Holtville, California

STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOE MAGGIO, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-19-E 5 ALRB No. 26

DECISION AND

CLARIFICATION OF BARGAINING UNIT

On December 21, 1976, we certified the United Farm Workers of America, AFL-CIO (UFW) as the collective bargaining representative of the agricultural employees of Joe Maggio, Inc. (Maggio), excluding workers in the packing house and vacuum cooler. On May 24, 1977, the parties executed a collective bargaining agreement to which they attached a letter of understanding. By this letter, they agreed to seek a unit clarification from the Agricultural Labor Relations Board as to whether a truck driver, the shop mechanics and the employees working in the topped-carrot harvest should be included in the bargaining unit.

After the UFW filed a petition for clarification of bargaining unit, a hearing on the matter was held before Investigative Hearing Examiner (IHE) Jim Denvir on January 18, March 9 and March 10, 1978. On June 6, 1978, the IHE issued the attached Decision. Maggio filed an exception, with a

supporting brief, to the IHE's conclusion and recommendation that the topped-carrot harvest workers be included in the bargaining unit. The UFW filed a brief in opposition to Maggio's exception.

The Board has considered the record and the IHE's Decision in light of the exception and the parties' briefs and has decided to affirm the rulings, findings and conclusions of the IHE and to adopt his recommendation.

Maggio grows topped carrots in Arizona and California. Prior to the 1976-77 season, it harvested its own carrots with single-row harvesting machines. In 1976, it entered into a written harvesting agreement with Taylor/Williams Harvesting (Taylor/Williams). Taylor/Williams agreed therein to harvest the topped carrots grown by Maggio in California. Maggio agreed to pay Taylor/Williams a set amount per ton of-harvested carrots plus costs, including labor. Taylor/Williams and Maggio entered into an oral contract for the 1977-78 season whereby Maggio agreed to pay Taylor/Williams $6.00 per ton of harvested carrots. This figure reflected the parties' experience under the previous season's contract. These agreements were beneficial to both parties because Taylor/Williams had, with the financial assistance of Maggio, developed a double-row harvesting machine which required a smaller work force than the single-row machines.

Taylor/Williams hired machine operators, tractor drivers and bagging-crew employees[1/] for the 1976-77 and 1977-78 harvests„ Almost all of these employees were hired from Maggio's

1/ The bagging crew walks behind the harvesting machines, picking up any carrots the machines leave behind.

other crews; most of them had worked in its previous carrot harvests and some had worked in its broccoli fields. Taylor/ Williams assumed supervisorial responsibility for these employees and carried them on its own payroll.

Taylor/Williams' participation in the harvest was limited to the actual picking. Joe Sandoval, a Maggio supervisor, set the daily tonnage to be picked and told Taylor/Williams which fields were to be harvested on a given day. Sandoval also set the irrigation schedule. The irrigation had to be timed properly to insure that the machines operated at maximum efficiency. After the carrots were picked, they were loaded into trailers owned by Maggio and hauled to its packing facilities by its own employees .

Maggio argues that the topped-carrot harvest workers should be excluded from the bargaining unit because Taylor/ Williams is their employer. To support its position, Maggio points to the equipment provided by Taylor/Williams, the supervisorial duties (including hiring and firing) assumed by Taylor/Williams, and the fee arrangement embodied in the unwritten 1977-78 harvesting agreement. The UFW argues that, notwithstanding the factors emphasized by Maggio, Maggio is the employer because of the control it exerts over the harvesting operation and the long-standing employment relationship between Maggio and the individuals in the topped-carrot harvest crew. The IHE concluded that the topped-carrot harvest workers should be included in the bargaining unit because Maggio is their

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agricultural employer as defined in Labor Code Section 1140.4 (c).[2/]

We face conflicting considerations when deciding whether the harvester or the crop owner is the agricultural employer of harvest workers. As a result, we do not look to any single factor but to the whole activity of each of the parties to decide which should assume the collective bargaining responsibilities. Napa Valley Vineyards Co., 3 ALRB No. 22 (1977). This approach best serves the purposes of the Act because it provides the most stable bargaining relationship. Gourmet Harvesting and Packing, 4 ALRB No. 14 (1978).

We conclude that Maggio is .the agricultural employer and that the workers in the topped-carrot harvest are included in the bargaining unit of its employees. The factors emphasized by Maggio are outweighed by the control which Maggio exerts over the harvest and by the ongoing employment relationship between Maggio and the individuals in the topped-carrot harvest crew.

[2/] Labor Code Section 1140.4(c) reads as follows:

> (c) The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

Maggio, relying on Kotchevar Brothers, 2 ALRB No. 45 (1976), argues that Taylor/Williams should be considered the agricultural employer because it provides highly specialized harvesting equipment. Although this is an important factor to be considered, it is not determinative in this case. There are countervailing considerations here which were not present in Kotchever. The harvester in Kotchevar played a larger role in the harvest operation than Taylor/Williams plays here. Furthermore, the employees in Kotchevar had their primary ties to the harvester; they followed the harvester from farm to farm and stayed only a few days at the fields of the crop owner. Here, the employees were hired from other Maggio crews and do not work for Taylor/Williams at any other location.[3/] In fact, some return to other work for Maggio after the carrot harvest is finished.

