Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GROW ART, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 80-RC-13-SAL 7 ALRB No. 19

DECISION ON CHALLENGED BALLOTS

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on July 31, 1980,[1/] a representation election was conducted on August 2 among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW	21
No Union	6
Challenged Ballots	66
Total	93

The Employer timely filed post-election objections, two of which were set for hearing. The Employer alleged that inadequate notice by Board agents disenfranchised 51 eligible voters and that the UFW had created such a climate of fear and intimidation, through threats and other coercive behavior, that

[1/] Unless otherwise noted, all dates herein refer to 1980.

the employees' free choice of representation was affected.

As the challenged ballots were sufficient in number to determine the outcome of the election, the challenges were also set for hearing.

The hearing was held on November 17 and 18 before Investigative Hearing Examiner (IHE) Arie Schoorl, who issued the attached proposed decision on April 20, 1981, wherein he concluded that Board agents had provided inadequate notice of the election, arguably disenfranchising 51 eligible voters. He also concluded that the Employer's packing-shed operation was not a commercial enterprise and that the employees therein were engaged in agriculture.[2/] As all 66 challenged ballots were cast by packing-shed workers, he recommended opening and counting all of the challenged ballots. As to the post-election objection which was based on alleged UFW threats and intimidation, he recommended that it be dismissed on the basis of insufficient evidence. He recommended certification of the results of the election in the event the margin between the pro-UFW and the No-Union ballots exceeds 51 votes, for then it could be assumed that the inadequate

---

[2/]Although we agree with the conclusions of the IHE, we reject his analysis of the relevant law regarding the challenged ballots, specifically wherein he stated that the percentage of crops which the Employer arranged to protect from the risks of ownership would be irrelevant to the finding that the packing-shed employees were engaged in agriculture. Rather, we find, viewing the total situation and avoiding the mechanical application of any rule or percentage, that T. W. Slaughter chose not to exercise any of the rights guaranteed him in the contract between himself and the Employer that may have caused him to act as an independent grower. Therefore, Grow Art neither packaged nor processed any agricultural commodity for an independent grower. Bonita Packing Co. (Dec. 1, 1978) 4 ALRB No. 96; D'Arrigo Brothers (1968) 171 NLRB 22, 23; Maneja v. Waialua Agriculture Co. (1955) 349 U.S. 254.

notice did not affect or tend to affect the outcome of the election.

The UFW and the Employer each timely filed exceptions to the IHE's decision and a brief in support thereof.

The Board has considered the record and the attached IHE decision in light of the exceptions and briefs and has decided to affirm the IHE's rulings, findings, and conclusions, and to adopt, at this time, only his recommendation with respect to the 66 challenged ballots,

Accordingly, we hereby direct the Regional Director to open and count all 66 challenged ballots and to issue a Revised Tally of Ballots. We shall not issue any ruling or decision on the remaining election objections until said objections can be considered in light of the revised tally of ballots.

Dated: August 7, 1981

HERBERT A. PERRY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Grow Art

7 ALRB No. 19
Case No. 80-RC-13-SAL

IHE DECISION

After the UFW filed a representation petition on July 31, 1980, an election was scheduled to be conducted within 48 hours because a strike was in progress. At the pre-election conference on August 1, the Employer requested an additional voting site and longer polling hours to accommodate the 51 employees of its labor contractor at a jobsite 30 miles away. The Employer objected to allowing its 70 packing-shed workers to vote, contending that they are not agricultural employees. The Board agent denied the request for longer polling hours and decided that the packing-shed employees were eligible to vote. The Board agent later decided to set up a second polling site but neglected to inform the Employer until approximately one half hour before voting was to begin. The Employer challenged all 66 ballots cast by its packing-shed workers. None of the 51 employees of the labor contractor voted in the election.

