(Merced, California)

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

STRIBLING'S NURSERIES, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner, and WESTERN CONFERENCE OF TEAMSTERS, Intervenor.	)	Case No. 76-RC-7-F 4 ALRB No. 50

DECISION ON CHALLENGED BALLOTS

Following a petition for certification filed by United Farm Workers of America, AFL-CIO (UFW), a representation election was conducted on February 3, 1976 among the employees of the Employer. The tally of ballots served upon the parties that day showed the following results:

UFW	81
WCT	1
No Union	81
Void	1
Challenged Ballots	23

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director conducted an investigation pursuant to 8 Cal. Admin. Code Section

20363(a), and issued his Report on Challenged Ballots on January 25, 1977 and served it on January 26, 1977. He recommended that the challenges to the ballots of the nine voters listed in Schedule A (attached) be overruled and that their ballots be opened and counted, and that the challenges to the ballots of the five voters listed in Schedule B (attached) be sustained and their ballots not counted. No exceptions having been taken to this portion of the Report on Challenged Ballots, we adopt the Regional Director's recommendations, and order that the ballots of the nine voters listed in Schedule A be opened and counted and that the ballots of the five voters listed in Schedule B not be counted.

The UFW excepted to the Regional Director's additional recommendation that the ballots of the nine landscaping employees listed in Schedule C (attached) not be counted. Pursuant to the May 17, 1977 Order of the Executive Secretary, an investigative hearing was scheduled with respect to the challenges to the ballots of the Employer's landscaping employees. The issues at this hearing were limited by the Executive Secretary's order to: (1) the amount of time spent by each landscaper on horticultural and non-horticultural work; (2) the corporate relationship between the landscaping and ranch operations before and after November 1976; and (3) whether the nine landscaping employees listed in Schedule C qualify as agricultural employees eligible to vote under the Agricultural Labor Relations Act. The hearing was held before Investigative Hearing Examiner (IHE) Vincent A. Harrington, Jr., and the IHE's Initial Decision (attached) was issued and served by the Executive Secretary on July 28, 1977. The Employer excepted

to the IHE's recommendation that the ballots of the landscaping employees be opened and counted.

The Board has considered the record, the attached Report on Challenged Ballots and the IHE's Initial Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Regional Director and the IHE with regard to the landscaping employees to the extent they are consistent with this opinion.

The IHE found that the landscaping division was operated in conjunction with and as an incident to the Employer's nursery, that this was a "mixed-work" case, and that the ballots of the landscaping employees should be opened 'and counted. We disagree.

We start with the language of the statute, which provides in pertinent part:

> The term 'agricultural employee' or 'employee' shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 152(3), Title 29, United States Code, 29 USCS S 152(3) and Section 3(f) of the Fair Labor Standards Act, Section 203 (f), Title 29, United States Code, 29 USCS S 203 (f).

Thus, those employees covered by the NLRB fall outside this Board's jurisdiction.

While not all its decisions are crystal clear, the NLRB has developed two lines of cases in defining its jurisdiction in this area. One line of decisions applies to employees who divide their time between agricultural and non-agricultural duties. Such mixed-work employees, who engage in a regular and substantial

amount of non-agricultural activity, will be found to be subject to NLRB jurisdiction only for that portion of the time they are engaged in non-agricultural tasks. See Olaa Sugar Co., Ltd., 118 NLRB 1442 (1957).

In the second line of cases, the NLRB focuses on the operation itself and uses a variety of tests to determine whether it is a commercial or agricultural operation. For example, if the Employer's practice is adopted to change the form of or to add greater value to the farm products, DiGiorgio Fruit Corp., 80 NLRB 853 (1948), or involves the regular processing or handling of substantial amounts of commodities not grown by the Employer, Garin Co., 148 NLRB 1499 (1964), the Employer's operation will be deemed commercial and the employees will be treated as completely covered by the NLRB. Since at least 35% of the horticultural goods used by the landscaping division were grown by sources other than the Employer, it follows that the landscaping operation is commercial and that the landscaping employees are outside our jurisdiction.

Our dissenting colleagues have erred in accepting the IHE's finding that the landscaping division was operated in conjunction with and as an incident to the Employer's nursery.[1/] Examination of the totality of the circumstances reveals that

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[1/] A critical fact ignored in the dissenting opinions is that the employees at issue here worked exclusively for the landscape division. They did not divide their time between the landscaping

(fn. Cont. on p. 5)

the landscaping division was separately organized as an independent productive activity. The landscaping division was not dependent on the nursery for labor. There was no interchange of employees between the landscaping and the other divisions, and personnel decisions for the landscaping division were made by its own manager, This independence was underscored by the use of substantial amounts of non-employer grown horticultural commodities.

We therefore sustain the challenges to the votes of the landscaping employees and order that the ballots of the nine employees listed in Schedule C not be counted.

The Regional Director is hereby ordered to open and count the ballots of the voters named in Schedule A attached hereto. An amended tally of ballots shall thereafter be issued and served upon all parties.

DATED: July 21, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

(fn. 1 cont.)

operations and the growing operations. Thus, we are faced with virtually identical situations as were presented in Carl Joseph Maggio Inc., 2 ALRB No. 9 (1976), Mr. Artichoke, Inc., 2 ALRB No. 5 (1976), and McFarland Rose Production Co., 2 ALRB No. 44. See also Kitayama Bros. Nursery, 4 ALRB No. *3* (1978) , in which both our dissenting colleagues participated in a unanimous opinion, upholding the Regional Director's finding that an employer-owned wholesale outlet was a commercial enterprise because there was no interchange of workers and 19% (as opposed to 35% in the present case) of the goods sold were from vendors other than the employer.

