDER

It is hereby ordered that the election objections are overruled and the results of the election be certified.

Dated: December 16, 2009

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

[5] We note that Nunes was not a party to these proceedings. Although counsel for Nunes made an appearance on the second day of hearings, counsel for Nunes took no position on whether Nunes was the statutory employer of the thin and hoe employees, and this issue was not litigated by Nunes. While we agree with the IHE's conclusion that Nunes is the statutory employer, we note that this conclusion may not be binding on Nunes in future proceedings. (*See generally Michael Hat Farming Co.* (1992) 4 Cal. App. 4th 1037, 1047, fn. 6 [declining to predetermine that the owner at issue was an agricultural employer since it was not a party to the proceedings].)

CASE SUMMARY

HENRY HIBINO FARMS, LLC. (United Farm Workers of America)

35 ALRB NO. 9
Case No. 2009-RD-001-SAL

IHE Decision

This case involved a decertification election by employees of Henry Hibino Farms, LLC (Hibino Farms). At issue was whether thin and hoe employees from Oasis Agricultural Services (Oasis), contracted to work at Hibino Farms by Nunes Vegetables, Inc. (Nunes), were employees of the Hibino Farms bargaining unit such that they should have been included in decertification election. Election objections related to this issue were filed by the United Farm Workers of America (UFW).

The Investigative Hearing Examiner (IHE) held that Nunes was not a labor contractor vis-à-vis Hibino Farms and was therefore not excluded from the statutory definition of employer under California Labor Code Section 1140.4(c). Applying factors cited in *Tony Lamanto* (1982) 8 ALRB No. 44 to determine which of two possible statutory employers should have collective bargaining responsibility, the IHE concluded that Nunes, and not Hibino Farms, was the more appropriate statutory employer of the thin and hoe employees at issue.

Board Decision

The Board affirmed the IHE decision with clarification. The Board held that the determination as to which of two possible statutory employers is the appropriate employer to which collective bargaining responsibility should attach is based on which has the more substantial long-term interest in the ongoing agricultural operation. The factors cited from *Tony Lamanto* are relevant to making this determination.

The Board agreed with the IHE that Nunes' substantial control over, and responsibility for, the farming operation, coupled with Hibino Farms' complete lack of control over the work of the thin and hoe employees, compels the conclusion that Hibino Farms is not the statutory employer of those employees and that, based on the evidence in the record, Nunes is the entity to which any bargaining obligation should attach.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 2009-RD-001-SAL
	)	
HENRY HIBINO FARMS,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
JOSE LOPEZ MARRON,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Certified Bargaining Representative.	)	
_____	)	

Appearances:

Thomas P. Lynch
Marcos Camacho, A Law Corporation
Bakersfield, California
For the Certified Bargaining Representative

Anne Frassetto Olsen
Abramson, Church & Stave, L.L.C.
Salinas, California
For the Employer

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: On April 7, 2009, Jose Lopez Marron filed a petition in the above-captioned matter to decertify United Farm Workers of America (hereinafter Union) as the collective bargaining representative of the agricultural employees of Henry Hibino Farms. An election was conducted on April 14, 2006, resulting in a vote of six votes for and nine votes against continued representation by the Union. The Union filed timely objections to the conduct of the election.

After an investigation, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) set the objections for hearing as follows:

Objection 1

Whether the bargaining unit petitioned for and participating in the decertification election was co-extensive with the statewide bargaining unit certified by the Agricultural Labor Relations Board.

Objection 2

Whether the petition for decertification was timely filed with respect to peak.

