STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., AND ABATTI PRODUCE, INC., Employers, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner, and WESTERN CONFERENCE OF TEAMSTERS, Intervenor.	Case No. 76-RC-17-E(R) 3 ALRB No. 83

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel. [1/]

Following a petition for certification filed by the UFW on January 21, 1976, an election by secret ballot was conducted on January 28, 1976, among the agricultural employees of Abatti Farms, Inc., and Abatti Produce, Inc. The tally of ballots furnished to the parties at that time showed that there were 242 votes for the UFW, 124 for the Teamsters, 18 for No Union and 52 unresolved challenged ballots, which are not outcome-determinative. Thereafter, the Employers filed timely objections, 12 of which were dismissed by the Executive Secretary. Intervenor Teamsters also filed timely objections, three of which were dismissed by the Executive Secretary. The

one remaining Teamster objection and the two remaining Employer objections were noticed for hearing by the Board's Executive Secretary.

The hearing was conducted on May 16, 17 and 18, 1977, in El Centro, California, before Investigative Hearing Examiner Thomas Sobel. As no evidence other than the initial declarations was introduced in support of the Teamster objection, that objection was dismissed by the Hearing Examiner. Testimony was received with respect to the Employers' objection that Abatti Farms, Inc., and Abatti Produce, Inc., should not be considered joint employers and as to their objection that the Board Agent closed the polls at one site promptly at 1:00 p.m. and refused to permit waiting employees to cast their ballots, and that later in the day at a different polling site he inserted a ballot into the box after it was sealed.

On July 19, 1977, the Investigative Hearing Examiner issued his Decision, in which he concluded that Abatti Farms, Inc., and Abatti Produce, Inc., constitute a single employer and recommended that the objections be overruled and that the election be upheld. The Employer filed timely exceptions to the report and a supporting brief.

The Board has considered the objections, the record, and the Investigative Hearing Examiner's Decision in light of the exceptions and a supporting brief and hereby affirms the rulings, findings and conclusions of the Investigative Hearing Examiner and adopts his recommendations. In so doing, however, we do not condone the conduct of the Board Agent at the two polling sites in question. Although the actions of the Board

Agent could not have affected the results of this election and do not warrant setting aside the election, it was improper for him to turn away a voter during a scheduled voting period and to insert an additional ballot in the box after it had been sealed even if, as one observer testified, the ballot was a challenged one and the observers thereafter re-signed the ballot box. We consider Tidelands Marine Services, Inc., 116 NLRB No. 162, 38 LRRM 1444 (1956), cited by the Employer in its brief, to be inapposite, as in that case the unsealed ballot box was transported under conditions that might have permitted access thereto by one party outside of the presence of the other.

The objections in this case are hereby overruled, the election is upheld and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Abatti Farms, Inc., and Abatti Produce, Inc., for the purposes of collective bargaining, as defined in Labor Code Section 1155.2 (a), concerning employees' wages, working hours and other terms and conditions of employment.

Dated: November 18, 1977

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

ABATTI FARMS, INC., Case No. 76-RC-17-E(R)

and

ABATTI PRODUCE, INC.,

Employers,

and

UNITED FARM WORKERS OF

AMERICA, AFL-CIO,

Petitioner,

and

WESTERN CONFERENCE OF TEAMSTERS,

Intervenor.

Thomas Nassif, Byrd, Sturdevant, Nassif & Pinney for Abatti Farms, Inc.

Richard Strickland, Plourd, Blume, Scoville and Siddell for Abatti Produce, Inc.