The IHE found the packing-shed workers to be agricultural employees, holding that since all the produce packaged in the shed was grown on the Employer's land it was irrelevant that 20 per cent of the crop was protected from loss by the Employer's arrangement with another person. The IHE found that the Board agent gave insufficient notice of the second polling site and thereby disenfranchised most or all of the 51 labor contractor employees. The IHE found insufficient evidence to support the Employer's post-election objection that the UFW created a climate of fear and violence prior to the election.

The IHE recommended opening and counting the challenged ballots and certifying the result should the margin between the UFW and No Union exceed 51 votes. The IHE recommended setting the election aside if the margin were 51 votes or less.

BOARD DECISION

The Board adopted the IHE's findings, rulings, and conclusions as to the packing-shed employees, holding that the Employer packaged no produce in its packing shed that was grown by an independent grower. The Board directed that the 66 challenged ballots be opened and counted, reserving ruling on the other election objections until they could be assessed in light of the revised tally of ballots.

***

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
GROW-ART,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 80-RC-13-SAL
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	
	)	

Arnold B. Myers for the Employer

Carlos M. Alcala and Alicia Sanchez for the Petitioner

DECISION

STATEMENT OF THE CASE

ARIE SCHOORL, Investigative Hearing Examiner: This case was heard by me on November 17 and 18, 1980, in Salinas, California. A petition for certification was filed by the United Farm Workers of America, AFL-CIO (hereinafter referred to as the UFW), on July 31, 1980. The Agricultural Labor Relations Board conducted an election on August 2, 1980. The tally of ballots showed the following results:

UFW	21
No Union	6
Unresolved Challenged Ballots	66
Total	93

Grow-Art (hereinafter referred to as Employer or Company) thereafter filed timely post-election objections pursuant to Labor Code Section 1156.3 (c). The Executive Secretary of the Board dismissed one objection concerning whether threats, intimidation, and coercion against employees by the UFW and its agents which allegedly triggered a 48-hour strike election when in actuality there was no strike.

The following issues were set for hearing:

1. Whether inadequate notice procedures resulted in the disenfranchisement of a significant number of eligible voters; and

2. Whether workers in the Employer's packing shed are agricultural employees within the meaning of Labor Code Section 1140.4 (b).

On October 29, 1980, the Executive Secretary issued an order granting in part and denying in part the Employer's request for review and thereby added an additional issue for hearing, viz:

3. Whether alleged threats and intimidation caused the election to be conducted in an atmosphere of fear.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings, and filed post-hearing briefs.

Upon the entire record, and an evaluation of the demeanor of the witnesses, and after consideration of the arguments made by the parties, I make the following findings

of fact, and conclusions of law:

FINDINGS OF FACT

I. Background

Grow-Art, a corporation, is an agricultural employer which grows vegetables including lettuce, celery, broccoli, cauliflower, mixed greens, green onions, and spinach. It is located in the Salinas Valley and its president is Arthur Panziera. Grow-Art owns and operates a packing shed at the same location but only packs mixed greens and green onions at that facility. In the latter part of July, 1980, Grow-Art employed field workers who did the thinning and harvesting, shed employees who worked in its packing facility, and for one day, harvest workers employed through a labor contractor.

II. Whether inadequate notice procedures resulted in disenfranchisement of a significant number of eligible voters.

A. Facts

On Thursday, July 31-, 1980, the employees of Grow-Art went out on strike and on the same day the UFW filed a petition with the ALRB seeking certification as the bargaining agent of all the agricultural workers of Grow-Art. Since the employees were on strike the Regional Director decided to hold the election within 48 hours pursuant to Section 1156(a)-of the Labor Code. A pre-election conference was held at the ALRB offices at Boronda Road in Salinas at 4:30 p.m. on the next day, Friday, August 1. Present at the conference were ALRB field

examiners Carlos Bowker and Ricardo Ornelas, the Employer's president Arthur Panziera, and its attorney Arnold Myers, and a representative of the UFW.