The hearing was conducted at the Salinas ALRB Regional Office on June 23 and 24, 2009. The Union and Employer, but not the Petitioner, appeared at the hearing, and submitted post-hearing briefs, which have been duly considered. Upon the testimony of the witnesses, the documentary evidence, the arguments of counsel and the record as a whole, the undersigned submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Employer grows crops, including lettuce, cauliflower, broccoli, onions and celery. The Union was certified as the collective bargaining representative in a statewide unit of the Employer's agricultural employees on November 21, 1978, after a Board-

conducted election.[1] In its response to the 1978 petition, the Employer submitted a voter eligibility list containing 29 names in the following job classifications: irrigator, tractor driver, water truck driver, green onion puller, general farm worker and assistant foreman. Inasmuch as the Employer stated it did not engage any labor contractors during the voting eligibility period, it may be assumed the 29 employees were direct hires. The Employer further stated that the petition was timely filed with respect to peak.

The Employer and Union subsequently entered into a series of collective bargaining agreements. The most recent agreements have been renewals of a 1994 master agreement, with wage adjustments and other minor modifications. The master agreement permits subcontracting of various functions under certain circumstances, including the Employer's lack of required equipment, and specifically permits subcontracting onion harvest work, when the Employer has no foreman available for that purpose. The agreement excludes subcontractor employees from its provisions. The master agreement contains a grower-shipper clause, permitting the Employer to enter into such agreements, but specifying that whenever possible, the Employer should use its own employees to perform weeding, thinning and hoeing work. The most recent agreement continues to provide wage scales for thin and hoe, green onion puller, harvest and general labor employees, in addition to irrigators and tractor drivers.

Irrespective of the contractual provisions covering such employees, the Employer has never directly employed thin and hoe workers. Rather, it has sold the crops to other

[1] Case No. 78-RC-14-M. The certification excludes packing shed and freezer employees. The Employer currently leases out its packing shed, and does not employ such employees.

companies, Salinas Lettuce, and then Nunes Vegetables, prior to the harvest and, pursuant to the agreements, these companies have taken over such functions. With the exception of green onion pullers, the Employer has never employed harvest workers. Onions are now machine-harvested, and while the Employer continues to grow onions, it ceased harvesting them many years ago, because it was unprofitable. With respect to the thin and hoe, and any mechanized harvesting work, the Employer does not have the equipment to perform these functions. About three years ago, the Employer began subcontracting sprinkler irrigator employees to Oasis Agricultural Services, because it could not obtain such employees on its own. This contractor was identified in the Employer's response to the current decertification petition, and the Oasis sprinkler irrigator employees were included in the Employer's voter eligibility list.[2]

The voting eligibility period for this election was March 30 to April 5, 2009. In addition to the Oasis sprinkler irrigator employees, the Employer listed 11 of its direct hires, in the job classifications of irrigators and tractor drivers. Nunes' records show that 39 additional agricultural employees, direct hires of Oasis, performed thin and hoe work in the Employer's fields during the voting eligibility period. The owner of Oasis did not notify these employees of the election, and inasmuch as none of them attempted to vote, it is clear they were not otherwise informed of it. The parties agree that the Oasis thin and hoe workers were agricultural employees, but the Employer contends they were contract employees of Nunes, while the Union contends the relationship was with the

[2] It appears that Oasis also supplies a tractor driver, at times, to the Employer. Apparently, the driver was not employed at the Employer's fields during the voting eligibility period.

Employer. Oasis was paid by the Employer for the sprinkler irrigator employees' work, and by Nunes for the thin and hoe workers' labor.[3]

The Employer and Nunes Vegetables have been parties to a Custom Farming and Marketing Agreement since 1993. Under the agreement, the Employer is the grower, and Nunes is the harvester. Some of the applicable provisions are as follows:

