

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SAN JUSTO FARMS, a Partnership)	
of Frank Wyrick and Wyrick)	
Farms, Inc.,)	Case No. 80-RC-46-SAL
)	
Employer,)	
)	
and)	7 ALRB No. 29
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
_____)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on August 13, 1980, a representation election was conducted on August 26 among the agricultural employees of San Justo Farms (San Justo). At the election, San Justo challenged 55 employees who worked in the 1980 garlic harvest on San Justo's property, alleging that the workers were not San Justo's agricultural employees. The Board agent in charge of the election refused the challenges and the ballots were therefore mingled with the other ballots. The official Tally of Ballots showed the following results:

UFW.	41
No Union	33
Challenged Ballots	<u>4</u>
Total	78

San Justo timely filed post-election objections, two of which were set for hearing. A hearing was held before

Investigative Hearing Examiner (IHE) Joel Gomberg on April 7 and 8, 1981. At the hearing, San Justo withdrew its election objections alleging misconduct by UFW representatives. The parties stipulated to the following formulation of the issue to be litigated: whether the agricultural employees who harvested the garlic grown on San Justo's property in 1980 were agricultural employees of San Justo. The parties agreed that an affirmative answer to this question would result in the election results being certified, and that a negative answer would require that the election be set aside. In his Decision dated June 1, 1981, the IHE concluded that the agricultural employees who worked in the 1980 garlic harvest on San Justo's property were employed by San Justo and were therefore eligible to vote in the election.

The Employer filed timely exceptions to the IHE's Decision and a brief in support of its exceptions. The UFW filed a brief in reply to the Employer's exceptions. The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the IHE's rulings, findings, and conclusions, as modified herein, and to adopt his recommendation to certify the union.

San Justo Farms is a partnership which was formed on May 1, 1980. Prior to the formation of San Justo, Wyrick Farms, Inc. farmed land owned or leased by the Wyrick family. Wyrick Farms, Inc. and Frank Wyrick are the partners/owners of San Justo. Frank Wyrick's son, David, was vice-president of Wyrick Farms, Inc. and now, as president of San Justo, is responsible for the overall operation of the company. For at least the past ten

years, San Justo and its predecessors have entered into agreements with Vessey Foods, Inc. (Vessey) to grow garlic on Wyrick or San Justo land. Until 1980, the agreements were oral between Carroll Vessey and Frank Wyrick. Pursuant to the terms of the oral agreements, Vessey decided when to plant the garlic, and provided, prepared and planted the seed, using custom-made equipment. The Wyricks were responsible for irrigating and cultivating the garlic. When Vessey determined that the garlic was ready to be dug up or undercut, it performed that task using its own specialized equipment. After undercutting, the garlic was pulled and topped by a harvesting crew. The harvesting workers, who were carried on Wyrick's payroll, were paid by the basket for topping, and used shears, gloves and baskets provided by Vessey. Vessey hauled the garlic from the fields in its bins and trucks, and then packed and sold the garlic. Vessey decided what area of the field would be pulled or topped on any given day. After deducting all the expenses of the operation, including labor costs, Vessey and Wyrick split the profits equally.

The 1980 garlic harvest deviated from the previous years' practice in two ways: the growing agreement between San Justo and Vessey was reduced to writing on advice of Vessey's lawyers, and the harvesting crew was placed on the Vessey payroll. Pursuant to the written contract, which was introduced at the hearing, Vessey had the responsibility of providing, preparing and planting the seed (furnishing the necessary labor and equipment), providing pesticides and fungicides, harvesting the crop (providing all labor and equipment), and packing and

marketing the crop. San Justo was responsible for furnishing and preparing the land, irrigating and fertilizing, hoeing, weeding and cultivating the crop, San Justo agreed that Vessey would be reimbursed for the cost of grading, packing, shipping and selling the crop. The parties agreed to share equally the total harvest costs and the total container and transportation charges, and to split the profits equally. Both of the parties agreed to carry worker's compensation insurance and general liability insurance.

San Justo excepts to the IHE's conclusion that the garlic harvesters were employees of San Justo and therefore eligible to vote in the election. We uphold the IHE's conclusion.