SCHEDULE A

CHALLENGES OVERRULED - NO EXCEPTIONS

BALLOTS TO BE OPENED AND COUNTED

1. Apolinar Perez
2. Tony Rodriquez
3. Alton Lee Farmer
4. Conrad Max Levy
5. John Richard Martinez
6. Otis L. Morris
7. Jesus Jose Meraz
8. Mary Zamudio
9. Jesus M. Gonzalez

SCHEDULE B

CHALLENGES SUSTAINED - NO EXCEPTIONS

BALLOTS NOT TO BE OPENED OR COUNTED

1. Santiago Andrade
2. Mike Camino
3. Helen Fugate
4. Jesse D. Gonzalez
5. Kathy Kaspar

SCHEDULE C

LANDSCAPING EMPLOYEE CHALLENGES - SUSTAINED PER OPINION

BALLOTS NOT TO BE OPENED OR COUNTED

1. Sylvester Cisneros
2. Gerardo Lozano
3. Anne Marie Gonzalez
4. Richard Lane
5. Ken Embshoff
6. Inez Ramirez
7. Steve L. Woods
8. Ben Duenas
9. Lawrence Ramirez

MEMBER PERRY, Concurring and Dissenting in Part:

I dissent on the issue of the eligibility of the landscape employees. I would uphold the IHE who found, based on the totality of the evidence and on Labor Code Section 1140.4 (b) that the landscaping division was not separately organized as an independent productive activity at the time of the election.

In reaching its conclusion that the landscaping employees work in a commercial enterprise outside the jurisdiction of the Board, the majority emphasizes that 35% of the nursery goods handled by the landscaping employees were purchased from sources other than the Employer's nursery operation and overturns the IHE by finding that the landscaping department is largely separately organized from and independent of the Employer's nursery operation. I believe the majority is ignoring a record which clearly establishes that at the time of the election the landscaping division was an integral element of this nursery's operations. The IHE specifically found the department "functioned as a means of providing year-round

employment in an industry which was seasonal in nature in many respects, and as a source for sales of company products and services; ... the division ... did provide an additional sales outlet for company products, and projects were designed to use the nursery's plant list; ... a substantial portion of the tasks performed by the division employees were agricultural in nature within the meaning of 29 CFR Section 680.206(a) and (b), and the employees in the division therefore shared a similarity of interests with other nursery employees in connection with this work." See IHED at p. 14. The record shows that as of the date of the election the landscaping division was a minor part of a family operation devoted to producing and growing horticultural goods. While the landscaping division was a relatively small sales outlet, it was integrally related to the nursery operation. This indicates that the landscaping division was used as part of the subordinate marketing operations of the grower, and consequently constituted a practice performed as an incident to and in conjunction with the Employer's primary agricultural activity, 29 CFR Section 780.206(a), I would therefore find the landscape employees are engaged in agriculture and overrule the challenges to their ballots.

I believe the majority is misdirected in its emphasis of the fact that 35% of the nursery goods handled by these employees are not purchased from their own employer. What I find to be most compelling in resolving the issue of whether or not we should exercise jurisdiction over these employees is the fact that they engage in a regular and substantial amount of agricultural work.

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The decisions of the NLRB [1/] regarding whether or not they will assert their jurisdiction ever workers whose tasks include agricultural work are not sufficiently well-defined that we may absolutely predict that it would find the landscaping operations of Stribling Nursery to be commercial rather than agricultural. Rather than create a situation where these workers would "fall through the crack' between the ALRA's and NLRA's respective jurisdictions, I would find that because these workers were engaged in a regular and substantial amount of agricultural work that was an incident to and in conjunction with the Employer's primary agricultural operations, that they are agricultural workers within the meaning of Section 1140.4 (b) and are therefore eligible voters.

Dated: July 21, 1978

HERBERT A. PERRY, Member

[1/] See Kelly Bros. Nurseries, Inc., 341 F.2d 433, 58 LRRM 2426 (2 Cir. 1965); Light's tree Company, Inc., 194 NLRB 229, 78 LRRM 1528 (1971); and Truckee-Carson Irrigation District, 164 NLRB 1176 (1967).

MEMBER RUIZ, Concurring and Dissenting in Part:

I also dissent on the issue of the eligibility of the nine landscape division employees and, like Member Perry, would uphold the Investigative Hearing Examiner's conclusion that they are agricultural employees within the meaning of Section 1140.4(b) of the Labor Code and thus eligible to vote in this election. It is clear from the record that Stribling's Nurseries, Inc., operates a subordinate landscape division incidental to and in conjunction wit its horticultural nursery operation. Neither the occasional use of purchased, non-Stribling grown green goods to fill out orders, nor the infrequent incidental performance of nonagricultural work, such as fencing and stone work, transform the Stribling landscape department into either a separate commercial enterprise or a distributor or processor of agricultural commodities. Farmer's Reservoir v. McComb, 337 U.S. 755 (1949); Walling v. Rocklin, 132 F.2d 3 (8th Cir, 1942}; Light's Tree Co., 194 NLRB 229, 78 LRRM 1528 (1971).

Stribling's Nurseries has operated since about 1911 as a

family business. The nursery has had a landscaping component since its earliest days developed as a means of marketing the material grown by the nursery and as a vehicle for promoting income and activity on a year round, rather than seasonal, basis. The landscaping department is a relatively small sales outlet of the overall nursery operations. In 1974-75, it apparently employed only nine landscape workers, out of over 170 other employees eligible to vote in the 1975 ALRB election. Hiring and firing is by department head with interchange of management personnel who rotate from department to department. The IHE found this degree of autonomy in personnel matters to be typical of the various departments of the nursery.