The Employer provided, for the appropriate payroll period, a list of its employees which included 51 persons who were supplied by a farm-labor contractor, 27 field workers, and 77 packing-shed workers. Board agent Carlos Bowker informed the parties that the election would be held the next day between 8:00 and 10:30 a.m. at the ALRB office in Salinas. Company president Panziera asked that a second election site be set up in Soledad since the contract-labor employees lived in or near that community and had not worked for the Employer since the previous week. He also requested longer voting hours so that the contract workers could vote either before or after their work hours. The UFW objected to the second voting site as it contended that the labor-contractor workers were not eligible because they had not worked during the applicable payroll period. The Board Agent stated that they would be eligible voters but that the UFW could challenge them if it wished to do so. The Board agent rejected Panziera's request for longer voting hours and added that he had not yet decided whether to establish a second voting site but, if and when he decided to do so, he would notify the parties. Panziera objected to the employees of the packing shed voting as he contended that they were not agricultural employees under the Act since the packing shed was a commercial operation. The Board agent declared that they would

be considered eligible voters and that the Employer could challenge them at the polls. The pre-election conference ended at 5:50 p.m.

Shortly after the meeting ended, Bowker decided to set up a second voting site in Soledad. He telephoned the labor contractor and informed him that an election was to be held the next day for Grow-Art employees. He added that the members of the labor contractor's crew who had worked for Grow-Art during the previous week were eligible to vote and that there would be two voting sites , one at the ALRB office in Salinas and the other in Vosti Park in Soledad, and that the voting hours would be from 8:00 a.m. to 10:30 a.m. and from 7:00 a.m. to 9:00 a.m. respectively. The labor contractor and his brother or son (Carlos Bowker was not sure which in his testimony) responded that the only way they would be able to determine the whereabouts of their employees was to wait until they came to ask for work. They indicated to Bowker that they were not willing to assist in contacting the workers in any other way. Prior to Bowker notifying the labor contractor, Panziera had telephoned the latter and told him about the pending election and that later that evening he would let him know about the site in Soledad. That evening Bowker failed to contact Panziera, Myers or any other Employer representative about the location of the second voting site but did notify the UFW.

At 6:30 p.m., Ricardo Ornelas and David Caravantes left the ALRB office in Salinas to travel to Soledad to notify the labor contractor's workers there about the election, its time

and its place. The two Board agents visited approximately 13 of the addresses on the voter list and contacted and notified approximately 7 workers living at the addresses. At approximately 6 of the addresses they visited, the occupants told them that the eligible voters had moved or had never lived there. Where no one was home at an address, they left a notice of the election. They made no attempt to locate employees who had post-office box numbers. They did not visit those workers whose addresses were either at a hotel, motel, or labor camp. They also failed to visit three additional street addresses in Soledad and one in Greenfield. They attempted to locate the Villa Camphora labor camp but soon gave up since the directions they had received were not accurate. They spent from 7:00 p.m. to 8:30 p.m. in Soledad and then returned to Salinas.

Board Agent Ornelas had no explanation as to why they stopped trying to notify workers at their home addresses after 8:30 p.m. other than darkness and the lateness of the hour. Upon returning to Salinas, Ornelas reported in to Bowker and informed him in detail about their attempts to contact workers in Soledad.

The next morning at 6:40 a.m., Bowker telephoned Employer's attorney Arnold Myers and informed him that the second election site would be Vosti Park in Soledad and polling would be between 7:00 and 9:00 a.m. Myers protested vehemently about the late notice and informed Bowker that the Employer would communicate to the Board its protest about

holding the election that morning. Myers telephoned Panziera immediately and informed him of the latest developments. Nevertheless Panziera did not send an observer to the Soledad voting site because, according to his testimony, it was impossible to send one there, thirty miles away, who would arrive on time. Employer's attorney Myers sent a telegram to the ALRB protesting the delay in notice to the Employer and the lack of notice to the eligible voters living in and around Soledad and requested that the election be rescheduled. The voting site in Soledad was open between 7:00 and 9:00 a.m. but no one appeared to vote. None of the 51 workers supplied by the labor contractor voted at either site.