The issue before the Board in this case is not a simple one. Evidence presented at the hearing indicates that both San Justo and Vessey Foods have a substantial interest in the garlic crop grown on San Justo's property, and that the garlic harvesting employees have significant ties to both San Justo and Vessey. As the IHE notes in his Decision, the facts of this case at first glance suggest a joint employer relationship between San Justo and Vessey, since both have an equal financial interest in the garlic crop and both are involved in the growing and harvesting of the crop and supervision of the workforce. Louis Delfino Co. (Jan. 18, 1977) 3 ALRB No. 2; Abatti Farms, Inc. (Nov. 18, 1977) 3 ALRB No. 83. However, there is no evidence of common ownership, and neither San Justo nor Vessey owns stock in or participates in the management of the other. In addition, the agreement between San Justo and Vessey only covers the garlic crop grown on San Justo's property, and San Justo and Vessey are

separately engaged in other growing and harvesting operations throughout the year. We therefore find that it would be inappropriate to certify San Justo and Vessey as joint employers.^{1/}

We therefore must determine whether San Justo or Vessey employed the workers who harvested garlic on San Justo's property in 1980. In determining which of several parties is the employer of a group of agricultural employees, we look not to any single factor but consider the "whole activity" of each of the parties in order to determine which should assume the collective bargaining responsibilities, Joe Maggio, Inc. (April 10, 1979) 5 ALRB Mo. 26; Napa Valley Vineyards Co. (March 7, 1977) 3 ALRB No. 22. This approach best serves the purposes of the Act because it provides the most stable bargaining relationship. Gourmet Harvesting and Packing (March 29, 1978) 4 ALRB No. 14.

We find, based on our consideration of the "whole activity" of San Justo and Vessey and the relationship of each to the garlic harvesters, that San Justo is the employer of the garlic workers. San Justo shares equally in the growing and harvesting expenses, receives an equal share of the profits, and takes responsibility for cultivating and irrigating the crop after it is planted by Vessey. Vessey decides when to plant and harvest,

^{1/}We reject the IHE's suggestion that Labor Code section 1155.2 forecloses the possibility of certifying San Justo and Vessey as joint employers for purposes of the garlic crop. Although section 1156.2 defines the bargaining unit as "all the agricultural employees of an employer", this Board must determine who the employer is in any given factual situation. See for example Abatti Farms, Inc., supra, 3 ALRB Mo. 83. We find, however, that the facts of this case do not warrant the certification of San Justo and Vessey as a joint venture which employs the garlic harvesting crew.

but San Justo's continuing interest in the garlic crop is demonstrated by the presence of its president, David Wyrick, at the garlic harvest each day. Two employees testified that Wyrick checked the garlic and gave instructions to supervisor Ralph Duarte. Duarte, although on Vessey's payroll during the 1980 garlic harvest, works during most of the rest of the year supervising San Justo's field workers.

Most importantly, the employees involved in the garlic harvest have a primary and continuing employment relationship with San Justo rather than Vessey. A significant number of the harvesting employees worked for San Justo before and after the garlic harvest. The evidence introduced at the hearing indicates, however, that none of the garlic harvesters worked for Vessey at any time before or after the garlic harvest. One employee testified that he asked supervisor Ralph Duarte for work in the garlic harvest while he was hoeing and thinning tomatoes for San Justo. While he worked in the garlic harvest, the same employee asked Duarte for work with San Justo after the harvest ended. David Wyrick testified that a similar overlap between San Justo workers and the garlic harvesters occurred in previous years. Although the garlic workers were carried on Vessey's payroll in 1980, they were paid by Wyrick in all the previous years that Wyrick Farms and Vessey engaged in their garlic-growing venture. The appearance of the workers on the payroll of San Justo or Vessey was based on the convenience and cash-flow needs of the two growers.

San Justo argues that the contract it entered into with

Vessey in 1980 is conclusive evidence that Vessey was in control of all labor decisions during the 1980 San Justo garlic harvest. However, San Justo failed to demonstrate that the contract substantially altered the pre-existing relationship between Vessey and Wyrick/San Justo or that San Justo exercised no control over labor matters. Additionally, it is not the legal relationship established by the contract that makes Vessey or San Justo the employer, but the nature of the functions performed by each party and the relationship each has to the agricultural employees which are determinative of the party's status under Labor Code section 1140.4(c). Freshpict Foods, Inc. (Jan. 27, 1978) 4 ALRB No. 4; Grow-Art (Aug. 7, 1981) 7 ALRB No. 19.