The work of the landscape employees is generally considered as agricultural, that is, ground preparation, planting, of horticultural goods and activity necessary to insure the development and proper growth of the stock on the premises of the nursery customers. Several witnesses agreed that in a typical five-day week of a landscape employee, approximately three to three and a half days would be spent in preparation of the ground, and the remaining one and a half to two days would be spent in actual implantation of growing material. Only occasionally, and generally in connection with plantings installed by the department, would landscaping employees perform such work as installation of redwood fences and decking, construction of cement forms for terraces and retaining walls, and installation of natural gas lines for outdoor cooking or of outdoor lighting as part of an overall landscaping job. In a recent case, the NLRB has declined to take jurisdiction.

of nursery and landscape workers involved primarily in planting and tending nursery-grown goods on its customers' premises, despite a small amount of nonagricultural work such as fencing and stone work performed by the landscapers in conjunction with and incidental to their landscaping work. Light's Tree Co., supra.

The landscape division bids for jobs and designs its projects with the nursery's plant list in hand and the policy is to use these Stribling goods wherever possible. The nursery does not grow grass seed, sod or ground cover and, when needed on a project, these must be purchased from outside sources. The nursery grows approximately 1,000 varieties of bushes, plants, and trees. According to the IHE, these items are purchased from outside sources only on occasion when "due to season, factors not contemplated when the bid was made, or unusual specifications, the material cannot be found at the nursery when performance is required."

Section 1140.4(b) of our Act requires that this Board follow the policy of the NLRB in being guided by the definition of "agriculture" provided in Section 3(f) of the Fair Labor Standards Act. Section 3(f} of the Fair Labor Standards Act reads, in pertinent part, as follows:

> ... agriculture, includes fanning in all its branches and among other things includes ... the production, cultivation, growing and harvesting of any agricultural ... commodities, ... and any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations .... FLSA of 1938, Section 3(f), Title 29 C.P.R. sec. 203 (f).

Commenting on that definition in Farmers Reservoir Irrigation Company v. McComb, 337 U.S. 755 (1949), the U.S. Supreme Court said:

> As can be readily seen this definition has two distinct branches. First, there is a primary meaning. Agriculture includes farming and all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is a broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, which are performed either by a farmer or on a farm, incidental to or in conjunction with "such" farming operations. Id. at 762.

The courts have held that work may qualify as a practice incident to or in conjunction with farming only if it is performed by a farmer or on a farm and is incidental to "such" farming operation. From the inception of the FLSA an essential requisite of the exemption has been that the incidental activity must be that of the farmer, not that of the farming operation of other farmers. Thus, the processing on a farm of commodities produced by other farmers is considered incidental to or in conjunction with the farming operations of the other farmers and not of the farmer on whose premises the processing is performed. The processing of commodities of other farmers is not, therefore, within the definition of agriculture under the Fair Labor Standards Act. Bowie v. Gonzales, 117 F.2d 11 (1941) (sugar mill processing non-employer grown sugar cane into molasses and raw sugar on a commission basis not incidental to agriculture); see also Mitchell v. Huntsville Wholesale Nurseries, 267 F.2d 286 (urban nursery warehouse for storage, and distribution of nonemployer grown goods not incidental to agriculture); Mitchell v. Hunt, 263 F.2d 913 (5th Cir. 1959) (auction barn on premises of rancher-operator where most of livestock sold belongs to farmers other than the operator not incidental to agriculture); Garin Co., 148 NLRB

1499 (1964) (packing shed packing nonemployer grown goods, receiving a fee for that service, not incidental to agriculture).[1/] In these cases, the sugar processing mill, nursery warehouse, or packing shed is conceived of as a separate commercial enterprise.[2/]

[1/] In Farmer's Reservoir, supra, the Supreme Court confronted the distinct though related threshold problem of whether a particular type of activity is essentially agricultural or has become a separately organized industrial enterprise. The court stated in this connection:

> Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their economic routine .... Thus the question as to whether *a* particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a powerplant and the packer in a fertilizer factory are not employed in agriculture even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture. Supra, at 760-762.

[2/] As noted by the majority, a separate, though frequently related, line of NLRB cases concern the so-called "mixed work" situation in which an employee divides his or her work time between agricultural and industrial work. An example is the employee who works part of the year in the fields and part of the year in a commercial packing shed. In Olaa Sugar Co., Ltd., 118 NLRB 1442 (1957), the NLRB held that mixed-work employees who engage in a regular and substantial amount of nonagricultural work will be found subject to NLRB jurisdiction (and may thus be represented by an industrial union)

[fn. 2 cont. on p. 14]

Yet, in cases decided under the Fair Labor Standards Act,the courts early recognized as distinguishable the purchase of

[fn. 2 cont.]

with respect to that nonagricultural work.

Confusion has resulted from the NLRB's apparent application of the mixed-work principle to nursery warehouse employees in the Kelly Nurseries case. NLRB' v. Kelly Bros. Nurseries, 341 F.2d 433(2nd Cir. 1965}, 58 LRRM 2426, denying enforcement of 140 NLRB 82 (1962). Kelly, supra, the NLRB concluded that a nursery warehouse for packing and grading and storage of green goods was operated incidental to and in conjunction with the nursery's horticultural operations, largely carried out in adjacent fields. The employees generally divided their time between field and warehouse work, largely rotating on a seasonal basis. Twenty-eight percent of the employer's warehouse sales were of nonemployer-grown green goods also stored and graded for sale at the warehouse. The Board reasoned that, under mixed-work principles, the NLRB had jurisdiction of the employees to the extent that they engaged in nonagricultural work, that is, to the extent that they handled nonemployer-grown goods at the warehouse. Further, as nonemployer and employer-grown goods were thoroughly intermingled at the warehouse, the Board concluded that its jurisdiction extended to more or less all warehouse work. 140 NLRB 82. The Board's bargaining order was denied enforcement by the Second Circuit. 341 F.2d 433. The court found the Board's mixed-work analysis inappropriate, and further held that the amount of nonagricultural work done by the warehouse employees was insufficient to warrant the NLRB's assumption of jurisdiction in the case. The court found the warehouse operation to be agricultural, noting the Board's concession that the warehouse functioned incidentally to and in conjunction with the horticultural operations. The court emphasized that Congress did not, by enacting riders incorporating the Fair Labor Standards Act's definition of agriculture, mean to relieve the Board of the task of developing an approach to the mixed-work question that would be suitable in light of the principles, policies, and administrative problems of the NLRA, and to permit instead the mechanical adoption of practices developed by the Department of Labor to meet the altogether different problems of the Fair Labor Standards Act.