The payroll and supervisorial services (including hiring and firing) provided by Taylor/Williams do not change the result. Although important, these services are not unique to custom harvesters but are often provided by labor contractors excluded from the statutory definition of "agricultural employer". In Cardinal Distributing Co., 3 ALRB No. 23 (1977), we found the harvester to be a labor contractor and not the agricultural employer despite its maintenance of a payroll and its day-to-day

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[3/] Taylor/Williams does not provide its services to any other grower.

hiring, firing and supervision of the employees. Neither does the fee arrangement outweigh the control exerted by Maggio over the harvest. The Garin Company, 5 ALRB No. 4 (1979).

On the other hand, Maggio exerts the kind of control over the entire harvest that we have previously found determinative. The Garin Company, supra; Freshpict Foods, Inc., 4 ALRB No. 4 (1978); Jack Stowells, Jr., 3 ALRB No. 93 (1977). Maggio sets the irrigation and picking schedules, deciding when and where picking will occur and the amount of daily tonnage to be picked. Taylor/Williams picks the carrots but does nothing more.

Maggio's long-standing employment relationship with the topped-carrot harvest workers is also an important factor in this case. These employees were hired almost exclusively from Maggio carrot or broccoli crews and do not follow Taylor/ Williams from farm to farm unlike the situation of custom harvesters, who generally have their own employees working with ""them at more than one agricultural site. See, e.g., Jack Stowells, Jr., supra; Napa Valley Vineyards Co., supra; and Kotchevar Brothers, supra.

The overall control that Maggio exerts and the long-standing employment relationship that Maggio has with these workers persuades us that Maggio is best able to provide

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[4/] We also note that although Taylor/Williams hired, fired and supervised the topped-carrot harvest employees, it did not do so exclusively. The IHE credited the testimony of a member of the bagging crew who testified that following a strike at Maggio she was rehired by Joe Sandoval.

the most logical and stable bargaining relationship which best serves the purposes of the Act.

CLARIFICATION OF BARGAINING UNIT

Accordingly, we adopt the recommendation of the IHE and conclude that: the topped-carrot harvest employees are within the bargaining unit of Maggio's agricultural employees because Joe Maggio, Inc. is their agricultural employer; the shop mechanics are within the bargaining unit of Maggio's agricultural employees because they are agricultural employees as defined in Labor Code Section 1140.4(b); and the service truck driver is not within the bargaining unit because he is a supervisor as defined in Labor Code Section 1140.4 (j). Dated: April 10, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBERS HUTCHINSON and McCARTHY, Dissenting in Part;

We dissent from the majority's conclusion that Maggio is the agricultural employer of the topped-carrot harvest employees, and would find instead/ that Taylor/Williams is the agricultural employer of said employees.

At the encouragement of Maggio, Taylor/Williams developed a mechanical two-row topped-carrot harvester which doubled harvesting capacity and reduced personnel needs by two-thirds, compared to the previous harvesting method. After unsuccessful negotiations for purchase of the machine by Maggio, Taylor/Williams began using it to harvest carrots for Maggio, to repay Maggio for its cash investment in the development of the machine.

Due to the inability of Maggio and Taylor/Williams to reach agreement on financial terms for further harvesting by Taylor/Williams, the latter began harvesting for Marshburn

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Farms.[1/] Ultimately, Taylor-Williams was re-engaged by Maggio and harvested its topped carrots during the 1976 and 1977 harvesting seasons. The fee arrangement for the 1976 season consisted of a flat rate per ton, plus reimbursement for all costs. The agreement for the 1977 harvest provided for a higher flat rate per ton, reimbursement to Taylor-Williams for the expense of the bagging crew,[2/] and that all other costs be absorbed by Taylor-Williams. Both agreements provided for Taylor-Williams to provide all labor.

During the 1976 season, Maggio supplied the tractors and trailers used to collect the harvested carrots. During the 1977 season, Maggio sold three tractors to Taylor-Williams for use in its harvesting business and thereafter Maggio provided the trailers only.

The employees working in the topped-carrot harvest were .on the payroll of Taylor-Williams, which also paid all employment taxes and fees. The bulk of the record evidence Indicates that Taylor-Williams personnel hired, assigned, supervised, and

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[1/] Taylor-Williams also harvested briefly for Bellridge Farms, and submitted bids to several other growers.

[2/] Rod Williams testified that the bagging crew, whose _function is to manually collect carrots not picked up by the mechanical harvester, is being used to a lesser degree as the machine is perfected. He stated that the time was approaching when a bagging crew would not be needed. . .

[3/] The majority relies heavily on the fact that Taylor-Williams hired several of Maggie's former topped-carrot-harvest employees. This, however, was not the result of any control by Maggio. Rod Williams testified that there was no agreement to hire these employees, but his company did not want to put anyone out of a job, and believed that the former Maggio employees' expertise in harvesting topped carrots would be a valuable asset.

laid off employees working in the topped-carrot harvest.

The involvement of Maggio was, for the most part, limited to designating the sequence in which the fields were to be harvested, determining the volume of the daily harvest, and hauling the harvested carrots to the packing shed. Joe Sandoval, a supervisor on Maggie's payroll, advised Taylor/ Williams' personnel as to these matters. Because Maggio has complex growing, irrigating, harvesting, and packing schedules, which must be carefully coordinated, Sandoval's role appears to be essential. In any event, we would find that Sandoval's activities on behalf of Maggio do not constitute the kind of direct control over the harvesting employees that justifies the finding of an employer-employee relationship between Maggio and the harvesting personnel.