Glenn Rothner, Susan Alva ,for United Farm Workers of America, AFL-CIO

John Maloof, Ormes, Farrell, Monroy & Drost for Western Conference of Teamsters

DECISION

THOMAS SOBEL, Investigative Hearing Examiner: This case was heard by me in El Centro, California, on May 16, 17 and 18, 1977 Pursuant to Petition for Certification filed by the United Farm Workers on January 21, 1976, a representation election was held

among the employees of Abatti Farms and Abatti Produce on January 28, 1976. The result was:

UFW	242
WCT	124
No Union	18
Unresolved Challenged Ballots	52

Employers, Abatti Farms and Abatti Produce (hereafter called Farms and Produce), and Intervenor, Western Conference of Teamsters, timely filed petitions alleging a variety of misconduct as grounds upon which to overturn the election. Pursuant to his authority under 8 Cal. Admin. Code Section 20365(c) , the Executive Secretary dismissed some of these objections and set for hearing the following:

I.

Objection Filed by the Western Conference of Teamsters

1. That the United Farm Workers campaigned among those waiting to vote and that such campaigning, if any, affected the outcome of the election;

II.

Objections Filed by Employers

1. That the employers of Abatti Produce Company and the employees of Abatti Farms, Inc. should not be included in a single bargaining unit; and
2. That the Board agent refused to permit voters waiting to vote to cast their ballots in order to close the polls promptly at 1:00 p.m., and that a Board agent slipped a ballot into the ballot box after it was sealed.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings including the opportunity to present oral argument at the conclusion of the hearing. Additionally, parties were given leave to file written briefs.

Upon the entire record, including my observation of the demeanor of witnesses, and after consideration of the arguments made by the parties, I make the following findings of fact and conclusions of law:

I.

TEAMSTER OBJECTION

At the hearing, Intervenor Western Conference of Teamsters, appearing through its Counsel, declined to present any evidence in support of its allegations of United Farm Workers' misconduct, but chose to rest its case upon the declarations on file with the Board.[1/] Because these declarations are merely hearsay and because, under Board regulations, hearsay alone cannot support a finding of fact, 8 Cal. Admin. Code Section 20370(c) , I dismissed the Teamster objection.

II.

EMPLOYER OBJECTIONS
VOTING IMPROPRIETIES

Employers contend that two incidents of alleged impropriety in voting procedures, either taken together or separately, justify overturning the election. Both incidents involve the casting of ballots, although one of them entails the Board agent's refusal to permit a voter to cast his ballot prior to the closing of the polls

[1/] Board regulations applicable at the time of this election required parties filing objections based upon the conduct of the election or based upon conduct affecting the results of the election to file "declarations or other evidence establishing a prima facie case in support of" their objections. 8 Cal. Admin. Code Section 20365(d); see also Interharvest, Inc., 1 ALRB No. 2. This requirement remains unchanged in the Board's revised regulations. 8 Cal. Admin. Code Section 20365 (c).

and the other entails the Board agent's permitting a voter to vote after the polls had closed and the ballot box had been sealed. Because each of these events took place at a different polling site/ I will characterize the former as the third site incident and the latter as the Calexico incident.

A.

At the pre-election conference, three polling sites were agreed upon with a fourth to be used if the mustard crew did not work.[2/] The polls at the third site were to be open from 11:30 to 1:00 p.m. It was also agreed that the polls would remain open as long as workers were there to vote. James House and Doris Hess, two of employers' observers, testified that they were present at the third site at around 1:00 p.m. when, despite the poll's still being up and the ballot box's not having been sealed, the Board agent refused to permit a single voter, a truck driver, to vote. [3/]

The testimony of both witnesses was fragmentary. Neither witness heard the entire conversation between the Board agent and the voter. On cross-examination all that Mr. House could remember was overhearing the truck driver tell the Board agent something like, "If that's the way it's going to be I'm not going to vote." Mrs.

[2/]One of the Employers' dismissed objections was that the use of a fourth site was contrary to the agreement of the parties because the mustard crew did work on election day. The Executive Secretary dismissed this objection and Employers did not request the Board to review the Executive Secretary's dismissal.

[3/] Employers contend in their objections petition, Paragraph 12, and in their post-hearing briefs that more than one voter was turned away, Brief for Abatti Farms, p. 13; Brief for Abatti Produce, p. 3. While there was testimony that two truck drivers were on the scene, the evidence does not establish that more than one truck driver wanted to vote. Without some evidence of the second man's desire to vote, an alleged refusal to permit him to vote is meaningless.