The results of the election according to the Tally of Ballots was: UFW 21, No Union 6 and 66 challenged ballots (challenged by the Employer, claiming they were not agricultural employees under the Act as they were packing shed employees and that the Employer's shed was not covered by the Act since it was a commercial operation) out of 155 eligible voters.

The UFW called two witnesses, Raimundo Gomez and Gilberto Martinez, who lived at the same addresses as appeared on the list as addresses of eligible voters. They testified that they did not know any individuals with the names of the eligible voters living at the said addresses in July and August 1980. Gomez lived at 345 Montgomery Street, an address listed for four of the eligible voters. However his residence was one of a group of seven and there was no persuasive evidence as to

whether the other residences had the same number (345) . Gomez admitted that he knew the names of the tenants in only one or two apartments since there was a considerable amount of moving.

Martinez was the manager of a labor camp, Villa Camphora, which was the listed address for six of the eligible voters. He testified that there were 40 residences at the camp and he knew all the occupants by name. He stated on cross-examination that at times there were up to ten people living in a residence and he did not know all their names.

As this evidence deals only with a small number of eligible voters on the list of the contract workers and as the evidence is less than cogent regarding the inaccuracy of the addresses, I find that there is insufficient evidence to support the UFW's contention that the eligibility list submitted by the Employer was almost totally inaccurate which complicated the Board agent's efforts to notify the eligible voters.

B. Analysis and Conclusion

The Employer contends that the election should be set aside because a substantial number of agricultural employees were disenfranchised due to inadequate notice; more specifically, that the Board agent made a insufficient effort to notify them by having Board agents visit only one-fourth of the addresses on a voter eligibility list and totally failed to notify the Employer about the second election site until twenty minutes before the polls opened.

The Board in Verde Produce Company, Inc., 6 ALRB No. 24 stated that:

> "Standing alone, low voter turnout is not a basis upon which this Board will set aside an election. As in other settings, prospective voters may refrain from exercising their franchise without affecting the integrity of the electoral process. Where, however, inadequate notice procedure result in a voter turnout too low to provide a representative election, we shall set the election aside."

The circumstances in the Verde case were similar to those in the instant matter. The Employer presented evidence that a substantial number of eligible voters did not work during the time in which the Regional Director attempted to notify them and that the only employees who voted were those who worked on the day of the election.

In the instant case, none of the 51 employees of the labor contractor voted; the only voters were those who had worked regularly until the strike: the 27 regular field employees and 66 packing-shed workers. This factor combined with the fact that the Regional Director contacted at most only 13 of the 51 employees, and perhaps as few as 7, suggests that a significant number of eligible voters did not vote because they were not notified of the times and places of the election.

The Board stated in the Verde case that it will certify the results of an election as long as the Regional Director has provided as much notice as reasonably possible under the circumstances. It went on to state that the Regional Director

is permitted to schedule elections later than required under the 48-hour rule where it is necessary in order to provide adequate notice, since the 48-hour rule is not jurisdictional.

It is clear that under the circumstances of the instant case, and I find, that the Regional Director failed to provide as much notice as reasonably possible in respect to the 51 labor contractor employees. At the pre-election conference, the Employer brought to the Board agent's attention those workers and suggested solutions, i.e., longer voting hours and a voting place in Soledad near where they resided. The Board agent rejected out of hand the longer-hours solution and, although he belatedly decided on a second voting place in Soledad, his whole approach to notice in regard to said second site was haphazard at best. First of all, no notice whatsoever was provided to the Employer that evening so as to give him an opportunity to provide notice through his own efforts or to enlist the assistance of the labor contractor in locating and notifying the 51 employees.[1/] There was an inadequate attempt to

---

1/The UFW argues that the Employer was guilty of nonfeasance in bailing to make any effort to notify the contract-labor employees. The UFW further argues that the Employer was guilty of misconduct by its failure to inform the labor contractor that the contract laborers could vote at the Salinas voting site. The UFW concludes therefore that the Employer cannot now use its own nonfeasance and misconduct as grounds to set aside the election.