On the other hand, it is clear that Taylor/Williams provided and operated complex mechanical equipment, assumed responsibility for getting the carrots to Maggio trailers and trucks, charged a fee for an entire service as opposed to a fee for labor only, hired, assigned, directly supervised, and laid off employees, paid employees' wages, benefits, taxes, and fees, and bore the legal and economic risks involved in operating a business in today's unstable economic environment. In other words, Taylor/Williams operated as an independent business entity, separate and apart from Maggio, which autonomously controlled both mechanical and human harvesting resources. Its success depended on its ability to properly manage those resources so as to fulfill its contractual obligations and to profit from

its operations.

The facts and circumstances discussed above are reflective of the factors which the Board has relied upon in past cases to determine whether an entity is an agricultural employer under the Act and therefore subject to collective bargaining obligations . See, e.g., Kotchevar Brothers, 2 ALRB No. 45 (1976); Cardinal Distributing Co., 3 ALRB No. 23 (1977); Napa Valley Vineyards Co., 3 ALRB No. 22 (1977) ; Jack Stowells, Jr. , 3 ALRB No. 93 (1977) ; and Gourmet Harvesting and Packing, 4 ALRB No. 14 (1978) . We agree with the majority that no one factor is dispositive, and that we must look to the parties' activities generally. However, application of those factors to all of the facts and circumstances in the instant case compels the conclusion that Taylor/Williams is the agricultural employer of the topped-carrot harvest employees.

The majority relies heavily upon the fact that some of the harvest employees had previously worked for Maggio, and may do so again in the future. Certainly, any prior or future employment relationship between Maggio and the employees is a relevant factor for our consideration. Of greater importance, however, is the bond that has been established between Taylor/ Williams and its employees, and the likelihood that this relationship is permanent. The complex nature of the mechanical equipment used by Taylor/Williams in its harvesting operation makes it likely that a considerable amount of training is

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necessary to prepare persons assigned to operate it.[4/] In the event Taylor/Williams should abandon its present status of harvesting for Maggio only/ and undertakes harvesting for others, it is more likely than not that it will retain its harvest employees rather than hiring and training new operators at each new location. If it is held that employees moving about with Taylor/Williams are to be treated as the employees of each grower that Taylor/Williams contracts with for its services, those employees will be subject to countless and varying terms and conditions of employment. Certainly, it makes more sense to designate Taylor/Williams as the agricultural employer of these employees so as to make their employment situation more consistent and stable.

Moreover, the very nature of Taylor/Williams' complex, sophisticated equipment leads one to conclude that it will continue to exert more control and supervision over the equipment operators than a grower would, due to the fact that it is the only entity likely to possess the expertise and qualifications necessary to do so.

Finally, we must recognize that this is not a situation where the employees' ability to organize and otherwise exercise their rights under the Act is at stake. Here, regardless of which entity is found to be their employer, the employees will be covered under the provisions of the Agricultural Labor

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[4/]At this point, we address ourselves mainly to the operators of the mechanical equipment, as it appears that the bagging crew is not intended to be a permanent component of the Taylor/ Williams harvesting operation. See footnote 2, supra.

Relations Act, and their employer will be bound thereby.

In conclusion, we would find that Taylor/Williams asserts more direct control over the employees in the topped-carrot harvest than does Maggio, that it has an established employer-employee relationship with those workers, and that it has a strong interest in maintaining that relationship. Accordingly, we would conclude that Taylor/Williams is a custom harvester within the meaning of the cases cited supra, and is clearly the agricultural employer of the aforesaid employees. Dated: April 10, 1979

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Joe Maggio, Inc. Case No. 75-RC-19-E
5 ALRB No. 26

THE DECISION

The Investigative Hearing Examiner "(IHE) found that Bill Wester used independent judgment in directing employees and possessed the power to hire and discharge employees and concluded that he was a supervisor as defined in the Act, noting that Bill Wester received compensation, including salary, insurance, vacation and an annual bonus in common with admitted supervisors, benefits which were not available to bargaining unit members.

The IHE concluded that the Employer's shop mechanics were agricultural employees as defined by the Act and therefore within the bargaining unit, based on his finding that the bulk of the. work performed by the shop mechanics is incidental to the Employer's agricultural operations.

The IHE also concluded that the Employer was the employer of the workers in the carrot-topping operation for bargaining purposes and that Taylor/Williams was not an agricultural employer, but rather an entity which develops various types of agricultural machinery and whose interests were mainly in developing their machine through experience in harvesting the crops of a major carrot grower, such as the Employer.

BOARD DECISION

The Board majority affirmed the IHE's conclusions concerning the supervisory status of Bill Wester and the inclusion in the unit of the Employer's shop mechanics. The Board also affirmed the IHE's conclusion that Joe Maggio, Inc. was the employer of the workers in the topped-carrot harvest for bargaining purposes, for the following reasons: (1) the employees were hired from other Maggio crews and c not work for Taylor/Williams at any other location; (2) the payroll and supervisorial services provided by Taylor/Williams are not unique to, custom harvesters but are often provided by labor contractors excluded from the statutory definition of "agricultural employer"; (3) Maggio: exerts the kind of control over the entire harvest that the Board has previously found determinative (Maggio sets the irrigation and picking schedules, deciding when and where picking will occur and the amount of daily tonnage to be picked); (4) Maggio has had a long-standing employment relationship with the topped-carrot harvest workers.

DISSENTING OPINION

The dissenting Board members would conclude that Taylor/ Williams was the employer of the agricultural workers for bargaining purposes as Taylor/Williams asserted more direct control over the employees in the topped-carrot harvest than did Maggio, that it had an established employer-employee relationship with those workers, and that it had a strong interest in maintaining that relationship.