Vessey Foods clearly plays a substantial role in the garlic-growing operation on San Justo's property. However, based on the "whole activity" of these growers, we find that San Justo is the primary agricultural employer of the garlic harvesting employees. San Justo, rather than Vessey, has a continuing relationship with a substantial number of the harvesting employees. This relationship, combined with the fact that San Justo owns the land, participated in the cultivation and harvesting of the garlic, and acted on behalf of the garlic venture to negotiate an access agreement with the UFW, supports our finding that San Justo is the primary agricultural employer of the garlic harvesting employees. This finding will provide a stable collective bargaining relationship and furthers the purposes and goals of the Act to encourage and protect the employees' right to negotiate the terms or conditions of their employment.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of San Justo Farms, a Partnership of Frank Wyrick and Wyrick Farms, Inc., in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2 (a), concerning employees' wages, hours, and working conditions.

Dated: October 2, 1981

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

San Justo Farms, a Partnership
of Frank Wyrick and Wyrick
Farms, Inc. (UFW.)

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Case No. 80-RC-46-SAL

IHE DECISION

After the UFW filed a representation petition on August 18, 1980, an election was held on August 26. At the election, the Employer's observer attempted to challenge 55 employees who worked in the 1980 garlic harvest on the Employer's property, on the basis that they were actually employees of Vessey Foods rather than San Justo. The Board agent in charge of the election refused to permit the challenges and the 55 ballots were mingled, and counted, with the other ballots. The garlic was grown on the Employer's property in 1980 and in several preceding years pursuant to a series of agreements between Vessey Foods and San Justo (or its predecessor Wyrick Farms). Pursuant to the agreements, Vessey decided when to plant the garlic and then prepared and planted the seed. San Justo/Wyrick irrigated and cultivated the garlic. Vessey decided when to undercut and top the garlic, and provided machinery for the undercutting. Vessey decided where and when to harvest and provided the hand tools, bins and trucks used to haul the garlic from the fields. Vessey then packed and sold the garlic. Vessey and San Justo/Wyrick split the profits equally after deducting all expenses, including labor expenses.

The IHE found that the employees in the garlic harvesting crew at San Justo's premises in 1980 were employees of San Justo, noting that David Wyrick, president of San Justo, was in the fields on a regular basis during the harvest and that Ralph Duarte, San Justo's regular field supervisor, acted as a supervisor in the garlic harvest while he was carried on Vessey's payroll. In addition, there was considerable employee interchange between the harvesting crew and employees who worked for San Justo before and after the garlic harvest, and it was San Justo, rather than Vessey, which acted as the employer when the UFW sought to take access at San Justo's premises and met with the Wyricks to negotiate and sign a voluntary access agreement.

BOARD DECISION

The Board upheld the IHE's finding that the garlic harvesters were employees of San Justo rather than Vessey. The Board noted that there was insufficient evidence to find that Vessey and San Justo were joint employers, and found that certifying Vessey and San Justo as joint employers for purposes of the garlic crop only, although not foreclosed by section 1156.2 of the Act, was not warranted under the circumstances.

In determining that San Justo is the employer of the harvesting workers, the Board looked not to any single factor, but

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to the "whole activity" of each of the parties in order to determine which should assume the collective bargaining responsibilities. The Board found that although both Vessey and San Justo have a substantial interest in the garlic crop grown on San Justo's property and significant ties to the garlic harvesting employees, San Justo, rather than Vessey, has a continuing employment relationship with the harvesting employees. This relationship, combined with the fact that San Justo provided the land, participated in the cultivation and harvesting of the garlic, and acted on behalf of the garlic venture to negotiate an access agreement with the UFW, led the Board to conclude that San Justo is the employer of the garlic harvesters. Objections dismissed. UFW certified.

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

1980,^{1/} by the United Farm Workers of America, AFL-CIO (hereafter "UFW"). An election was held on August 26 in a unit described as including all the agricultural employees of the Employer in the State of California. At the election, the Employer challenged 55 prospective voters on the ground that they were not its agricultural employees. The challenges were disallowed by the Board agent conducting the election. The ballots of the challenged voters were placed in the same ballot box as those of the other voters and they were counted together. The results of the election follow:

UFW	41
No Union	33
Unresolved Challenges	4

The Employer filed a timely petition pursuant to Labor Code §1156,3(c) objecting to the certification of the election. Among the objections were several pertaining to the status of the 55 voters whom it had attempted to challenge. After dismissing several of the objections, the Executive Secretary set two for hearing. At the outset of the hearing the parties and I discussed further simplification of the issues to be resolved. The parties agreed to the following formulation of the legal issue surrounding the challenged ballot controversy: Whether the agricultural employees who harvested the garlic grown on the property of the Employer in 1980 were agricultural employees of the Employer.^{2/} The parties agreed that if the answer to this question

^{1/}All dates refer to 1980 unless otherwise noted.