This is highly fallacious reasoning. The UFW bypasses an important fact in their reasoning. That fact is that Board agent Bowker made a commitment to Arthur Panziera, Employer's general manager, to notify the parties of the Soledad voting site if and when he decided there would be one, (footnote 1 continued on p. 11)

visit the eligible voters, which was limited to 13 private residences, where only half were found to be at home.

The Board agent should have known at the time of the pre-election conference that there would be difficulties in notifying the 51 labor-contractor employees who would not be working for the Employer the next day and should have scheduled the election subsequent to the 48-hour limit. The Board's decision in Verde Produce Company, Inc., had issued in May 1980 so the Board agent is charged with knowledge of the holding therein. Assuming, arguendo, the Board agent was correct in proceeding with the election within 48-hour rule, he should at least taken every step possible to reach and notify the 51 employees well in advance of the election. His most serious error was his failure to notify the Employer about the second election site until about twenty minutes before

---

1/(continued from p. 10) and then failed to follow up on his commitment to Panziera. Panziera explained that he contacted the labor contractor about the election and told him that later in the evening he would inform him about a possible site in Soledad. No doubt Panziera relied on Bowker's commitment to inform him of the Soledad polling place and once that occured, he planned to telephone the information about the site to the labor contractor, who in turn could relay this data to the contract laborers. Since Bowker failed to notify him of the Soledad voting site that evening, Panziera was prevented from carrying out his plan to notify the labor contractor and the 51 employees. So it was not the misconduct or the nonfeasance of the Employer but nonfeasance of the Board agent that prevented adequate notice being given to the workers.

It seems from the UFW's argument that the Employer should have contacted the 51 employees about the voting site in Salinas and then once he learned of the Soledad voting site to contact them again with this additional information. In my opinion the Employer acted in a reasonable manner and waited for the promised information about the Soledad polling place and then after receiving that information, planned to contact the employees only once and provide them with information as to both the time and place of the election.

the election started. He erred also in failing to make a more thorough effort (through Board agents) to notify every voter on the eligibility list.

Notwithstanding the several steps the Regional Director took to provide eligible employees with notice of the election in this case, I find, on the basis of the entire record, that the election was scheduled so hastily that there was insufficient time for the employees to receive adequate notice and additionally that inadequate notice was given to 51 employees and therefore they were in effect disenfranchised.

III. Whether Alleged Threats and Intimidation resulted in the election being conducted in an atmosphere of fear.

A. Facts

Filimon Altamirano, an employee, testified that two days before the election a group of strikers threatened him with bodily harm if he refrained from joining the strike. Altamirano further testified that the next day a UFW representative, accompanied by a group of strikers, threatened him that if he did not join the strike they could stop him from working when the union won the election. Altamirano joined the strike and went on the picket line because, as he testified, he was afraid the strikers might injure members of his family. He heard from some strikers that if he didn't vote for the union that he could be fired if the union won. Later he heard that that was not true and that he could not be fired if the union won. Moreover he testified that he voted with the assurance that his job would not

be in jeopardy if he voted against the union.

Another employee, Jaime Cepeda Valencia, testified that on the first day of the strike a group of strikers approached him and told him that if he didn't stop work they would stop him. The next morning, a group of strikers threatened him that if he did not join the strike they would break the trailer and its windows. Later that day a UFW representative told him to stop work and added that if he didn't stop, the strikers would stop him. Later that day, Cepeda joined the strike because, as he testified, he didn't want problems.