In Light's Tree Co., 194 NLRB 229, 78 LRRM 1528 (1971), the NLRB, following the Second Circuit's admonishment in Kelly, supra, declined to assert jurisdiction over the employees of a nursery's subordinate landscape operations, though the employees performed a small amount of nonagricultural work (incidental fencing, stone work, and so forth). Kelly, supra, and Light' s Tree Co., supra, indicate, nonetheless, a tendency by the NLRB to consider nursery landscape and warehouse operations as agricultural rather than separate commercial enterprises.

nursery goods to fill orders when necessary due to seasonal fluctuations, crop failures, and other emergencies. Such purchase of nonemployer-grown green goods to round out orders and fulfill the incidental needs of customers does not defeat the agricultural exemption or transform what is otherwise a subordinate marketing operation incidental to a horticultural enterprise into a separate commercial business. Walling v. Rocklin, 132 F.2d 3 (8th Cir. 1942) (greenhouse shop purchased outside flowers when necessitated by weather, etc., to enable company to satisfactorily keep its wholesale customers supplied when in need so as to hold their trade), followed in Damutz v. William Pinchbeck, Inc., 158 F.2d 882 (2nd Cir. 1946); Mitchell v. Hornbuckle, 155 F.Supp. 205 (M.D. Ga. 1957); Wirtz v. Jackson & Perkins Co., 312 F.2d 48 (2nd Cir. 1963). The logic of these cases is persuasive here. Stribling does not process the crops of other growers for a fee or commission, nor regularly purchase, store and grade for sale green goods of other nurseries. Here, too, the fact that some nonemployer-grown products are occasionally used in filling orders is insufficient to make this incidental operation a separate commercial enterprise or to transform Stribling into a distributor of agricultural commodities.

The landscaping division bids for jobs and designs its projects with the Stribling Nursery's plant list in hand. There is a company policy to use intracompany goods wherever possible. In the fiscal year 1975-76, the division purchased roughly 40 percent of its green goods outside the company; but there were no comparable figures for other years. It is one thing to find that a

roadside stand whose sales involve 40 percent of the employer's agricultural products and 40 percent of other commercial nonagricultural products is not incidental to the employer's farming operation [Mr. Artichoke, Inc., 2 ALRB No. 5 (1976)], or that a packing shed designed to handle not only the produce of an employer but also those of other growers in which the employer has no financial interest is a commercial shed outside the jurisdiction of the ALRB [Carl Joseph Maggio, Inc., 2 ALRB No. 9 (1976)]; it is quite another thing to label a landscaping department that operates in conjunction with and as an incident to a nursery a commercial operation because it uses nursery goods produced by other nurseries to fill a customer's order, only after it cannot first fill that order from approximately 1,000 varieties of bushes, shrubs, trees and plants its parent nursery produces.

I, too, would find that these workers are agricultural employees within the meaning of Labor Code Section 1140.4(b) and are therefore eligible voters.

Dated: July 21, 1978

RONALD L. RUIZ, Member

CASE SUMMARY

Stribling's Nurseries, Inc. (UFW) 4 ALRB No. 50
Case No. 76-RC-7-F

REGIONAL DIRECTOR'S REPORT

An election was conducted on February 3, 1976. The challenges being outcome determinative, the Regional Director issued a report recommending that the Board sustain objections to 14 ballots and overrule objections to 9 ballots. The UFW excepted to the recommendation that the challenges to the ballots of 9 landscapers be sustained. The Regional Director had found that the landscape employees were non-agricultural employees outside the Board's jurisdiction.

IHE REPORT

Pursuant to a Notice of Investigative Hearing, a hearing was conducted regarding the status of the landscaping employees and the IHE issued his decision, finding said employees to be agricultural employees and recommending that their ballots be counted. The IHE found that the landscaping division was not separately organized as an independent productive activity, but rather was operated in conjunction with and as an incident to the nursery. Acknowledging that the facts presented a mixed-work case, he found that the bulk of the division's purchases were intra-company in nature and that sprinkler installation was agricultural work when performed in connection with horticultural tasks. The IHE concluded that the convergence of federal and state policies militate in favor of state coverage even where simultaneous federal and state coverage results.

BOARD DECISION

The Board decided that the landscaping division is a commercial operation which was separately organized as an independent productive activity, and that consequently the landscaping employees are outside its jurisdiction. In reaching this conclusion the Board examined the totality of the circumstances and stressed that *at* least 35% of the horticultural goods used by the landscaping division were grown by non-Employer sources, and that the landscape employees worked exclusively for the landscaping division of the nursery. The Board found the situation to be similar to that in Carl Joseph Maggio, Inc., 2 ALRB No. 9 (1976), Mr. Artichoke, Inc., 2 ALRB No. 5 (1976), and McFarland Rose Production Co., 2 ALRB No. 44 (1976), and it also cited Kitayama Bros. Nursery, 4 ALRB No. 8 (1978).

DISSENTING OPINIONS

Member Ruiz dissented, arguing that the landscaping division is operated in conjunction with and as an incident to the nursery operation, and that since the division only used non-Employer horticultural goods when the Employer's own stock of 1,000 varieties proved inadequate, the use of non-Employer horticultural goods should not result in a finding that the employees were non-agricultural employees, citing Walling v. Rocklin (8th Cir. 1942), 132 F.2d 3; Damutz v. William Pinchbeck Inc. (2nd Cir. 1946), 158 F.2d 882; Mitchell v. Kornbuckle (M.D. Ga., 1957), 155 F.Supp. 205; Wirtz v. Jackson & Perkins Co. (2nd Cir. 1963), 312 F.2d 48.