> 3.1. GROWER'S Obligations.
>
> (a) GROWER shall provide the Farmlands for the Crops.
>
> (b) GROWER shall be responsible for all Water Costs.
>
> (c) GROWER shall be responsible for all Direct Commercial Costs except as otherwise specified in the applicable Exhibit "A".
>
> (d) GROWER shall be responsible for all Cultural Practices and Cultural Practices Costs.
>
> 2.5. "Cultural Practices" means the farming of the Crop and bringing it to harvest (but does not include services provided by others on a commercial basis which are included under the definition of Direct Commercial Costs) and includes, without limiting the generality of the foregoing, land preparation, bed preparation, planting, cultivation, irrigation, supervision, research and development, administration, and all other cultural practices applicable and necessary in bringing the crop to maturity, and making it ready for harvest.
>
> 2.6. "Cultural Practices Costs" means the costs incident to providing the Cultural Practices.
>
> 2.7. "Direct Commercial Costs" means the costs paid to others, who generally specialize in providing specific goods and/or services, directly related to the Crop and includes, without limiting the generality of the foregoing, the following:
>
> (1) soil amendments and its (sic) application;

[3] There was initially some confusion as to which company was being billed, because Oasis' business records list its billings for both companies in the same document, without specific separations, and contains some errors.

(2) fertilizer and its application;
(3) pesticides and its (sic) application;
(4) seed;
(5) plants and transplanting;
(6) thinning and hoeing labor;
(7) cauliflower tying.

Section 4 of the Agreement gives Nunes sole control over how to harvest the crops, or whether to harvest them at all. Although not set forth in the Agreements, Nunes decides which seeds will be used, and decides which crops will be produced from transplants.

The 2008 and 2009 addenda to the agreement provide the terms for specific crops to be grown, including green onions, and set forth a fee payable to the Employer from Nunes, for growing the crops. They provide that Nunes owns 100% of the crops, meaning it bears the entire risk of loss should the crop fail, the market price fall, or it is unable to sell the crop at all. The addenda do not provide that Nunes is to pay any of the "Direct Commercial Costs," but Kent Hibino testified that Nunes, in fact, does pay for some of these, including thinning and hoeing labor, seeds, plants and transplanting.

Nunes, in turn, subcontracts the work it performs pursuant to the agreements, such as thin and hoe. Nunes determines the method of thin and hoe work to be performed. Nunes chooses the contractors it wishes to use, and sets the terms of the subcontracts, without any input from the Employer. Oasis is one of the principal contractors engaged by Nunes, and performs the thin and hoe work. Nunes has a supervisor who oversees the work of the contractors working at the Employer's premises.

The Union, in its brief, takes issue with Hibino's testimony concerning the payment by Nunes for thinning and hoeing labor, pointing to the agreement, which

assigns such costs to the Employer, under "Direct Commercial Costs." It appears the Union contends that, due to the great fluctuations in such costs at different times during the year, the Employer would be hard pressed to meet the thin and hoe payroll during periods of high employment. Therefore, in order to keep the Employer's costs constant, Nunes technically pays for the labor but, in fact, it is factored in when establishing the installments paid to the Employer for growing the crops (presumably resulting in a lower rate being paid to the Employer). Therefore, in reality, the Employer is paying for the thin and hoe labor, and is, in fact, paying a fee to Nunes, who in turn subcontracts the work to Oasis.

While the agreement does provide that the Employer is responsible for the cost of thin and hoe labor, there is no evidence, beyond assumptions the Union believes should be made, that Nunes' payments to the Employer are reduced to cover this expense. There is no testimony or documentary evidence establishing such an arrangement. It is equally probable that, irrespective of the terms of the agreement, the parties, in practice, have assigned this responsibility to Nunes. This is particularly true since the Employer has not historically performed such work. Also, as noted above, the Employer and Nunes, in practice, have altered other terms of their agreement. Therefore, the Union has failed to preponderantly rebut Kent Hibino's testimony, that Nunes pays for this labor.

The employees provided by Oasis to Nunes are different than the sprinkler irrigation employees Oasis provides to the Employer. The Employer exercises no labor relations functions concerning the employees of the Nunes contractors, when they provide services for Nunes. The primary contact between the Employer and Nunes is to

water the fields for thin and hoe work, and to notify Nunes when the crops are ready to harvest. Nunes contracts with other companies to harvest the crops grown by the Employer, including onions. Nunes also contracts with other companies to haul the crops to market.