^{2/}By formulating the issue in this manner, it became unnecessary to address the Employer's objections concerning peak and Board agent misconduct. The Employer agreed that-[continued]

was affirmative the election should be certified and that a negative answer would require the election to be set aside. Several objections alleging misconduct on the part of the UFW were withdrawn by the Employer at the beginning of the second day of the hearing, prior to the taking of any testimony.

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

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

THE FACTS

A. The Employer's Operations.

The San Justo Farms partnership came into existence on May 1, 1980. From 1974 until that date, agricultural operations on land owned or leased by the Wyrick family were carried out by Wyrick Farms, Inc. Frank Wyrick, who is semi-retired, has been growing garlic and other agricultural commodities since at least 1960. His son, David Wyrick, became president of Wyrick Farms, Inc. in 1980 and is now in control of the day-to-day operations of the Employer.

San Justo Farms and its predecessors had approximately 700 acres of land under cultivation in 1979 and 1980.

2/ [continued]—if the garlic harvesters were found to be its employees then the Employer was at peak. The UFW agreed that if the garlic harvesters were not employed by San Justo, then the election must be set aside because the ballots of the harvesting crew were not segregated from those of the admitted San Justo employees.

Approximately two-thirds of the land was devoted to tomatoes and barley, the latter being dry-farmed. In 1979 and 1980, about 40 acres of garlic were planted.

Since the early 1970's, Ralph Duarte has been the supervisor of the Employer's field workers, with the exception of employees doing irrigation work. In his capacity as supervisor, Duarte had all the usual powers, including authority to hire and fire.

B. The Relationship Between The Employer And Vessey Foods, Inc.

For at least the past 10 years, the Employer and its predecessors have entered into growing agreements with Vessey Foods, Inc., a garlic grower, packer, and shipper concerning the garlic grown on Wyrick land. Until 1980, the agreement was always oral, based on a handshake between Vessey's president, Wayne Vessey, and Frank Wyrick. It is undisputed that, under the terms of the agreement, Vessey planted the garlic, typically in November or December, using custom-made equipment. The Wyricks were responsible for irrigation and cultivation of the garlic, Vessey then determined when the garlic was ready to be dug up (usually in August) and performed that task, again using its own specialized equipment. After the garlic was dug, it would be pulled by a harvesting crew of between 50 and 75 employees and left to dry for a period of a few days to a few weeks. This process is known as windrowing. The final step in the harvest of the garlic is topping, in which the tops and roots of the plant are cut from the bulb and the bulbs are placed in baskets. The harvesting crew is paid by the basket for this work and used shears, gloves, and baskets provided by Vessey. The garlic would

then be hauled away from the field in Vessey trucks, to be packed and sold by Vessey. After deducting the costs of marketing and harvesting the garlic, Vessey and Wyrick Farms would split the profits equally.

Prior to 1980, the employees who pulled and topped the garlic were on the Wyrick Farms payroll. According to David Wyrick, Wyrick Farms carried the harvesting crew on its payroll primarily as a matter of convenience to Vessey. Wyrick testified that Vessey's bookkeeping staff was not set up to handle so many extra employees and that their cash flow was not "right." After the harvest, Vessey would reimburse Wyrick for the harvest costs. Wayne Vessey testified that "we harvest a lot of garlic in a short period of time and we ... need to get the garlic harvested. In all cases we either pay a contractor or reimburse the grower . . . And our responsibility is the harvesting. The basic reason they're on our payroll this year is our contractor . . . was in question of whether his license was valid or not. . . ." (R.T. Vol. III, pp. 98-99). Vessey's testimony indicates that placing the harvesting crew on its own payroll was a departure from its customary practice. His reference to problems a labor contractor was having with his license has no bearing on this question, because there is no indication that a labor contractor had ever been employed in the harvesting of garlic on San Justo land.^{3/}

^{3/}According to a letter from Vessey's labor counsel to the UFW, which was admitted without objection from the Employer, Vessey has decided that as of 1981 it will no longer be involved in the harvesting of garlic. Because there is nothing inherent in the Vessey-San Justo relationship which makes it more likely that Vessey, rather than San Justo, would decide to go out of the garlic harvesting business, I find that this evidence is not relevant to the issue of which company would be better able to provide stability in the collective bargaining - [continued]