Hess, on the other hand, testified that she heard the Board agent tell the truck driver that he (the truck driver) would have to go to Calexico in order to vote, the implication being that the third site polls were closed and those at Calexico would next be open. No one heard the Board agent tell the driver that he could not vote at the third site. In rebuttal, Reuben Vasquez testified for the United Farm Workers that he was told by the Board agent that the truck driver didn't vote because, upon hearing that his vote would be challenged, [4/] and his ballot placed in an envelope bearing his name, he decided not to vote at all. Sr. Vasquez's testimony was remarkable for his inability to recall much more than what contradicted employer's version. A selective memory is, by definition, unreliable with respect to everything not selected by it and at some point the appearance of so many gaps in its fabric cast doubts upon its capacity to retain anything at all. Sr. Vasquez's memory passed that point. Thus, I find the House-Hess version to be true: the Board agent did turn away a voter while the polls were still up and prior to the sealing of the ballot box.

[4/] Mrs. Hess testified that the UFW was routinely challenging truck drivers. Neither Mr. House nor Sr. Vasquez was able to testify to this. This routine challenging is not necessarily corroborative of Sr. Vasquez's testimony in that it also tends to support Employer's original theory, that the Board agent might have been instructed to exclude the truck driver from voting because of a pro-UFW bias. See infra, p. 6.

I presume, in the Vasquez version, that Sr. Vasquez is purportedly quoting the Board agent who, in turn, is purportedly quoting the truck driver. Even if I were to credit Sr. Vasquez's testimony, therefore, I do not feel it could support a finding of fact. If Sr. Vasquez were testifying as to something he heard the truck driver say, such hearsay would go to the truck driver's state of mind, and would be admissible evidence. Coming through the medium of the Board agent, however, it becomes another level of hearsay which does not satisfy any exception.

B.

There is no factual dispute about what happened at the Calexico site. James House and Doris Hess both testified, and I so find, that after the polls had closed and after the ballot box had been sealed and after the tape was signed by the observers, another voter appeared and the Board agent (the same Board agent who turned away the voter at the Third Site,) permitted this late arriving voter to vote. After the voter marked his ballot the Board agent pressed the tape flaps down in order to separate the cardboard from the tape, thereby creating an aperture through which he inserted the ballot.

Both Mr. House and Mrs. Hess testified that they protested the Board agent's letting the voter vote. Mr. House, however, testified that this vote was challenged and that he thought he and Mrs. Hess re-signed the ballot box; Mrs. Hess did not recall this. After the ballot had been inserted and the box reclosed, neither Mr. House nor Mrs. Hess accompanied the box during the return to the ALRB's office where it was opened and votes counted.

Employers have advanced two theories in their briefs to justify their contention that the election should be overturned. At the hearing, however, Counsel for Abatti Farms attempted to elicit testimony in support of a third theory, not briefed, but implied in its original petition, that the reason the Board agent refused to permit the truck driver to vote before the polls had closed at one site although he permitted a voter to vote after the polls had closed at another site, was to maximize the franchise of UFW supporters. Although Employer attempted to adduce testimony which

might tend to show bias on the part of the Board agent in refusing to permit the truck driver (presumably an anti-UFW voter,) to vote and in permitting the voter at the Calexico site to vote, its witnesses were unable to provide any evidence of bias. The mere juxtaposition of two such contrary decisions does not compel an inference of bias; the second decision may simply be the result of second-thoughts about the first.