CLARIFICATION OF BARGAINING UNIT

The topped-carrot harvest employees are within the bargaining unit of Maggio's agricultural employees because Joe Maggio, Inc. is their agricultural employer; the shop mechanics are within the bargaining unit of Maggie's agricultural employees because they are agricultural employees as defined in Labor Code Section 1140.4(b); and the service truck driver is not within the bargaining unit because he is a supervisor as defined in Labor Code Section 1140.4(j

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

JOE MAGGIO, INC.,

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Bargaining Representative,

Case No. 75-RC-19-E

Decision on Motion for Clarification of Bargaining Unit

Thomas Nassif, Byrd, Sturdevant, Nassif and Pinney for the Employer,

Thomas Dalzell for the United Farm Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

Jim Denvir, Investigative Hearing Examiner: This case was heard by me at an investigatory hearing held in Holtville, California on January 18 and March 9 and 10, 1978. The United Farm Workers of America, AFL-CIO (UFW), was certified on December 21, 1976, as the exclusive bargaining representative of all of the agricultural employees of the employer in California, excluding all workers in the packing house and vacuum coolers. The parties entered into a collective bargaining agreement on or about May-24, 13-77 and, signed a Letter of Understanding that the parties would seek a unit clarification decision from the Board on the following job classifications: mechanics, service truck driver and workers employed in the topped

carrot operation. On August 23, 1977, the UFW mailed a Motion for Clarification of Unit to the Regional Director of the San Diego region. This filing and further mailings were apparently lost in the mail and on November 2, 1977, the Motion was forwarded to the Executive Secretary. After consultation with-the Regional Director and with, the agreement of the parties, it was decided that in, the interest of a swift resolution of the matter, the Motion would be heard and evidence taken in an investigatory hearing limited to three issues:

> 1. Whether Bill Wester, an agricultural employee of Joe Maggio, Inc., is a supervisor as defined by Cal. Lab. Code §1140.4(j).
>
> 2. Whether the shop mechanics employed by Joe Maggio, Inc. are agricultural employees as defined by Cal. Lab. Code §1140.4(b).
>
> 3. Whether Joe Maggio, Inc. is the agricultural employer, as defined by Cal. Lab. Code §1140.4(c), of the carrot harvest crew hired by or through the Taylor/Williams Company.

The employer and the UFW were represented at the hearing and were given full opportunity to participate in the proceedings. Both parties submitted post-hearing briefs.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments of the parties, I make the following findings of fact, conclusions, and recommendations.

I. Bill Wester

The company took the position that Bill Wester is a supervisor, as defined in the Act, and the union that he is not a supervisor and therefore is within the bargaining unit.

The evidence as to status of Bill Wester went to: 1) his possession of independent supervisory authority as set out in the Act[1/] and, 2) "secondary" indicators of supervisory status.

A. Supervisory Authority

1. Hiring and Firing - It is unchallenged that Bill Wester has the authority to hire and fire workers when the foreman of the tractor department, Gene Smith, is on vacation and that he has done so on at least one occasion when he hired Amado Sandoval. The company presented testimony of George Stergious, the production supervisor, and Gene Smith that Mr. Wester has authority to hire and fire during the rest of the year, but that he has never exercised it.

The union did not present evidence contradicting the above, but rather suggests that the fact that Wester has never hired or fired when Smith is present puts into doubt whether he actually possesses such authority. Such an inference can not be drawn. The tractor department is relatively small and has had few hirings and fewer firings. Additionally, the testimony and attitude of Gene Smith leads me to believe that he exerts a great deal of control over the decisions in the department and it would be natural that he would personally make most of the weighty decisions to hire and fire. Therefore, I find Bill Wester possesses the authority to hire and fire.

1/ Section 1140.4 (j) of the Act defines "supervisor" as: Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, or responsibility to direct them, or to adjust their grievances or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgement.

2. Responsibility to Direct Employees - The company. presented testimonial evidence that Bill Wester has the authority to direct the tractor drivers in their work, though once again, Gene Smith's testimony would indicate that this authority is circumscribed by his own desire to control the operation. The union presented the testimony of two tractor drivers to the effect that Wester only transmits the orders of Gene Smith and makes no independent judgements of his own.

I credit the employer's witnesses on this point. The tractor department employs relatively few workers, who are spread out over a wide geographical area. This geographical distribution makes it difficult for Gene Smith to actually supervise the individual workers at the job site and for that reason, Wester has the authority to evaluate a given work situation and instruct the tractor drivers accordingly. Once again, it appears that Smith makes these decisions when feasible and that therefore Wester's exercise of this authority is sporadic, but it nonetheless exists.

The union's testimony that Wester only relays orders is based on what is probably the more usual situation and on the fact that Wester prefaces instructions by referring to the way Gene Smith wants a job done.

I therefore find that Bill Wester has the authority to use his independent judgement in directing workers.

3. Other Supervisory Functions - No evidence was presented that Bill Wester has any independent authority to transfer, suspend, layoff, recall, promote workers or to adjust their grievances.

B. Secondary Indicators

The balance of the evidence concerning Mr. Wester's status concentrated on "secondary" indicators of supervisory status. These factors, while not directly bearing on the supervisory duties set out in the definition of "supervisor," Cal. Lab. Code-§1140.4 (j), are facts from which an inference may be made that a person is a supervisor.