According to Wyrick and Vessey, the harvesting crew was supervised by David Grimes, a Vessey employee who speaks no Spanish. Vessey employed Ralph Duarte, the Wyrick field supervisor, to "help" Grimes in the harvest. Vessey and Wyrick testified that Duarte's help was limited to acting as an interpreter and that he had no authority to hire or fire,

C. The 1980 Garlic Harvest.

The 1980 harvest followed the pattern of earlier years except that the growing agreement between Wyrick and Vessey was reduced to writing and the harvesting crew was placed on the Vessey payroll. The record, although not as complete as it ought to be, does contain somewhat more detail about the hiring and working conditions of the harvesting crew in 1980, than it does for earlier years.

According to Wayne Vessey, the growing agreement was reduced to writing on the advice of his legal counsel. It was signed on March 24, 1980, three or four months after the garlic had been planted. The agreement does not indicate whether it was meant to apply to the garlic harvested in August, 1980, or to the garlic to be planted later in the year. The space on the contract form to indicate crop year was never completed. David Wyrick stated that the written agreement was identical to the earlier oral agreements with one exception not relevant to this case. The agreement provides that Vessey has the responsibility for the harvest, including the provision and control of all labor,

3/[continued]-relationship. After all, San Justo could just as easily have decided to stop growing garlic on its land, However, Vessey's decision is further evidence that the harvest function was peripheral to its overall business operation.

materials and equipment. The costs of the harvest are split equally between San Justo and Vessey.

The 1980 harvest at San Justo began on August 12, with the pulling or windrowing of the garlic. Vessey payroll records disclose that 49 employees pulled garlic on that date. The topping of the garlic began on August 14. Two employees who worked in the topping crew, Nemorio Ramirez Rios and Geodulo Ruiz, testified on behalf of the UFW. Ramirez had previously worked for San Justo in June, 1980, hoeing and thinning tomatoes. He had been hired and supervised by Ralph Duarte, Ramirez testified that he was hired by Duarte to work in the garlic harvest, that Duarte was the person who gave the crew its orders, and that he considered Duarte to be the foreman. He stated that he often saw David Wyrick in the field talking to Duarte. Another Anglo man also visited the fields, but only Duarte spoke to the crew. Ramirez was unfamiliar with the name "David Grimes."

Ruiz, who had never worked prior to the 1980 garlic harvest for San Justo or its predecessors, also testified that he was hired by the foreman, Ralph Duarte, Ruiz was able to identify David Wyrick as a frequent visitor to the field, but was vague about the presence of any other Anglo man, Ruiz stated that, for the first few days of the garlic harvest, Wyrick punch cards were used to keep track of the number of baskets picked. Then, after the employees filled out Vessey application forms, Vessey punch cards were used. David Wyrick stated that punch cards other than Vessey's were used for the first two days of the harvest.

Wayne Vessey testified that David Grimes hired the workers. When he was asked how Grimes could accomplish this task

without being able to speak Spanish, he testified that Grimes would let Duarte know that people were needed and that those persons who came to the field to work would be put on the Vessey payroll by Grimes without any independent investigation by him of their qualifications. Although the record is rather sparse concerning the issue of hiring and supervision of the harvest crew, because the two central figures, Grimes and Duarte, were not called as witnesses and therefore remain rather shadowy figures, I credit the testimony of the two workers that they were hired and directed in their work by Duarte. No witness with personal knowledge was able to place Grimes in the field on a regular basis other than at the beginning and end of the work day. In his questioning of David Wyrick, Employer's counsel referred to Grimes as a "harvest superintendent," which appears to be an accurate characterization of his role. Despite the Employer's attempt to portray Duarte as nothing more than an interpreter for Grimes, I find that he exercised supervisory authority. If Duarte were only to be used as an interpreter, it certainly would not have been necessary to hire an experienced field supervisor. Surely, other persons who spoke Spanish could have been found simply to transmit orders from Grimes to the crew. The Wyrick and San Justo payroll records in evidence demonstrate that Duarte worked for the Wyricks virtually year-round. Wyrick's attempt, in his testimony, to downplay Duarte's connection to the Wyricks and his role in the garlic harvest (Duarte's name was not even mentioned in the direct examination of Wyrick) further convinces me that Duarte was the primary supervisor of the garlic harvesting crew.