There were no onion harvest workers working at the Employer's fields during the voting eligibility period. The Union has shown that there were, or will be many workers harvesting the onion and other crops at other points in 2009. Again, the parties agree that the harvesters are agricultural employees, but disagree as to who is the employing entity. As noted above, the agreement between the Employer and Nunes Vegetables assigns the harvesting function to Nunes. Nunes subcontracts the harvest work, paying a fee to the subcontractors. Nunes does not receive a fee from the Employer for the harvest work.

ANALYSIS AND CONCLUSIONS OF LAW

Under section 1140.4(c) of the Agricultural Labor Relations Act (Act) the employees of a labor contractor engaged by an agricultural employer are deemed to be employees of the employer. Inasmuch as the Union lost the election by only a few votes, it is clear that if the 39 Oasis thin and hoe workers in the fields during the voting eligibility period are found to be employees of the Employer, this would require setting aside the election.

Under section 1156.4 of the Act, an election may only be conducted at such time where the employer's workforce is at least 50% of the peak number of agricultural employees for the calendar year. Although no harvest employees worked in the Employer's fields during the voting eligibility period, it is probable that many have or

will work at other points in 2009, raising the issue of peak. Again, such workers must be found to be employees of the Employer to sustain the Union's position.

Other than the labor contractor exception, Section 1140.4(c) provides, inter alia, that the term, "agricultural employer," shall be construed liberally, and includes harvesting associations and land management groups. Under Labor Code section 1682, a labor contractor is defined as an entity which, for a fee, employs workers to render personal services in connection with the production of farm products, or which recruits, solicits, supplies or hires workers on behalf of an agricultural employer, and which, for a fee, provides one or more of the following services: furnishes board, lodging or transportation for such workers, supervises or otherwise directs or measures their work; or disburses wage payments to such persons. A "fee" is the profit the contractor receives for providing the labor, or other service. An entity may be considered a contractor, even if it subcontracts the work it is responsible for performing. *Michael Hat Farming Co., dba Capello Vineyards.* (1991) 17 ALRB No. 2, enfd. (1992) 4 Cal.App. 4th 1037.

It is undisputed that Nunes Vegetables is responsible for the harvest work under the agreement. As found above, Nunes has assumed the thin and hoe work obligation, irrespective of the terms of the agreement. Therefore, it does not engage these workers on behalf of the Employer. The evidence also fails to show that Nunes receives money, or other compensation from the Employer, for the thin and hoe, or harvest labor. Even if the Union's assumptions were sustainable based on the evidence, the record fails to establish that Nunes makes a profit by arranging for the thin and hoe, or harvest workers. Thus, even if the Employer indirectly pays for this labor, this does not establish that it

pays Nunes a "fee," within the statutory definition. Accordingly, Nunes does not fall within the statutory definition of a labor contractor, for either the thin and hoe, or harvest employees. Cf. *Jordan Brothers Ranch* (1983) 9 ALRB No. 41. Other than the labor contractor issue, it is clear that Nunes would otherwise be considered an agricultural employer under section 1140.4(c). Since Nunes is a statutory agricultural employer, and not a labor contractor, it is the employer of the thin and hoe, and harvest employees provided by its contractors. Accordingly, it will be recommended that the Union's objections be overruled.

If Nunes could be construed to be a labor contractor of the Employer, the Board has developed a two-pronged test to determine whether direct hires, or contractor employees of one company should nevertheless be considered employees of another under the Act.[4] The first test is whether the employer is a mere labor contractor, or something more. If the employer is something more than a mere labor contractor, and could be considered a statutory employer, the Board then determines, based on policy grounds, which of the two entities is the most appropriate for stable collective bargaining purposes. *S & J Ranch* (1984) 10 ALRB No. 26; *San Joaquin Tomato Growers, Inc.* (1994) 20 ALRB No. 13. Some of the factors used to determine this are the following:

1. Managerial control over the farming operations.
2. Control over day-to-day labor relations.
3. Decisions as to what plants to grow, and when to irrigate and harvest them.