Member Perry dissented, arguing that the landscaping division was not separately organized from and independent of the nursery operation, but rather was integrally related to the nursery, operation, and constituted a subordinate marketing operation under 29 CFR Section 780.206(a). The Board Member declined to rely on the landscaping division's use of substantial amounts of non-Employer horticultural goods, noting that the landscaping employees were engaged in a regular and substantial amount of agricultural work that was an incident to and in conjunction with the Employer's primary agricultural operations, that NLRB law in the area was not sufficiently well-defined, and that jurisdiction should be asserted so that the employees would not fall in the crack between ALRA and NLRA jurisdiction.

This summary is furnished for information only and is not an official statement of the Board.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

STRIBLING'S NURSERIES, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner, and WESTERN CONFERENCE OF TEAMSTERS, Intervenor.	No. 76-RC-7-F HEARING EXAMINER'S INITIAL DECISION

William S. Marrs, Esq.
Berkeley, California, for
the Employer 1/

Glenn Ro timer, Esq.
Salinas, California, for
the Petitioner

VINCENT A. HARRINGTON, JR., Investigative Hearing Examiner: This matter came on for hearing before me in Merced California, on June 21, 1977. The hearing was to determine the challenges to the ballots of nine landscape employees of the employer. Pursuant to a Notice of Investigative Hearing dated May 17, 1977, the issues were as follows:

1/ E. Dean Price, Esq., appeared at the hearing on behalf of the Willis Stribling Nursery Co., Inc., a successor in interest to a portion of the employer's business organization, in response to a subpoena directed to that company for certain business records. Mr. Price did not actively participate in the hearing and left upon the UFW's representation, that it was satisfied that its subpoena ha been complied with.

(1) The amount of tine spent by each landscaper on horticultural and non-horticultural work;"

(2) The corporate relationship between the landscaping and ranch operations before and after November, 1976;

(3) Whether the nine landscapers qualify as agricultural employees.

The Western Conference of Teamsters failed to appear. All other parties were represented by counsel and were given *s.* full opportunity to participate in the hearing.[2/]

Upon the exhibits, the stipulations of the parties and ray observation of the demeanor of the various witnesses, I make the following recommenced:

FINDINGS OF FACT

Background

An election was conducted among the employees of the employer on February 3, 1976. The tally of ballots served upon the parties that day showed the following results:

UFW	81
WCT	1
No Union	81
Void	1
Challenged	23

On January 26, 1977, the regional director served his report regarding the twenty-three challenged ballots No exception was taken to his recommendation that the ballots of nine voters be opened, or to the recommendation that those of five others not be counted. The ballots of the nine landscape employees thus remain determinative.

[2/]The substance of the employer's Motion to Partially Revoke the Subpoena was resolved by the parties and I consider the motion to have been withdrawn.

The Employer's Operations

Members of the Stribling family have been, involved in the nursery business to one degree or another, and in various commercial forms, since approximately 1911. There has been a landscaping component of the company since its earliest days. It was developed as a means of marketing the material grown by the nursery and as a vehicle for promoting income and activity on a year-round, rather than a seasonal basis.

The present corporation came into existence on or about December 19, 1958. The stated general aim of the corporation was "...to engage in general farming and growing nursery stock, and to conduct a general wholesale and retail nursery and merchandising business, including the sale of garden and nursery stock, supplies, and equipment, and to provide landscaping service." (EX. 1).[3/]

The corporation operates on a fiscal year from September to August 31, and yearly meetings of the shareholders are conducted in November of each year. The employer is a closely held corporation. The stipulation of the parties reflects that all shares in the corporation are owned by members of the Stribling family or those related by marriage. The officers and directors are also drawn from this group. Prior to, and at the time of, the election, the landscape department was one of the seven operational divisions of which the employer was composed. The others were: ornamental production, deciduous production, wholesale sales, general administration, propagation, and retail store. The deciduous and ornament

[3/] The following system is used herein to refer to exhibits. Employer's exhibits shall be denoted "EX.--" and Board exhibits "BX---

production units were located at the same site; the wholesale sales and general administration shared a second location; the propagation, retail store and landscaping divisions were at a third. (EX. 3). The propagation division, located with the retail store and landscape departments, provides its services to both the ornamental and deciduous production units.

On December 13, 1976 the shareholders and the corporation entered into an agreement to transfer the retail store and landscape division to one of the stockholders in return for stock and other valuable consideration. (EX. 2). This reorganization was accomplished in January, 1977 with the creation of the Willis A. Stribling Nursery Co., a California corporation, composed of these two portions Stribling's Nurseries, Inc. I do not, however, consider this fact to be of relevance to the issue of the status of the landscapers on February 3, 1976, the date of the election. Developments of this sort subsequent to the date of the election are properly subjects for collective bargaining or proceedings to clarify the unit, should certification eventually issue.

The company raises approximately 1,000 varieties of bushes, shrubs, trees and plants. It does not stock lawn seeds, or grow ground cover or sod. The bulk of its business is wholesale merchandising of its products to large chain store customers, as well as to "jobbers" and broker nurseries. The landscape department was billed as a jobber or nursery, that is, list less 20 percent. In fiscal year 1974-75 the wholesale sales charged to the landscape division represented slightly more than five-

tenths of one percent of the total of such sales during the period. Compare EX. 7 with EX 9. In the following year the percentage declined to slightly less than four-tenths of one-percent of such sales. Compare EX. 6 with EX. 8.