Employers presently argue that the Board agent's turning away of the truck driver warrants overturning the election both because it was a violation of the agreement to keep the polls open as well as a violation of the Board's "Representation Case Guidelines and Manual of Procedure." The Manual provides:

> All in the voting line at the time scheduled for closing should be permitted to vote, even though the election is prolonged thereby. Those who join the line thereafter should be permitted to vote so long as the ballot box has not been sealed or opened. [5/]

I cannot conclude that violation of the agreement to keep the polls open is a ground for setting aside this election. The refusal to permit the truck driver to cast a single vote in an election won by more than 100 votes, [6/] absent any showing of discrimination, presents no question as to the fairness of the election process itself. See Perez Packing Co., 2 ALRB No. 13, p. 4. That the refusal to permit someone to vote might violate the Guidelines is of little moment in that the Board has determined that they are not

[5/] See Representation Guidelines and Manual of Procedure, p. 62; Representation Case Manual, p. 65. The "Case Manual" is a revised edition of the "Representation Guidelines."

[6/] See NLRB v. Wilkening Mfg. Co., 207 F.2d 98, 32 LRRM 2667, refusing enforcement of 100 NLRB 1201, in which the Court set aside an election in which a late voter was disenfranchised because the disenfranchisement affected the outcome of the election.

binding and that the gravity of deviations from them is to be measured by its tendency to interfere with the free choice of voters or to affect the outcome of the election. Harden Farms, 2 ALRB Mb. 13, p. 12. This incident can have had neither effect. With regard to the Calexico incident, Employers once again urge that the election be set aside because the insertion of the ballot into the box after it has been sealed is a violation of the Board's election manual. As noted above, the Board does not regard these guidelines as binding so that deviation from them is not a ground for overturning an election.[7/]

Employers' major argument is that, the box once having been sealed and the tape signed, the breaking of the seal in order to insert the late ballot violates the "integrity" (Farms' brief) or the "sanctity" (Produce's brief) of the ballot box. These

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7/ As quoted by Employers, Brief for Produce, p. 10; Brief for Farms, pp. 16-17, the manual reads:

> "All in the voting line at the time scheduled for closing should be permitted to vote, even though the election is prolonged thereby. Those who join the line thereafter should be permitted to vote so long as the ballot box has not been sealed. . ."

The manual actually reads: "those who join the line thereafter should be permitted to vote so long as the ballot box has not been sealed or opened." (Emphasis supplied). Although a review of NLRB cases indicates what might be meant by this odd disjunctive, such apparently contradictory guidelines provide reason enough for the manual to be regarded as merely directory.

If I view this only as a problem of late casting of ballots, I can find no precedent for overturning an election on account of it unless the late votes be outcome determinative. As a rule, the NLRB leaves it to the discretion of the Board agent conducting the election as to whether a particular employee should be permitted to cast a late ballot, Atlantic International Corp., 228 NLRB No. 187, p. 3, Westchester Plastics of Ohio, 165 NLRB No. 219, enforced 401 F.2d 903 (1968), so that the question in late voting cases is usually whether to count the particular ballot. See Glauber Water Works, 112 NLRB No. 1462 (1955).

colorful images are expressive of a serious intention, shared by the Board, to insure that tampering with the ballot box does not occur. "The integrity of the ballot box is, of course, vital to the conduct of a secret ballot election, and Board agents should take every precaution reasonably available to assure that integrity. Any impairment, or any substantial possibility for the occurrence of such impairment, may require that an election be set aside." California Coastal Farms, 2 ALRB No. 26, p. 7.

I have little doubt that if a party could show a Board agent attempted to surreptitiously slip a ballot into an already sealed ballot box, the election should be set aside. For I take preservation of the integrity of the ballot box to reflect the Board's desire to insure that the results of an election may be fairly taken to reflect the vote of employees and not of some other agency. [8/] Where, as in this case, the irregularity complained of is the Board agent's insertion of (presumably) an agricultural employee's [9/] ballot into the ballot box, in full view of all the parties, there seems little reason to overturn an election.