On August 12, the UFW filed a Notice of Intent to Take Access with the Board. The following day representatives of the UFW (Larry Tramultola), the Employer (David and Frank Wyrick}, and the Board (Ricardo Ornelas), met to negotiate a voluntary access agreement. The Wyricks were primarily concerned about limiting lunch-time access so that there would be no undue interference with work. According to Ornelas, David Wyrick referred to the employees as "my workers" and did not mention Vessey or any other entity as employing the workers. On August 13, only seven employees were on the San Jus to payroll. From August 14 through August 22, there were six employees on the San Justo payroll on one day, and five or fewer employees on the remainder of the days. Because the term of the agreement was from August 12 to September 12, it is clear that Wyrick must have intended to include the garlic harvesters, who numbered about 55 per day, within the terms of the access agreement and within the compass of his remarks about access interfering with the production of "my workers." Wyrick also apparently considered that it was his responsibility to monitor UFW compliance with the access agreement. UFW organizer John Brown testified that he was confronted by Wyrick on several occasions when he took access to speak to the garlic harvesters at San Justo. Wyrick would watch and follow Brown on these occasions.

Twenty-six employees are listed on the San Justo payroll for the period from August 11 through August 17. of these persons, three worked only in the garlic harvest, but were paid with San Justo checks. Another was Ralph Duarte, the San Justo field supervisor. Of the remaining 22 employees, 17 worked

during the garlic harvest on the Vessey payroll. All but four of these 17 employees worked on the San Justo payroll on Saturday, August 23, a rest day for the garlic harvest. Approximately 20 other harvest employees worked for San Justo on Saturday, August 23, before returning to the Vessey payroll on August 25,

On August 25, 26, and part of August 27, most of the crew harvested garlic in the fields of Enos Silva, a garlic grower whose property adjoined the San Justo fields. The crew, including Duarte, remained on the Vessey payroll during this period. The harvest resumed at San Justo on August 27, ending on August 30. Thirty-seven of the workers were also paid by Vessey for work performed during a payroll period ending September 2. Since Duarte worked six hours during this period, it is reasonable to assume that the crew harvested garlic on property other than San Justo's for six hours on September 2. The Vessey payroll records in evidence indicate that none of the crew members had worked for Vessey in 1980 prior to the San Justo harvest and that none of them worked for Vessey after September 2.

The parties stipulated that, pursuant to a petition for representation filed by the UFW, an election was held among the agricultural employees of Vessey Foods, Inc., on July 26, 1980, that the UFW received a majority of votes cast, but that no certification has yet issued because of objections to the election filed by the Employer unrelated to its status as an agricultural employer, I have taken administrative notice of the Decision of the Investigative Hearing Examiner in Vessey Foods, Inc., Case No, 80-RC-3-SAL. I find that Vessey, at the time of the election, had a crew of approximately 150 employees involved in the harvesting

of garlic, directed by a labor contractor. There were 204 votes cast in the election.

ANALYSIS AND CONCLUSIONS

The question of determining the employer of a group of agricultural employees who have ties with more than one possible employing entity is one of the most vexing issues to arise under the Agricultural Labor Relations Act. Here, both San Justo and Vessey had an equal financial interest in the work of the garlic harvesters and both had a significant involvement in their working conditions. This might well be an appropriate case, were it to arise under the National Labor Relations Act, in which to carve out a unit of garlic harvesters and designate both San Justo and Vessey as their employer, either under a joint employer or a partnership analysis. However, the clear and unambiguous policy underlying the ALRA is to have one and only one bargaining unit per employer. Labor Code §1156.2 requires that: "[t]he bargaining unit shall be all the agricultural employees of an employer," To create one unit of Vessey employees, another of San Justo employees, and a third of San Justo-Vessey employees would undermine this policy, no matter how logically attractive this alternative appears.

The Board has been called upon to make such determinations in a number of cases. In determining which of two possible alternatives is the employer of a group of agricultural employees, the Board has consistently looked at the "whole activity" of each company, focusing on what "it actually does," rather than applying a rigid, mechanical formula, Napa Valley Vineyards Co. , 3 ALRB No. 22 (1977) , at p. 12. Recognizing that

in some cases both companies have a relationship with the affected employees that could be viewed as one of employer and employee, the Board has followed the practice of identifying one as the "primary agricultural employer" for purposes of the collective bargaining function. Corona College Heights Orange and Lemon Association, 5 ALRB No. 15 (1979). In all cases, the Board has attempted to identify as the agricultural employer the company which can provide the most stable bargaining relationship, in order to further the basic policy of the ALRA "to provide for collective bargaining rights for agricultural employees." Labor Code §1140.2.