The landscape department was separately organized to the extent that actual hiring and firing is handled by the department head, apparently without individualized input from the general administration. The general manager did however, meet on a regular basis with, the department head and review general budgetary and personnel needs, as well as the profitability of job bids contemplated by the landscape department. This degree of autonomy in personnel matters was apparently typical of the various departments within the nursery. As a matter of practice, stockholders and officers do rotate in and out of supervisory positions in the various departments including landscaping.

The employer's business records are not organized in such a way as to reflect separate labor costs, for the specific tasks performed by the landscape employees on a given job. It is, therefore, not possible to clearly establish by reference to the records the amount of tine spent by the employees in the performance of horticultural and non-horticultural work. However, estimates were offered by witnesses, and other inferences may be drawn, from the records in evidence. Willis A. Stribling, now President of Willis Stribling Nursery Co., and in 1975 and years previous, Vice President of Striblings Nurseries, Inc., and officer-in-charge of the landscape division testified at length. He was unable to provide

an estimate of the amount of time spent by the employees in handling the sprinkler systems. He did, however, estimate that the cost of the material for such systems constituted approximately 70 percent of the total for so-called "hard goods" reflected in the 1975-76 profit and loss statement for the division. (EX. 5). He also offered as a rule of thumb in the industry for rough cost estimating, the guide that for each $1,000 in material costs one should anticipate $1,000 in labor costs. Records of a residential landscaping job performed by the division in the fall of 1975 were examined on Stribling's representation that it revealed the general pattern of the work performed by the division. The job was a complete one; i.e., it included ground preparation, installation o£ a sprinkler system and landscape planting of bushes, trees and lawn. (Approximately 70 percent of the jobs undertaken by the division involve the installation of sprinkler systems.) The costs related to the lawn seeding totalled $962, of which, $420 was for labor. Costs related to shrubbery totalled $797, of which $378 was for labor. Costs connected with the sprinkler system (front and back yards) totalled $1,708, of which $981 was for labor.

Of the total labor cost on this job, it would appear that slightly more than 55 percent may be attributable to the sprinkler installation, and roughly 24 percent may be attributed to the lawn. The remaining 21 percent is most obviously directly traced to the green goods installation. However, it. was acknowledged by several company witnesses that figures regarding sprinkler installation costs are ambiguous because a significant amount of such costs would be incurred if planted material only, and not

sprinklers, were called for. It is also true that at times the installation of a sprinkler system creates additional labor costs which would not otherwise exist, due to the need to grade the property to ensure a system which functions properly. In view of these variables, these figures provide only the most general guidelines and cannot be heavily relied upon. Several witnesses did, however, agree that in *a* typical five-day week, approximately three to three and one-half days would be spent in preparation of the ground, with one and one-half to two days devoted to the actual implantation of the growing material.

The landscaping division bids for jobs and designs its projects with the Stribling's Nursery plant list in hand. The policy is to use these intra-company goods wherever possible. While the nursery grows approximately 1,000 varieties of plants, bushes, and trees, it does not handle ground cover, sod or grass seed. If contemplated in a project, these materials must be ordered from outside sources. This is also done on occasion with plants, bushes and trees where due to season, factors not contemplated when the bid was made, or unusual specifications, the material cannot be found at the nursery when performance is required. The division also orders the materials described in the evidence as "hard goods' from outside of the company. See EX. 5, item 4125. "Hard goods" does not, however, have the meaning a layperson might attach to it. The term encompasses all non-growing materials and therefore includes not only sprinkler pipe and fittings, but also fertilizers, for both lawns and plants, insecticides, wood chips, rock, and

various soil additives such as humus, sawdust, pine bark, shavings, cottonseed, hulls, and sand. In other words, much material apparently leered necessary for the proper care and nurture *of* the planted material, and not produced by Stribling. Presumably, similar materials are ordered from, outside sources and utilized by the nursery in the care and preservation of the stock which it grows for the wholesale market. As indicated above, Willis Stribling estimated that approximately 70 percent of the total of the amount labeled "hard goods" was attributable to purchases of sprinkler pipe and fittings.

The figures contained in EX. 5 indicate that in the fiscal year 1575-76 the division purchased a total of $52,122 worth of goods. Of this amount, $17,059 was for green goods, of which approximately 60 percent was Stribling grown. Assuming the correctness of Stribling's estimate, approximately $24,472 was spent on sprinkler pipe and fittings arid the remainder on the other miscellaneous hard goods indicated above, a substantial portion of which was utilized for the care and preservation of the Stribling-grown material.

In addition to the tasks associated with the ground preparation for, and the installation of, the green goods, lawns and the sprinkler systems, there is evidence of other tasks performed by the employees. The division contracted for maintenance of planted materials. The bulk of these contracts deal with landscapes previously installed by the division. A few such contracts, however, involved service and maintenance of plantings not installed by the division. In the period surrounding the election there were a total of approximately nine such contracts, of which perhaps one or two, related to plantings not installed by the division. In addi-

tion, the division performs pest control spraying, primarily for those plantings installed by it, but also for others. This is a service which has a seasonal aspect; in the winter months surrounding the election there were approximately 10 such contracts per month, but at other times of the year the number drops to 3 to 5 per month. There is no spraying during certain periods of the year. This service is not independently advertised. There was also testimony concerning landscape construction and other like tasks performed by the division. It would appear that the landscape employees are occasionally construct and install redwood fences and decking and construct-cement forms for terraces and retaining walls, etc. Thomas Stribling, now Vice President of the Willis A. Stribling Nursery Co., testified that he could recall one such job in the last quarter of the calendar-year 1975. The actual mixing and pouring of concrete is, however, subcontracted, and on other occasions, so is the above-described construction work. It was acknowledged that the company does not maintain a lumber yard or a stock of lumber at any of its premises. Approximately six times per year the division installs natural gas lines for outdoor cooking as a part of an overall landscaping job, and the installation of low-voltage outdoor lighting occurs in approximately one job in ten. The outdoor lighting installation is advertised as a separate service.