THE APPROPRIATE BARGAINING UNIT

Employers next contend that the employees of Abatti Farms, Inc. and the employees of Abatti Produce Inc. should not be included in a single bargaining unit. To support this contention, Employers

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[8/] Thus, in Polymer's, Inc. v. NLRB, 414 F.2d 999, 71 LRRM 3107, cert, den. 396 U.S. 1010, the Court assesses the possibility of irregularity in the conduct complained of in this way: "Employer's allegations presupposed a spontaneous reaction by unknown parties to the fortuity of the ballot box and the blank ballots remaining in an unguarded but locked station wagon, and the perfect execution of a plot to tamper," 414 F.2d at 1004, 71 LRRM at 3110. (Emphasis supplied)

[9/] Employer provided no evidence that, but for his late arrival, the "voter" was otherwise ineligible to vote.

introduced substantial evidence regarding their operations.

FINDINGS OF FACT

Abatti Farms, Inc., a California corporation, was incorporated in 1967 for the primary purposes of "planting, cultivating, irrigating, growing and selling agricultural crops. . ." Abatti Produce, Inc., a California corporation, was incorporated in 1967, for the primary purposes of "packing, shipping and selling . . . agricultural crops. . .." Both corporations have the same general purposes. The officers of Abatti Farms are: President, Tony Abatti; Vice-President, Ben Abatti; Secretary-Treasurer, Agnes Poloni. The officers of Abatti Produce are: President, Ben Abatti; Vice-President, Tony Abatti; Secretary-Treasurer, Agnes Poloni. Ben and Tony Abatti are brothers; Agnes Poloni is their sister. The only stockholders of each corporation are the brothers, Ben and Tony; each owns one-half of the stock of each corporation. Both corporations share a single office location at 184 Commercial Avenue, El Centro. This office is leased by Abatti Produce. Agnes Poloni manages the office at which, beside Mrs. Poloni, Doris Hess, Barbara Lloyd, Sandy Weismeyer, and Mike Ganakas work. Doris Hess does the payroll for Farms; Barbara Lloyd does it for Produce. Sandy Weismeyer does the accounting work for both corporations, and Mike Ganakas performs financial and accounting work for both corporations, including the preparation of financial statements and income tax returns. He performs the same functions for a third entity, the Abatti Brothers, a partnership consisting of Ben and Tony Abatti.

All employees are paid from a common fund, described by Mr. Ganakas as the Ben and Tony payroll account which was set up shortly before the election in January of 1976. The payroll account is drawn against an account held in the name of the Abatti Brothers partnership. Although employees are paid by the partnership, each corporation reimburses the partnership payroll account for the salaries attributable to the work performed for it. Thus, Produce reimburses the payroll for Agnes Poloni, for Barbara Lloyd and for Sandy Weismeyer; while Farms reimburses the account for Doris Hess. Mike Ganakas, who performs the same functions for both corporations, is paid by the partnership; as are Ben and Tony Abatti themselves, who, taking no salary from either corporation, take a draw from the partnership.

As the partnership advances salaries, so it advances money to each corporation in order for Farms to grow, and for Produce to harvest, the crops owned by Abatti Brothers. Mike Ganakas testified that only the partnership owns or leases agricultural land. Abatti Farms, which performs a variety of growing and farming operations short of harvesting, from initial preparation of the ground to actual planting and plant care, neither owns nor leases land. It operates only as a custom farmer, both for the partnership itself and for other farmers. In both cases, it receives only a fixed fee for the work performed. While the terms of its custom farming work are the same, whether performed on crops owned by the Brothers, or on crops owned by other farmers, it does not receive payment from the Brothers for the work it performs except in terms of credits to its account with the partnership. Thus,

the partnership advances the money to Farms to grow a certain crop for a fixed fee which appears on the corporation's account with the partnership. Abatti Brothers takes the profit from those crops, or absorbs the loss.