[4] This analysis is being made in the event that the Board, or other reviewing authority, disagrees with the conclusion that Nunes Vegetables is not a statutory labor contractor of the Employer.

4. Responsibility for performing the farming operations.
5. Provision and supervision of labor.
6. Provision of specialized or costly equipment.
7. Responsibility for hauling crop to market.
8. Ownership or leasehold of the land.
9. Method of compensation.
10. Risk of loss.
11. Form of the business relationship.
12. How the parties to the business relationship view themselves.
13. Length of the business relationship.
14. Capital investment and liquidation potential.
15. Nature of the employment relationship between the employees and the businesses.

Tony Lomanto (1982) 8 ALRB No. 44; *San Justo Farms* (1981) 7 ALRB No. 29.

Assuming Nunes is a labor contractor of the Employer, it is clear that its functions go far beyond merely providing workers or agricultural services for a fee. With respect to the farming operations, Nunes exercises substantial control over such critical matters as the crops to be planted, who will perform the thin and hoe, and harvest work, and the sale and distribution of the crops. Although the thin and hoe work does not require costly equipment, much of the harvest work does. Nunes controls the compensation paid for performing these operations, and the Employer exercises no managerial control over the

employees performing them. Nunes bears the entire risk of crop loss or poor market conditions.

Historically, the thin and hoe work has been performed under this arrangement by Nunes' contractor, and Nunes' predecessor. The onion harvest work, which has changed in methodology, has also been performed by entities other than the Employer for a considerable period of time. Based on the scope of their operations, as described at the hearing, it is apparent that Nunes is a much larger company than the Employer, and thus, less likely to fail, one of the primary reasons contractor employees are treated separately under the Act.

It is clear that the companies view themselves as separate organizations with separate businesses.[5] The sudden inclusion of a large number of new employees into the collective bargaining unit would more likely disrupt, rather than promote stable collective bargaining relations, particularly since these would be the contractor employees of Nunes, rather than its direct hires. Contractual language aside, with the exception of onion pullers, many years ago, the collective bargaining history between the Employer

[5] In this regard, *TMY Farms* (1976) 2 ALRB No. 58, cited by the Union, is inapposite to the facts herein. In that case, the Board held that contractor employees engaged by a partner of the employer named in the representation petition were employees of the employer, based on the partnership status of the businesses. No such status exists here.

and Union has not included thin and hoe, or harvest employees.[6]

To repeat, based on the statutory definition of a labor contractor, it is concluded that Nunes does not occupy that status with respect to the Employer, and the objections should be overruled for this reason. Based on the foregoing considerations, to the extent that a contractor relationship could be construed, Nunes is more than a mere contractor, and is the appropriate employer for the thin and hoe, and harvest employees. *Kotchevar Brothers* (1976) 2 ALRB No. 45; *Jack Stowels, Jr.* (1977) 3 ALRB No. 93; *Napa Valley Vineyards Co.* (1977) 3 ALRB No. 22. Accordingly, it would be recommended that the Union's objections be overruled on that basis as well.

ORDER

It is hereby ordered that the Union's objections to conduct of the election are overruled, and that a certification of results issue.

Dated: September 14, 2009

_____

Douglas Gallop
Investigative Hearing Examiner, ALRB

[6] If the Union believed the onion harvesting work was improperly removed from the unit, it should have filed a grievance and/or an unfair labor practice charge. This is an entirely different issue from whether the onion harvesters stand as contractor employees of the Employer. Recognizing that the contract includes onion pullers, it still must be shown that the 2009 onion harvest workers are employees of the Employer, and not another entity.