A fair summary of the evidence regarding the landscape employees is as follows. Since the earliest days of its existence the company has had a landscaping component. Within the recollec-

tion of the current officers of the company the landscaping group has been one among a number of operational departments within the company. The head of the landscaping department exercises authority to hire and fire within the department, bids on jobs and oversees the work of the division, subject to discussion with the general manager of general budgetary requirements, personnel needs and the profitability of the proposed bids. There is no evidence that non-supervisory personnel interchanged between the division and other operations of the company. Company officers did, however, rotate in and out of the division in various supervisory capacities. While it is true that in the fiscal year 1975-76 the division purchased roughly 40 percent of its green goods outside of the company, it does so as a matter of principle only where intra-company goods are not available. There are no comparable figures for other years. The total of the purchases of hard goods includes both sprinkler pipe and fittings and other material such as fertilizers, soil supplements and pesticides necessary for the proper planting, care and maintenance of the growing material. While it is true that some construction work is performed it is also sometimes subcontracted, and all cement work is subcontracted. Gas and electric lighting installation does occur, and the latter is separately advertised, but it does not represent a significant proportion of the total work done by the employees.

ANALYSIS AND CONCLUSIONS

The Board is bound by Labor Code Section 1140.4 (b) to interpret the scope of the definition of "agricultural employee"

in accordance with applicable Federal court, NLRB and U. S. Department of Labor Regulations construing Section 3(f) of the Fair Labor Standards Act 29 USC Section 203 (f). In Hemet Wholesale, 2 ALRB No. 24 (1976) the Board held that its jurisdiction precisely abuts that of the Federal system. The end result of the relation between, the two legislative schemes must therefore be that no class of worker gets "lost in the seam" between them. [3/] If the NLRB has extended its jurisdiction to a class of workers this Board is presumptively ousted of jurisdiction to that extent. If it has not, then the Board's task is to determine with reference to the other sources of authority whether it may assert jurisdiction over the employees.

A review of Congressional action in this area discloses that its intent has been to expand the agricultural exemption under the NLRA. The NLRB on the other hand, has on occasion been expansive in its attempt to assert jurisdiction over workers whose actual tasks overlap into the agricultural arena. In one significant case such an extension of jurisdiction in this mixed work area was overruled by the Court of Appeals for the Second Circuit. See NLRB v. Kelly Bros. Nurseries, 341 F. 2d 433, 53 LRRM 2426 (2nd Cir. 1965). The Court there stated that where nursery employees do some agricultural work and some non-agricultural work, the proportion, of time spent on non-agricultural tasks must represent

[3/] This analysis, of course, must accord recognition to the existence of the NLRB's jurisdictional standards regarding impact upon commerce between the states. These standards may result in that agency's declining to extend its coverage to certain employers.

more than a de minimis amount of *the* total work performed before the NLRB may properly assert jurisdiction. (The Court found it likely that no more than 14 percent of the employees' work time was spent handling non-agricultural products. The NLRB's emphasis upon the numerically larger percentage which the revenues from the sale of the non-agricultural products represented as regards the company as a whole was viewed, by the Court as unpersuasive.) The Court also rejected the NLRB's virtually total reliance upon the Department of Labor regulations under the FLSA in situations of mixed work. While holding that the regulations should be given great weight when the question is whether particular work is agricultural, it was the Court's view that these regulations did not relieve the NLRB of its independent obligation to fashion its own approach to the question of mixed work which was consonant with the legislative intent and the realities of labor relations.

In Light's Tree Company, 194 NLRB 229, 78 LRRM 1528 (1971), the NLRB appeared to adopt the Second Circuit's view of the role of the Department of Labor regulations and to modify its Olaa Sugar Co., Ltd. [4/] "regular amount rule" to require that any regular performance of non-agricultural work represent a significant proportion of the total annual work time of the employees. Light's Tree Co., supra, at 230. The NLRB dismissed the union's petition to represent nursery and landscape employees of the company, on the ground that they

[4/] 118 NLRB 1442 (1957).

were all exempt agricultural laborers. The employer was a nursery which grew trees, bushes, shrubs and ground cover. While some of its stock was sold through its retail store to the general public and some on a wholesale basis to other nurseries and landscapers, the bulk of the products grown were used in its own landscaping operations. The Board found that the landscaping employees planted mulched, watered and trimmed the stock on the premises of the customer and as well, spent approximately 10 percent of their time (inferred from the gross receipts for the horticultural work, separate billed) performing what the Board described as non-horticultural landscaping. This category encompassed the installations of sprinkler systems, erection of fencing, stone work and sodding.

This Board has also applied a standard in this area of mixed work. In Mann. Packing Co., Inc., 2 ALRB No. 15 (1976) and Prohoroff Poultry Farms, 2 ALRB No. 56 (1976) the Board held that where employees do both agricultural and non-agricultural work, whether they may be included in an agricultural unit is dependent upon whether the "bulk" of the work performed is incident to the agricultural undertaking. In Prohoroff the Board was careful to limit its holding to the facts of the case and did not announce a general rule. I do not find this analysis appropriate for this case. To the extent that it would require a finding that more than 50 percent of the work of the employees must be agricultural before any jurisdiction may be asserted it would appear to fall short of the statutory design that the MRA precisely meet the boundaries of the NLRA. Further, it articulates a substantially higher standard than that adopted by the NLRB without apparent rationale.