1. Wages and Benefits - It is uncontradicted, and I find, that Bill Wester receives a weekly salary of $300, two weeks paid vacation annually, the highest insurance plan of the four types provided by the company (called the "Million Dollar Protector" plan),[2/] and an annual bonus.[2/] He has received a salary, annual vacation, insurance coverage and an annual bonus continually since he was promoted from tractor driver to service truck driver/assistant foreman approximately five and one-half years ago. Others in the tractor department, with the exception of Gene Smith, receive an hourly wage, vacation computed according to wages earned, medical benefits under the UFW plan and no annual bonus.

2. Use of the Company Vehicle and Radio - The employer presented evidence that Bill Wester has the use of a company vehicle, the service truck, which he takes home each evening and that the

2/Joint Exhibit No. 7 - This exhibit was ordered sealed at the hearing, to be available only to me, the Board upon review, if any or to a reviewing Court upon review, if any. The order also provided that no reference be made to any bonus in specific dollar amounts, but rather that all references be made only in relative terms, i.e., that Mr. Wester's bonus is a percentage of the highest bonus paid.

vehicle is equipped with a radio. Supervisors of the company are similarly provided with vehicles with radios.

The union did not challenge the fact of the vehicle or radio, but argued that they are necessary equipment for Mr. Wester in his duties as service truck driver and that therefore do not indicate any supervisory status.

The union's position is correct. While, if Wester is a supervisor, he would be provided with a vehicle according to company policy, no inference can be drawn from his possession in this situation. As service truck driver, Mr. Wester must be able to respond immediately to repair or maintenance needs in any of the company's fields. Given this business justification for his use of the service truck, it is likely that he would be provided it regardless of his status, or lack thereof, as a supervisor.

3. Perception of Wester's Status by Other Workers - The union presented the testimony of two tractor drivers, Earl Marcum and Richard King, to the effect that they did not perceive Mr. Wester as a supervisor, but rather as a conduit for Smith's orders and/or an assistant foreman. The company effectively rebutted this evidence by presenting the credible testimony of Amado Sandoval, another tractor driver, to the effect that he considered Mr. Wester as "boss." Based on these showings, a finding can not be made as to the general perception of the tractor drivers as a whole, though the testimony of the individuals stands on its own as evidence.

4. Other Factors - It is uncontradicted and I find that Bill Wester was not required to become a member of the Teamsters

union under the terms of a collective bargaining agreement between that union and the company which existed from 1973 to 1975. The tractor drivers were required to join the Teamsters.

Finally, it was stipulated that Mr. Wester was not listed on the eligibility list used in the representation election conducted by the ALRB.

I do not believe that any inference can properly be drawn from either of these facts. As to the Teamster contract, no evidence was presented as to the terms of the agreement which would indicate that the bargaining unit was defined by the parties in the same way as they are defined under our Act. For example, if they were defined as "all non-salaried employees," Wester would have been excluded regardless of his supervisory status.

As to the eligibility list, I likewise feel that no inference can be made as a result of the absence of Mr. Western's name. While some inference might be made from the fact that a person's name is on an eligibility list, at least in a situation in which an employer is challenging that person's eligibility, the inference is based on the fact that the employer prepares the list and the inclusion of an employee's name might be considered an admission of eligibility. In this situation, where the employer is attempting to attach significance to Mr. Wester's absence from the list, this fact itself is inconclusive. Furthermore, the fact that the UFW did not challenge Wester's absence cannot be construed as an admission of his supervisory status without some showing that Wester's eligibility *to* vote was put into question at some time prior to the election. No such evidence was presented, nor that, the union even knew that Wester existed in the hectic time immediately preceding the election.

ANALYSIS AND CONCLUSIONS

A supervisor is defined in Cal. Lab. Code §1140.4(j) as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, or responsibility to direct them, or to adjust their grievances or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgement.

The ALRB, following NLRB precedent, has held that the statute is worded in the disjunctive and that a finding of any one of the above factors can qualify an employee for supervisory status. Dairy Fresh Products Co., 3 ALRB No. 70 (1977), at page 5. Therefore, based on my findings that Bill Wester directs employees using his independent judgement and possesses the power to hire and fire, it appears that he is a supervisor, as defined in the Act. This conclusion is further supported by the fact that Bill Wester receives compensation, including salary, insurance, vacation and an annual bonus in common with other admitted supervisors which are not available to bargaining unit members. While such facts are only evidence and not independent factors in finding supervisory status, in the absence of any other explanation for the differences between Mr. Waster's situation and that of other employees who are clearly within the bargaining unit, they are strong evidence.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions I recommend that Bill Wester be found to be a supervisor, as defined in the Act.

[3/] NLRB v. Budd Manufacturing Co., 169 F.2d 571, 22 LRRM 2414 (6th Cir. 1948, cert. den., 335 U.S. 908, 69 S Ct 411, 23 LRRM 2228 (1949); Ohio Power Co. v. NLRB, 176 P.2d 385, 24 LRRM 2350 (CA 6, 1949), cert. den., 338 U.S. 900, 25 LRRM 2129 C1949).

II. Shop Mechanics

The company's position was that the shop mechanics were not agricultural employees and therefore not within the bargaining unit and the union took the opposite position.

The evidence as to this issue was largely uncontradicted. The company, for six to seven months each year, operates a shop in Holtville, off any ranch property it owns. The shop is operated only for the maintenance and repair of the farm equipment of Joe Maggio, Inc. This work appears to fall within the "secondary" definition of agriculture as being incident to the company's agricultural operation. Hemet Wholesale, 2 ALRB No. 24 (1976); Farmer's Reservoir and Irrigation Co., 337 U.S. 755 (1949).