In practice, the search for the most appropriate agricultural employer has led the Board to determine that a labor contractor acting as a custom harvester is the employer in some cases, see Kotchevar Brothers, 2 ALRB No. 45 (1976), while in other circumstances it has concluded that the crop or land owner, rather than the harvester, should be considered the employer, see Joe Maggio, Inc., 5 ALRB No. 26 (1979); and Napa Valley Vineyards, *supra*. In yet a third type of case, primarily involving the citrus industry, the Board has found that a harvesting association or packing house best fulfills the statutory criteria of an agricultural employer, see Rivcom Corporation, 5 ALRB No. 55 (1979); and Corona College Heights, *supra*.

Turning to the facts of the present case, some aspects of the Vessey-San Jus to relationship are rather clear, but when it comes to understanding the actual relationship between either company and the garlic harvesting crew only a hazy picture emerges. Primary responsibility for the failure of the record to

provide much detail about the crucial day-to-day working conditions of the crew must lie with the Employer, which chose to present its entire case on this point through the testimony of David Wyrick, who claimed not to be involved in the harvest.^{4/} By not calling either Grimes or Duarte as witnesses, the Employer has left the necessarily incomplete testimony of the two worker witnesses as the only evidence of how their work was directed. Under these circumstances, I am compelled to invoke the provisions of Evidence Code §412,^{5/} and view the evidence offered by the Employer with distrust,

The Employer's argument that Vessey is the agricultural employer of the garlic harvesting crew is based upon: (1) the provisions of the growing agreement calling upon Vessey to "furnish and control all labor, materials, and equipment. . ." for the harvest; (2) the testimony that Vessey indeed directed the harvest, hired the crew, set its wages, hours, and working conditions, and was supervised by David Grimes; (3) the fact that the crew was on the Vessey payroll; and (4) that Vessey had a 50% interest in the crop. If the contractual provisions were to be treated as conclusive, the inquiry could begin and end with an examination of their terms. But, I am enjoined to determine what Vessey actually does, regardless of what the growing agreement

^{4/}Wyrick admitted that he visited the field frequently, but provided almost no information about his or Grimes' activities. Wayne Vessey, the Employer's rebuttal witness, testified in generalities about Grimes' duties, but conceded that, because his own visits to the field were brief, he had no personal knowledge concerning what Grimes actually did when he was not present.

^{5/}Evidence Code §412 provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust,"

provides. An additional consideration leading me to give relatively little weight to the growing agreement is that the parties themselves evidently gave the document, as opposed to their long working relationship, little thought or attention. It was signed half way through the growing season and left undetermined the crop year to which it was supposed to apply. Wayne Vessey's testimony makes it appear that his request to the Wyricks that they sign an agreement was an afterthought, urged upon him by his attorney. David Wyrick testified that the agreement was essentially identical to the previous oral contracts. Clearly, he did not pay much attention to the second page of the document which contains a host of legal boilerplate provisions unlikely to have formed part of a handshake agreement. Similarly, the crucial provisions concerning the provision of labor for the harvest contained in a form contract used with a number of growers could not possibly take into account the unique aspects of the Vessey-San Justo relationship, which had evolved over a period of 10 years or more.

Nor can I give much weight to the fact that the harvesting crew was on the Vessey payroll in 1980. Again, the parties treated this fact as one of little significance. In prior years, the crew was paid by Wyrick Farms, Inc., yet the Employer still argues that the employees in those earlier harvests were Vessey's. The Board has often found that the company which provides payroll services and sets wages is not the agricultural employer. Joe Maggio, Inc., supra. Here, there is very little in the record to explain why the crew was placed on the Vessey payroll in 1980. What little evidence there is suggests that it

may have been a last-minute decision.

There is little doubt that Vessey made the decision of when to begin the harvest. Its machines were used to dig the garlic after it tested the garlic for maturity. But the evidence concerning the day-to-day conduct of the harvest is vague and highly abstract. David Wyrick merely stated that the harvest was controlled by Vessey, While the Board has considered overall responsibility for the harvest to be a significant factor in determining the employer in some industries, such as citrus, where quality control personnel are in the fields on a daily basis to direct which fruit shall be picked, in the case of garlic only two major decisions must be made: when to dig the garlic and when to top it. There is nothing in the record to suggest that once topping begins the employees must engage in any selection or sorting processes. Apparently, these activities take place in the packing house.