The same sort of arrangement obtains between the partnership and Produce except that Produce, instead of being a custom farmer, is a custom harvester. Like Farms, it too performs work for farmers other than Abatti Brothers; like Farms it too receives a fixed fee for the work it performs. And like Farms, those of its costs attributable to crops owned by the Brothers are advanced by the Brothers and the fees derived from the Brothers are credited to it by a system of invoicing and charging on the businesses' computer accounts. Reconciling of the accounts is done on a yearly, rather than on a crop-by-crop, basis.

Not all the farming performed by Farms is done on land owned by the Brothers; similarly, Produce not only doesn't harvest everything grown by Farms, but also harvests for other farmers. Farms even harvests some of its own crops; but only flat, or field crops (such as, in 1976, alfalfa and cotton). As a general rule, those of Farms-grown crops not harvested by either Farms or Produce are crops the harvesting of which requires certain kinds of machinery not owned by either of the corporations (such as, in 1976, carrots and sugar beets). In the 1975-76 crop year the harvesting breakdown of crops owned by the Brothers and grown by Farms was as follows:

I. Harvested by Produce;

Cantaloupes	474 acres
Watermelons	210 acres
Lettuce	1,580 acres
Onions	292 acres
Rapini	175 acres

II. Harvested by Farms:

Alfalfa	3,743 acres
Cotton	570 acres

III. Harvested by Other Custom Harvesters;

Carrots (by Mike Yurosek)	525 acres
Asparagus (by Sun World)	973 acres
Broccoli (by Yurosek)	175 acres
Beets (by Ralph Miranda and Leonard Quira)	825 acres
Wheat (by Lee Havens)	3,406 acres

The basic functional differentiation between Produce and Farms is which end of the agricultural operation they occupy: Farms grows and Produce harvests. The type of work force each requires, therefore, is different in that growing is a nurturing process which takes place over time, and harvesting is, relative to growing, an event. Farms' employees, therefore, are salaried employees and work the year round, while Produce employees are usually piece-rate employees. Although Produce has harvesting operations for 8-10 months of the year, its work force is more seasonal and workers are usually hired as individual crops are about to be picked. Even as to Produce, however, Ray Hernandez testified that the majority of Produce's employees, though working only ten months of the year, work steadily for Abatti Produce. The employees of each corporation are paid differently. The functions performed by Farms' employees place a premium on accuracy and thoroughness; therefore, salaried employees best perform them. For harvesting, on the other hand, speed is required and piece-rate provides the best incentive for it.

This rough differentiation in skills does not result in absolute segregation between the two classes of employees. Employers' witnesses testified that sometimes crews from Farms will perform some harvesting. For example, Ben Abatti testified that sprinkler

crew are referred to the rapini harvest. Ray Hernandez testified that when such interchange takes place men are not assigned to this work, but are merely offered it when their regular work is slack. I do not find it credible that interchanges take place only voluntarily - no gate separates these entities that would not easily be opened by either of the brother's words. On the other hand there was no evidence as to the precise amount of employee interchange which does take place. That it occurs was testified to by Ben Abatti, Ray Hernandez and Reuben Vasquez.

The day-to-day management of Produce is the responsibility of Ben Abatti. Responsibility for the management of Farms belongs to Tony Abatti. Ben Abatti testified that he and his brother consult nearly daily on the business of the two entities because crops come in nearly every day of the 8-10 month growing season. Besides this routine consultation, the two, as equal shareholders of each corporation, consult on major decisions. He gave investment decisions as an example. Moreover, whenever one of the brothers is unavailable the other takes charge of his brother's company.

Each of the brothers is responsible for the labor relations of the company of which he is president. Each is ultimately responsible for the hiring for "h i s" corporation. While Abatti Farms has never had a union contract, the employees of Abatti Produce have been represented by unions. Produce's truck drivers were under contract with the Teamsters in the middle of the early sixties; the Fresh Fruit and Vegetable Workers began to cover packing shed employees somewhat earlier and, for some time in the seventies, Produce had a contract with the Teamsters for its (field) harvesting and packing. Ben

Abatti testified that he alone negotiated for Produce on these contracts. While I credit his testimony as to the actual negotiations, I find incredible the implication that he never talked to Tony about what and how to negotiate. If, as Ben Abatti testified, the brothers consult on major decisions, it seems natural that they would talk about this: their livelihood depends on it.