The employer does not challenge the above, but rather argues that some employees do work which is non-agricultural. This work includes sweeping the shop, working at the Maggio family's private residence, occasionally transporting Maggio family members to San Diego for shopping trips, washing "long line" trucks and greasing and/or washing "personal" vehicles. The last includes the automobiles of visitors which become muddy from driving in the fields, the personal automobiles of the owners and some of the supervisors' pick-ups, which are provided by the company. Making no distinction between the types of vehicles, George Stergious, the production manager for the company, testified that six or seven personal cars are washed in an average week.

No direct evidence was presented as to what percentage of the total work in the shop falls within this "non-agricultural"

category, but evidence as to the typical job duties of the mechanics was presented. Only one, Enrique Fuentes, was shown to spend more than 50 percent of his time on these "non-agricultural" tasks and the rest of the workers spend substantially less.

ANALYSIS AND CONCLUSIONS

Initially, I reject the employer's contention regarding a number of the tasks alleged to be "non-agricultural." The pick-up trucks of the supervisors, while permitted to be used for personal business, are provided by the company to these employees for use in performing their work and are therefore incidental to the company's agricultural operation. Maintaining these vehicles, like maintaining other company equipment, is an incident of the agricultural operation. Similarly, the employer argues that the time certain employees spend sweeping the shop should be considered non-agricultural work. The opposite would seem to be the case. If workers who do mechanical work in a shop on farm equipment are considered agricultural workers, then it follows that the maintenance of the shop itself is an incident of the agricultural operation.

I would agree with the employer's contentions regarding the work around the Maggie's home, the shopping trips to San Diego and the washing of cars of the Maggio family and visitors. But this work is a small percentage of the total work done in the shop.

I note that the employer in its post-hearing brief offers a suggestion that one non-supervisory job in the shop be excluded from the unit as "non-agricultural" and the remainder be included.

Such a resolution would be contrary to the actual situation in the shop. George Stergious testified that there are no specific job titles for any workers in the shop. The workers have general areas of expertise and each assists the others when his individual job responsibilities permit. Those with greater experience in doing a job, for example, welding, spend more time doing that job. Those with less experience in any given job spend more time assisting other workers or doing what amounts to odd jobs, such as sweeping the shop.

The exclusion of one position from the bargaining unit would impose a classification system in the shop even though the employer, for its own reasons, has failed or declined to do so. Moreover, the fact that the odd jobs are performed by all of the shop mechanics only during the six to seven months the shop is operating indicates that these jobs are simply busy work, used to occupy workers when they have no other specific jobs to do. If these jobs were necessary tasks as opposed to busy work, the record would show that the jobs are performed on a year round basis.

Finally, ALRB precedent indicates that the approach suggested by the employer is incorrect legally. The Board, when confronted with claims that some portion of work done within a sub-unit of a bargaining unit is non-agricultural, makes a determination based on the entire sub-unit's work patterns. For example, in Dairy Fresh Products Co., 2 ALRB No. 55 (1976), the Board found the company's three mechanics to be agricultural workers, even though they spent some portion of their work time servicing interstate and intrastate diesel trucks and doing occasional repair

work for other farmers. Accord, Mann Packing Co., 2 ALRB No. 15 (1976), see also Carl Joseph Maggio, 2 ALRB No. 9 (1976) , where the Board did exclude one of two mechanics, where evidence showed he worked exclusively on machinery from a commercial packing shed operation.

Based on my finding that the bulk of the work-performed by the .shop mechanics is incidental to the company's agricultural operations, I conclude that they are agricultural workers-as defined in the Act.

RECOMMENDATION

I recommend that the shop mechanics be held to be agricultural workers as defined in the Act.

III. Topped Carrot Operation

The company took the position that the employees in the topped carrot operation since the 1976-1977 season were employed by a custom harvester and are therefore not within the bargaining unit. The union's position was that Joe Maggio, Inc. remained the employer of these workers and that they are within the bargaining unit.

The representation election for this employer was held on January 1, 1976, at the beginning of the carrot harvesting season. The season runs from December to June, depending on the weather. During this season, Joe Maggio, Inc. harvested its own "topped" carrots. The company used from two to five single-row carrot diggers. These machines required, at a minimum, three workers - the digger operator, a driver of the tractor which pulled the digger and a driver of the tractor which pulled the trailer into which the carrots

were loaded. At times, though apparently not in the 1975-1976 season, it is necessary to employ a crew of field workers who walk behind the machines and pick up carrots which have been missed and put them into bags.

At the time of the election, all of the employees involved in the carrot topping operations were agricultural; workers of Joe Maggio, Inc.

In the summer of 1976, negotiations were initiated between the company and Taylor/Williams Harvesting for the exclusive harvesting of the company's topped carrots. Taylor/Williams had, with the assistance of the Maggios, developed a new type of carrot digger. This digger was self-propelled and could harvest two rows of carrots at a time. This new machine cut labor requirements for each two rows of carrots (absent a need for a bag crew) to one-third of the previous machine's requirements.