Based on the totality of the evidence available, and in light of the above authorities, I find that the landscaping division was net "separately organized as an independent productive activity" at the time of the election, [See Farmers Reservoir and Irrigation Co., Inc. v. McComb, 337 U.S. 755, 761 (1949)], but was rather operated in conjunction with and as an incident to, the nursery. I make the finding on the basis of the following factors: the company has historically had a landscaping component which functioned as a means of providing year-round employment in an industry which was seasonal in nature in many respects, and as a source for sales of company products and services; although not representing a substantial portion of the total wholesale sales of the company, the division nonetheless did provide an additional sales outlet for company products, and projects were designed to use the nursery's plant list; the division was operated as an integral element of the company operation in that there was interchange of management level personnel among the landscape division and other company divisions; the central management did establish general personnel and budgetary principles for the division and reviewed proposed bids for profitability; a substantial portion of the tasks performed by the division employees were agricultural in nature within the meaning of 29 CFR Sections 730.206(a) and (b), and the employees in the division therefore shared a similarity of interests with other nursery employees in connection with, this work.

The parties have directed much of their proof and argument to the proportion of time spent by the employees in handling and utilizing non-Stribling green goods, hard goods which were not

produced by the nursery and the proportion of monies spent by the division for outside purchases. On balance, the totality of these facts weigh, in my view, more heavily in favor of the eligibility of these workers, clearly in a mixed work situation, than against.

Intra-company purchases of green goods represent the bulk of such purchases made by the division. The evidence is clear that the proportion would be larger if it were possible: these good were purchased outside of the company only where no intra-company option existed. While a clear majority of the total purchases made by the division are for so-called "hard goods", as previously indicated, this category includes fertilizers, insecticides, etc., which were necessary for the proper planting, care and preservation of the planted material, the bulk of which is Stribling grown. Finally, while the estimate is that 70 percent of the total spent for hard goods is for sprinkler pipe and fixtures, I cannot read that as meaning that 70 percent of the employee's time is therefore spent installing sprinkler systems which are designed solely to water non-horticultural plantings; i.e., lawns, sod and ground cover. As previously discussed, much of the ground preparation entailed in sprinkler installation would be required even if plants only were to, be installed. Moreover, I do not accept the validity of Willis Stribling's estimate that $1,000 of material cost equals $1,000 of labor cost as applied to this issue. Logic suggests that the unit cost of items such as polyvinyl pipe and metal fitter cannot appropriately be compared to the cost of growing material. Nor do I accept the company's theory that all time spent handling and installing sprinkler systems is non-agricultural. The NLRB

casually referred to the installation of sprinkler systems as non-horticultural work like sodding, fencing and stone work in Light's Tree Company, supra, but in my view unwisely so. Sprinkler installation is not mentioned in the FLSA regulations as an example of the type of activity, which if principally performed by employees of the grower of the planted material, would operate to characterize the work as commercial landscaping rather than horticulture. See 29 CFR 780.206(b). On the other hand, as a node of irrigation, it is functionally similar to the tasks performed by irrigators, a class of employee within the sweep of the Act. Thomas A. Stribling testified that he considers sprinkler systems essential to the care and preservation of planted material in this climate and for that, reason he actively encouraged customers to install such a system as an element of their overall project. These factors suggest that the installation of such systems can fairly be characterized as one of the "...other duties incidental to [the] care and preservation" of the planted material. [5/]

The FLSA regulations indicate that the task of planting sod and sowing lawns is considered non-horticultural. Therefore, to the extent that sprinkler installation can be shown to be supportive of lawns and sod, it presumably would also be within the area of non-horticultural work. However, I find no facts from which I can infer what proportion of work time and material is devoted to the installation of sprinklers solely for the care and preservation of lawns and sod.

[5/]29 CFR 780.206(a).

This is a new law. Federal cases concerning this mixed work question were decided prior to the enactment of the ALRA. The choice in those cases was therefore whether any of the protections of the labor laws were to be afforded the employees in question. Despite the urgency of that issue the Second Circuit in Kelly Bros. Nurseries, Inc., supra, overturned the NLRB's exercise of any jurisdiction where approximately 14 percent of the employees' work time was non-agricultural. In Truckee-Carson Irrigation District, 164 NLRB 1176 (1967) the NLRB dismissed a petition where the amount of non-agricultural work performed by mechanics and, welders was approximately 20 percent of their annual total. In Light's Tree Company, Inc., supra, similar action was taken where 10 percent of the employees' time was spent in non-agricultural pursuits. While it is difficult to predict where the line is for the NLRB, it is clear that the Congressional policy has been to create a broad exemption from the NLRA. Agricultural labor relations is of peripheral concern to the Federal system, while it is of direct and immediate concern to the people of this State. The convergence of these policies militates in favor of expansive coverage of these employees in the mixed work context under the ALRA. Nor is there any real incompatibility between this stance and the operation of the Federal labor law system. To the extent that the division employees do, on a regular basis, perform work such as fence erection, deck and concrete form construction, outdoor lighting or gas installation, they would not be performing unit work and would presumably be susceptible of coverage by the NLRA. That this may mean that the same employees

might simultaneously be covered by both systems in this mixed work area seems an unavoidable result of the way the two statutes are related. The particulars of unit vs. non-unit work and the wages, hours and conditions of employment as regards each must, of necessity be left to future collective bargaining between the parties.

The status of employee Ann Marie Gonzalez must be separately considered. While the parties did not address themselves to the issue at the hearing, the regional director found her to be the secretary for the division. Accepting that as a fact, her membership in the unit is dependent upon a determination that her functions are subordinate to the operations of the agricultural enterprise. Dairy Fresh Products, Co., 2 ALRB No. 55 (1976). Having found the division to have been incidental to, and in conjunction with, the nursery, and a significant portion of the work of the division to have been agricultural, applying the common-sense notion of secretary, and absent evidence of confidential status, I find that employee Gonzalez is appropriately within the limit.

Recommendation:

I recommend that the ballots of the following employees be opened and counted:

Sylvester Cisneros
Gerarco Lozano
Ann Marie Gonzalez
Richard Lane
Ken Embschoff
Inez Ramirez
Lawrence Ramirez
Steve L. Woods
Ben Duenas

Dated: July 27, 1977

VINCENT A. HARRINGTON, JR.