B. Analysis and Conclusion

The Board, in Jack or Marion Radoyich, 2 ALRB No. 12, stated that even if during an election campaign threats were made to employees by a representative of the union, there would still have to be some showing that such conduct would tend to affect the outcome of the election or that the election was conducted in an atmosphere of fear in order to have the election set aside.

The evidence establishes that threats were made to only two workers. One of the workers, Altamirano, admitted that the threat had no effect on his particular vote in the election since he was assured in his own mind that he could vote against the union if the latter won the election. Consequently there remains evidence that only one worker might had had some reluctance to vote against the union because of the threats.

However there is no indication that any voters , including Cepeda, were intimidated into voting contrary to their own convictions. Moreover there was no evidence to indicate that there was any atmosphere of fear at the time of the election.

Accordingly I recommend that this objection be dismissed.

IV. Whether Workers in the Employer's Packing Shed are Agricultural Employees within the Meaning of Labor Code Section 1140. 4 (b).

A. Facts

The Employer contends that its packing shed is commercial and that therefore the employees who work there are not agricultural employees under the Act and that their ballots, which were challenged by the Employer, should not be counted in the instant election. The Employer packs only the vegetable produce that it raises. However, in 1980 the Employer entered into an agreement with E. W. Slaughter, doing business as Carr Lake Ranches, by which the latter would assume financial responsibility for twenty percent of the 1980 green onion and mixed vegetable crop so that if a loss is incurred in respect to that portion of the crop Slaughter will reimburse the Employer for the expenses it incurred in raising that portion of the crop, including rent for the land utilized plus $100 an acre and 10¢ per carton of vegetables packed. In this regard, the language in the contract between the two parties reads:

> "It is understood that the farmer (Slaughter) has total financial risk in the growing of said crops and Contractor (Employer) is an independent contractor and has no responsibilities after a 'stand has been established' (seeds planted by employer emerge from the soil)."

In consideration for this Slaughter will be entitled to any profit that results from the sale of that twenty percent portion of the 1980 vegetable crop. The profit will be calculated by deducting the Employers' expenses, plus $100 an acre, plus 10¢ per carton of vegetables packed. According to the agreement, Slaughter will advance monies to the Employer only if the Employer incurs losses during the season and the Employer requests him to do so. In 1980, the Employer did not incur any losses during the season, so it did not ask Slaughter to make any progress payments, and the latter made no such payments.

In the contract, the Employer and Slaughter designated which parcels would be covered by the agreement and which crops would be raised on each parcel. The contract provides for Slaughter to decide the variety of seed to be planted and which fertilizer, herbicide and pesticide programs would be used by the Employer, but actually the Employer decided all these matters in the 1980 season.

The parties agreed that included in the amount for which the Employer would hold Slaughter responsible were the packing charges which would be at the prevailing rate and that

the Employer would notify Slaughter of any changes. The packing charge increased subsequent to July and the Employer notified Slaughter of his change by telephone.

The Employer arranged for the sale of the crops and received all the proceeds. According to the contract," the Employer was to make an account of final settlement before December 15, 1980. At the time of the hearing he had not done so. However in July the Employer sent an interim report to Slaughter with the estimated costs, losses and/or profits from the crops harvested and sold from the first three parcels in 1980.

B. Analysis and Conclusion

In its post-hearing brief the Employer contends that the packing-house employees are not agricultural laborers and therefore are ineligible to vote in the election. Specifically, Employer argues that its packing-house operation is a separate commercial activity because more than fifteen percent of the farm produce it packs belongs to another grower, i.e., E. W. Slaughter. To substantiate its position, the Employer cites Carl Joseph Maggio, 2 ALRB No. 9, which held that packing-shed employees were not agricultural employees even when the amount of produce packed for other growers was small.