In October of 1976, the negotiations produced the harvesting agreement which was to cover the 1976-1977 harvest. Because the machines were so new, the parties could not arrive at a fixed cost per ton for the harvest, and instead agreed that Taylor/Williams would be paid a fixed price per ton as a "rent/royalty"[4/] for the

4/The exact amount of the "rent/royalty" was ruled confidential at the hearing and it was ordered that it not be revealed by the parties and witnesses at the hearing or by the Board or any court on review.

machines, which would be operated, supervised and maintained by Taylor/Williams. Other than the "rent/royalty," the contract provided that Taylor/Williams would be reimbursed for all expenses incurred for labor, supplies and other expenses. The tractors and trailers used were provided by Maggio. At the beginning of the season, Taylor/Williams told Maggio that it would hire the Maggio employees who previously moved from Maggio's broccoli operation to the topped carrot operation, because, according to Rod Williams, they were not interested in putting people out of work and wanted to take advantage of their experience.

Under this agreement and the agreement which followed, an employee of Joe Maggio, Inc., Joe Sandoval, acted as a liaison or go-between for the two companies. Mr. Sandoval, the supervisor of the carrot topping operation for Maggio in previous years, would determine for the company which fields should be harvested and the tonnage to be harvested daily and sent to the company packing shed. Additionally, the UFW presented credible testimony that Mr. Sandoval called a worker from the bag crew to work after work was stopped for three days and was, therefore, at least somewhat involved with the workforce.

In the 1977-1978 season, Taylor/Williams and Joe Maggio, Inc. entered into a new agreement which was not reduced to writing. Evidence produced at the hearing indicates that under this agreement the company pays Taylor/Williams six dollars per ton harvested and expenses incurred in hiring a bag crew in return for which Taylor/ Williams harvests all of Maggie's topped carrots. The expense of the

operators of the machines and tractor drivers, maintenance of the machines and field supervision are absorbed by Taylor/Williams who presumably recover these costs out of the six dollar per ton. No evidence was presented as to how the wages of the operators or the bag crew were determined,

ANALYSIS AND CONCLUSIONS

The employer argues that this case is easily disposed of based on a line of ALRB cases, beginning with Kotchevar Brothers, 2 ALRB No. 45 (1976), which construed the labor contractor exception to the definition of agricultural employer set out in the Act. Cal. Lab. Code §1140.4 (c). In these cases, the Board relied upon a number of factors to determine whether an entity was a labor contractor, which the Board defined in Kotchevar as one who collects his fees and makes his profits from the laborers actually doing the work. The factors were examined to determine whether the person or entity was supplying something more than labor. Therefore, the Board in Kotchevar relied on the fact that the alleged labor contractor provided costly equipment, assumed responsibility for getting the grapes to the winery, was understood in the industry to be a custom harvester and received a fee based on tonnage (which are not necessarily related to labor costs) in holding that Mr. Ramsee Walker was in fact a custom harvester. The employer, citing evidence presented at the hearing that Taylor/Williams: (1) provides its costly and unique two-row carrot digger and, at least

for the 1977-1978 season, [5/] three tractors to pull the company's trailers; 2) is understood within the industry to be a custom harvester; and 3} receives a fee based on tonnage harvested in support of its position that Taylor/Williams is not a labor contractor, but rather a custom harvester.

I agree with the employer that the evidence shows that Taylor/Williams is not a labor contractor and so find. The cases cited dealt with situations in which one of the parties was attempting to bring a person or entity within the labor contractor exception to the definition of agricultural employer. Therefore, it is appropriate for the Board to look to factors which show that the person or entity does more than provide labor for a fee. But it does not necessarily follow that anyone who is not a labor contractor is necessarily a custom harvester or any kind of separate agricultural employer.

The UFW argued that another category, that of "machine contractor," be established based on many of the considerations which support the exclusion of labor contractors from the definition

5/ The company presented testimony that the tractors were purchased by Taylor/Williams at the end of the 1976-1977 season. Joint Exhibit 12 indicates that Carl Joseph Maggio, Inc., another Maggio family operation, sold the tractors to Taylor/Williams sometime between October 21, 1977 and January 10, 1978, the later date being eight days prior to the investigative hearing. I am unable to reconcile the differences in dates, though the evidence is in agreement that Taylor/Williams had purchased tractors by early in the present season.

of agricultural employer in the Act. They then argue that Taylor/Williams be so categorized. I do not believe that such a further category is necessary or desirable.

The evidence presented as to the relationship between Taylor/Williams and Joe Maggio, Inc. indicates that Taylor/Williams is simply the agent of the company, not an agricultural employer[6/] and that Joe Maggio, Inc. remains the employer of the workers in the carrot topping operation and I so find.

Rod Williams testified that he has a separate business as an engineer developing various types of agricultural machinery. He has developed melon, corn, tomato, and turnip harvesters. Additionally, he has developed other row crop equipment. He and Jerry Taylor, a machinist who is his partner in Dixon "Y" Machine, Inc., were called by Joe Maggio, the father of the president of Joe Maggio, Inc., to Arizona and asked to develop a two-row, self-propelled carrot digger. After negotiations, they entered into an agreement to develop such a machine, but this agreement fell through

6/I use the terms "agent" and "employer" as mutually exclusive in £his case so as to clarify the entity which I consider the "agricultural employer" upon whom the duty to bargain fixes so as to serve "the goal of stability by fastening the bargaining obligation upon the entity with the more permanent interest in the ongoing agricultural operation." Gourmet Harvesting and Packing, 4 ALRB No. 14, slip op. at 5, The terms may not be mutually exclusive in the unfair labor practice context in which, based on common law principles of agency, persons acting directly or indirectly in the interest of an employer are construed to be employers. See, for example, Western Tomato Growers and Shippers, Inc., 3 ALRB No. 51 (1977).