EMPLOYERS' THEORY

Employers' contend that Farm and Produce cannot be considered joint employers under either NLRB or ALRB precedent. [10/] Under the NLRA, a determination that two or more entities are joint employers is not conclusive as to whether all their employees belong in a single unit for the national Board has discretion to determine whether the appropriate unit is an "employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 USC 159(b)

[10/] Employer also argues that Produce and Farms cannot be considered part of a multi-employer unit. While I do not reach that question because of my findings on the joint employer issue, employer appears to suggest that a joint employer unit is a variety of multi-employer unit so that if employers cannot be appropriately placed in a multi-employer unit, neither can they be considered joint employers.

> The ALRB first considered the issue of whether multiple corporations should be considered as a single bargaining unit in the case of Eugene Acosta, et al., 1 ALRB No. 1, Brief for Farms,p.9.

To my mind, a joint employer unit is not a variety of multi-employer unit at all in that joint employers are considered a single employer for the purposes of the Act. Thus, it is conceivable that two or more employers who might not be considered joint employers, might still be part of a multi-employer unit.

(Emphasis supplied).[11/] Under the ALRA, however, the findings of joint employer status (so long as the operations are contiguous) is conclusive as to the unit question. The unit issue thus turns on the identity of the employer:

> The bargaining unit shall be all agricultural employees of an employer. Labor Code Section 1156.2.

CONCLUSIONS OF LAW

There is only one ALRB case on the joint, or single, employer issue and that case declined "to announce any mechanical

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[11/] The distinction between the joint employer inquiry for jurisdictional purposes, and the appropriate bargaining unit issue, once jurisdiction has been established, has been frequently made. An early case (1939) explains:

> The inference to be drawn. . . is that within the measuring of the Act, whoever as or in the capacity of an employer controls the employer-employee relations in an integrated industry is the employer. So interpreted it can make no difference in determining what constitutes an appropriate unit for collective bargaining whether there be two employers of one group of employees or one employer of two groups of employees. Either situation having been established, the question of appropriateness depends upon other factors, such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations. NLRB v. Christian A. Lund (8th Cir.,), 103 F.2d 815 4 LRRM 698, 702 (Emphasis supplied).

For later examples of this same distinction see Mercy Hospitals of Sacramento, 217 NLRB No. 131; South Prairie Construction Co. v. Local 627, __ U.S. ___, 96 Supreme Court 1842, 1844:

> The Board's cases hold that especially in the construction industry a determination that two affiliated firms constitute a single employer "does not necessarily establish that an employer-wide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit."

rule. . ., but [rather announced that the Board will look to] such factors as similarity of the operations, interchange of employees, common management, common labor relations policy, and common ownership." Louis Delfino Co., et al., 3 ALRB No. 2 at p. 3. Some of these criteria are what the NLRB looks to for jurisdictional purposes:

> [The NLRB] early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for the purpose of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.
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> The principal factors which the Board weights in deciding whether sufficient integration exists include the extent of:
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> 1. Interrelation of operations;
> 2. Centralized control of labor relations;
> 3. Common management; and
> 4. Common ownership as financial control.
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> NLRB, 21st Annual Report, pp. 14-15.

Although some of the criteria are different,[12/] I cannot conclude that the Board intended to substitute the factors recited in Delfino for those relied upon by the NLRB. Indeed, the reason the Board declined to announce a mechanical rule in Delfino was because "patterns of ownership and management are so varied and fluid," Op. Cit. at p. 3, and the pattern perceptible in the Abatti operation is quite different from that found in Delfino. In Delfino it appears that the same business is made up, essentially, of four identical

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[12/] For example, both criteria require reference to labor relations policy but, where the NLRB looks to centralized control of labor policy, Delfino apparently looks to whether there is a common labor relations policy; where the NLRB looks to interrelation of operation! Delfino looks to similarity of operations.

parts; while, in this case, what stands out is the integration of two functionally different parts. For the reasons stated below, I conclude that Abatti Farms, Inc., and Abatti Produce, Inc., are joint employers.