A leading case in this area and one cited by the Employer is Grower-Shipper Vegetable Association and Teamsters, 230 NLRB No. 150, 96 LRRM 1054. In the latter case, the NLRB determined the question of whether truck and other equipment drivers of Salinas Valley employers were agricultural employees

and exempt from the NLRA. In doing so, the NLRB analyzed Section 3(f) of the Fair Labor Standards Act, since Congress has directed the Board to be guided in said definition in determining who are agricultural employees and therefore not covered by the NLRA.

Section 3(f) reads:

> "Agriculture" includes farming in all its branches and among other things includes... the production...of any agricultural... commodities...the raising of livestock... or poultry, and any practices...performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

In Grower-Shipper, the NLRB cites the Supreme Court decision in Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949), in which the word agricultural is defined in relationship to whether an individual is employed as an agricultural laborer. The Supreme Court held that the word "agriculture"

includes both a primary and secondary classification. In its primary meaning, "agriculture" includes farming in all its branches, i.e. those functions normally associated with farming such as cultivation, tilling, growing, and harvesting of agricultural commodities. The secondary connotation of "agriculture" embraces those farming operations which do not fall within the primary meaning. Thus, work which is not directly associated with the day-to-day operations of farming will be deemed to be "agricultural" when performed "by a farmer or on a farm" as an incident to or in conjunction with such farming activities.

In the present case the Employer is engaged primarily in the production of vegetables. Vegetables are certainly a farm commodity, and, therefore, the Employer's growing operations clearly satisfy the primary definition of agriculture, not only as to the eighty percent it grows itself but also, as to the twenty percent it grows for E. W. Slaughter. The Employer's packing-house operation, however, is not primarily an agricultural activity, and thus, employees engaged in those activities cannot be considered agricultural laborers unless the secondary definition of agriculture is fulfilled. The secondary definition of agriculture according to the Supreme Court (as stated above) is that work which is performed "by a farmer or on a farm" as an incident to or in conjunction with such farming activities.

It appears clear that the Employer's packing of the green onions and mixed vegetables meets the secondary test. The Employer packs only those green onions and mixed vegetables that it produced on its own farm, eighty percent of which the Employer owns outright and twenty percent of which it raises for E. W. Slaughter.

The Employer argues that this arrangement is equivalent to the fact situation in the Garin Co., 148 NLRB No. 138, 57 LRRM 1175, in which the NLRB found a packing shed to be a commercial operation since the grower-operator performed a substantial amount of packing for another grower, approximately fifteen percent of its total annual output. I find the Garin

case inapposite. A grower sho operates a commercial packing shed packs produce grown by another farmer on a farm not his own. Moreover, the commercial packing-house operator is supplying a service which involves only packing. In the instant case, the Employer is supplying a complete service, i.e., the planting, cultivating, tilling, harvesting, packing, and marketing of a crop, every aspect of this service performed by it on its own farm. Consequently, the Employer's packing of the vegetables in which E. W. Slaughter has an economic interest (a secondary agricultural activity) is certainly incidental to and in conjunction with its growing the produce for E. W. Slaughter (a primary agricultural activity). All of the vegetables processed by the Employer in its packing shed are products of its own farm and therefore its employees working in its packing shed are engaged in activities falling within the secondary definition of agriculture and accordingly are agricultural employees under the Act[2/] and were eligible to vote in the election.

V. Conclusions of Law

Based on the above findings of fact, analysis, and conclusions, I recommend that the 66 challenged ballots of the packing-shed workers be opened and counted and, if the 51 votes of the disenfranchised labor contractor employees would prove not

---

2/Regardless of the percentage of its crops upon which the Employer makes financial arrangements for risks of ownership, 5%, 15%, 50%, 100% the result would be the same as in the instant case, since its packing shed solely and exclusively processes products of its own farm.

to be outcome-determinative, my recommendation is that the results of the election be certified. However if the votes of the 51 disenfranchised voters would prove to be outcome-determinative, my recommendation is that the election in this matter be set aside and that the Petition for Certification be dismissed.

DATED: April 20, 1981

ARIE SCHOORL
Investigative Hearing Examiner