when Williams and Taylor were unable to obtain a performance bond which was a condition of the agreement. Nonetheless, Joe Maggio gave them $10,000 to develop the machine. They then tested the first prototype on the Maggio fields in King City, and subsequently harvested Maggio's fields for seven dollars per ton to pay back the $10,000. In the beginning of the 1975-1976 season they moved their machine to Maggio property in Arizona under a verbal agreement, which shortly thereafter was terminated after some misunderstanding. The remainder of the season they worked for Marshburn Farms on a lease basis with no labor provided. This is the only use of the machine for any non-Maggio family operation. On October 15, 1976 they entered into their first agreement with Carl Maggio, president of Joe Maggio, Inc. I take note of the fact that a representation election had been held and objections of the employer were pending during these negotiations and were withdrawn by letter dated October 19, 1976. This agreement was the first under which Taylor/Williams had provided-labor in addition to its new machine. Prom this point until the present, Taylor/ Williams has harvested no other crops for any other employer than Joe Maggio, Inc. But, in contrast to the lack of growth of their harvesting operation, they have entered into an agreement with the FMC Corporation to produce these machines for commercial sale. These facts make me doubt that Taylor/Williams is actually-a separate agricultural employer or is likely to be one in the future. Rather I find that the interests of Taylor/Williams are mainly in developing their machine through experience in

harvesting the crops of a major carrot grower. In light of their agreement with the FMC Corporation, it seems unlikely that they have any long-term interest in custom harvesting since presumably the profits they will realize from the commercial venture will overshadow any profits available from custom harvesting, especially when the two-row harvester becomes available for purchase by Maggio and other carrot growers.

Joe Maggio, Inc., on the other hand, continues to function as the agricultural employer. Joe Sandoval, who was previously the supervisor of the carrot topping operation, under the agreements with Taylor/Williams exercises the same functions as previously, regardless of his less-than-distinctive title as "go-between." It is Mr. Sandoval who exercises responsibility for insuring that the right fields are harvested, that the tonnage harvested is in sufficient volume and no greater than what the Maggio packing shed can handle, that the crops get from the fields-in Maggio trailers to the Maggio sheds and presumably, when lay-offs occur. Therefore, any inference which might be drawn from the fact that Taylor/Williams is paid on a per ton basis as opposed to a flat fee, would be inappropriate here since Taylor/Williams has no control whatsoever of the tonnage harvested. On the other hand, the per ton fee would reflect use of the carrot digger. While no evidence was presented as to how the worker's wages are set, an inference can be drawn that Joe Maggio, Inc. sets the wage from the fact that under the two agreements between Taylor/Williams and Joe Maggio, Inc., Joe Maggio, Inc. is liable for out-of-pocket expenses of labor incurred by

Taylor/Williams Harvesting without limitation. It is unlikely that Joe Maggio, Inc. would write Taylor/Williams a blank check for labor costs without some way to control those costs unless the company was in fact setting the wage paid.

Finally, the conclusion that Taylor/Williams was- simply providing a unique and valuable machine and was not actually the employer in this situation is supported by the spontaneous testimony of Rod Williams, as follows:

> Mr. Dalzell: This year, in the Imperial Valley, will you tell me who the foremen and supervisors are for Taylor and Williams?
>
> Mr. Williams: There are only two...Jerry Taylor and myself.
>
> . . . .
>
> Mr. Dalzell: Do you consider Juan Padilla a foreman?
>
> Mr. Williams: Not for our company, no.
>
> Mr. Dalzell: Is he an employee of your company?
>
> Mr. Williams: No...well, I guess I have to take that-back. Yes, we pay his salary.
>
> Mr. Dalzell: What's the confusion?
>
> Mr. Williams: Well, he has nothing to do with the mechanical harvest at all. I thought you were talking about that. He has nothing to do whatsoever with our operators or tractor drivers - which field, which direction they go.
>
> Mr. Dalzell: He's just the carrot bagging crew?
>
> Mr. Williams: Strictly carrot bagging crew.
>
> Mr. Dalzell: Is he the foreman of that crew?
>
> Mr. Williams: Yes.

Mr. Williams was a calm, confident witness, which makes this testimony the more telling. He not only did not recognize his alleged foreman to be an employee, but he reflected a distinction between the mechanical harvest and other Maggio operations,

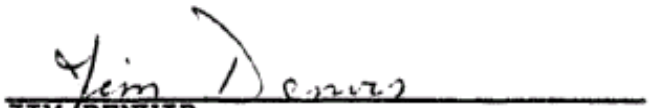
-- The above leads me to believe that Joe Maggio, Inc. is the employer of the workers in the carrot topping operation for -bargaining purposes. While the Act requires a liberal construction of the term "agricultural employer" and only specifically excludes labor contractors, I do not believe that by this language the legislature was attempting to categorize all independent legal entities as either labor contractors or agricultural employers. Rather, there are other types of independent entities which simply function as agents for the agricultural employer. To distinguish between the class of agricultural employers and other entities which can be classified as agents, one must look to the nature and function of the companies, rather than their contractural relationships. To do otherwise would permit imaginative lawyers to draft contracts which would effectively place a buffer between a union and the actual employer. Such a result would be contrary to the purposes of the Act of "guaranteeing justice for all agricultural workers and stability in labor relations." Section 1 of the Act.

RECOMMENDATION

I recommend that Joe Maggio, Inc. be found to be the agricultural employer of the workers in the topped carrot operations.

DATED: June 6, 1978

Respectfully submitted,



JIM DENVIR
Investigative Hearing Examiner, ALRB