COMMON OWNERSHIP

There is no question that Farms and Produce have common ownership. Ben and Tony Abatti are the only two stockholders, each of them owning 50% of each corporation.

COMMON CONTROL

A finding of common ownership is not, of course, conclusive as to any of the other criteria in that common ownership implies only potential, rather than actual, control over each other's operations.

> But while the power to control on all levels may be a concomitant of common ownership or financial control, and so embraced within that particular Board criterion, the actual exercise of that power is not. The other criteria deal not with power and authority as such, but with its exercise. Thus, interrelationship of operations, centralized control of labor relations, and common management, on any level, are considerations in addition to the factor of common ownership or financial control. Sakrete of Northern California v. NLRB, (9th Cir.) 332 F.2d 902, 907, 56 LRRM 2327, at 2329 cert, den. 379 U.S. 961.

The testimony of Ben Abatti established that the brothers, each of whom is mainly responsible for the day-to-day operations of one of the corporations, consult nearly daily in order to coordinate the operations of both. Furthermore, they consult on, and jointly make, major decisions. There is sufficient evidence to conclude that, on two levels, the daily, as well as on the critical, policy level, there is mutuality of control.

LABOR RELATIONS POLICY/INTERRELATIONS OF OPERATIONS

The NLRB considers common control of labor relations policy "a critical factor in determining whether separate legal entities operate as a single employing enterprise. . ." Gerace Construction, Inc., 193 NLRB No. 91, p. 645. Nevertheless,

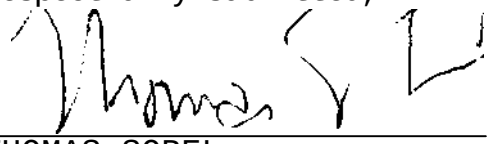
> "the presence or absence of a common labor relations policy is not conclusive in determining whether separate legal entities constitute a single employer. . . The Board has on several occasions made a finding of a single employer status in the absence of evidence of a common labor relations policy, and has found two corporations to be a single employer even though it was affirmatively shown that each corporation established its own labor relations policy. Thus, to accord less weight. . . to other evidence establishing close control through common ownership and management is not only contrary to Board policy, but would also ignore the realities of commercial organization. Canton Corps, 125 NLRB No. 55, pp. 483-84."

In this case, the employees of Produce have had a union history, while those of Farms have had none. Testimony also reveals that each of the brothers is primarily responsible for the labor relations of the corporation of which he is president. To concentrate on these differences, however, is to ignore the reality that these two separate organizations, which perform custom work for the partnership above them, as it were, are parts of the same machinery. As parts of such an enterprise, it strains my credulity to believe that labor relations policy is worked out in absolute isolation

by each of the brothers for himself. [13/] Accordingly, I conclude that the operations are so interrelated from the point of view of "the realities of commercial organization" that Abatti Farms and Abatti Produce should be considered a single employer. Therefore, under the ALRA, the bargaining unit shall consist of the employees of both of them.

I recommend the election be certified. DATED: July 19, 1977

Respectfully submitted,



THOMAS SOBEL
Investigative Hearing Examiner

[13/] See NLRB v. Royal Oak Tool and Mach. Co., 320 F.2d 77 (6th Cir. 1963), in which the Court says, at p. 81.

> It requires a greater degree of credulity than is possessed by this Court to accept the view that [the subsidiary's operating officers] could inaugurate or establish a labor policy. . . that did not meet with the absolute approval of the board of directors [of the parent company].

So in this case, the partnership's interests - since it is from that entity that Ben and Tony Abatti draw their livelihood -could not be far from either of the brother's minds in making decisions as to each of the corporate entities.