It is undisputed that Vessey provided the equipment and baskets used by the harvesters. Although Vessey did use specialized equipment in other aspects of the garlic production process at San Justo, the equipment used by the harvesters in the actual topping of the garlic was neither unusual nor expensive,

In arguing that San Justo was the agricultural employer of the harvesting crew, the UFW lays great stress on: (1) Ralph Duarte's supervisory status; (2) employee interchange between San Justo and the harvesting crew; (3) San Justo's financial interest in the crop; and (4) David Wyrick's negotiation of the access agreement.

I have already found that Ralph Duarte, and not David

Grimes, was the field supervisor of the crew. The worker witnesses identified him as their foreman and did not even know Grimes' name. It is clear that Duarte took Ramirez's Union activities into account in determining his qualifications to work in other crops at San Justo and that, in so doing, he was acting in the interests of San Justo. It is undisputed that Duarte talked frequently with David Wyrick during the garlic harvest. While this is clearly insufficient to establish, as the UFW urges, that Wyrick was actually in control of the harvest, it does tend to confirm that Wyrick had a continuing interest in the crop, as he himself testified. It also distinguishes Wyrick from land owners who are absentee landlords or are unfamiliar with agriculture. Wyrick's testimony establishes that he has a specialized knowledge of garlic production,

A further indication of a tie between San Justo and the harvesting crew is employee interchange. When the garlic harvest began, all but about five of San Justo's employees switched to the harvesting crew. Most of these employees returned to the San Justo payroll after the harvest. On at least one day during the harvest period, when no garlic work was done, about 30 of the harvesters worked on the San Justo payroll. Clearly, Duarte, who supervised these employees on both payrolls, was involved in this transfer. Equally clearly, Wyrick must have made the decision to have almost all the San Justo employees work in the garlic harvest, leaving San Justo with just a skeleton crew.

Finally, and perhaps most significantly, given the rather nebulous nature of much of the evidence, it was San Justo, and not Vessey, which acted as the employer the one time that a

labor relations issue arose. When the UFW sought to take access at San Justo to organize the employees, it was the Wyricks who negotiated and signed the voluntary access agreement. If, as the Employer urges, San Justo was uninvolved in the harvest, it is very strange that San Justo negotiated with the UFW and never mentioned that over 90% of the employees affected by the access agreement worked for Vessey. I also note that in its response to the UFW's Petition for Certification, the Employer answered "garlic" in response to the following question: "What agricultural commodities are involved in the work of employees in the bargaining unit sought and in the bargaining unit which the employer contends is appropriate?" Again, it appears that the Employer did not begin to question the status of the garlic harvesters as its employees until just before the election. Of course, a party may modify its position on a legal issue after obtaining legal advice, but the fact that San Justo acted as if it were the Employer of the crew is itself evidence of that fact. *If* it were clear to San Justo all along that the harvest employees worked for Vessey, then one would expect that it would have made its position clear at the meeting on the access agreement, or, at the latest, in its response to the certification petition, particularly since Wyrick testified that none of the employees on the San Justo payroll before the election was doing garlic work.

On balance, the ties between the garlic harvesting crew and San Justo are stronger and more substantial than those between the crew and Vessey, A substantial number of the garlic harvesters worked on the San Justo payroll before and after the

harvest. They worked on the same land and under the same super-vision regardless of the change in payroll. Vessey's overall direction of the harvest does not alter the fact that the working level foreman for these employees remained the same. That San Justo directed the labor relations policy concerning the harvesting crew is reflected in David Wyrick's participation in the drafting of the access agreement. Vessey's connection with the employees was limited to the provision of simple equipment, the setting of the piece rate, and issuance of paychecks.^{6/}

I therefore conclude that the agricultural employees who worked in the garlic harvest at San Justo Farms were employed by San Justo and that the challenges to their votes were properly overruled,

RECOMMENDATION

I recommend that the United Farm Workers of America, AFL-CIO be certified as the exclusive bargaining representative of all the agricultural employees of San Justo Farms in the

^{6/}The one important exception to this pattern is the few days the crew worked in a neighboring field on the Vessey payroll. It is true, as the Employer argues, that a finding that it is the Employer of the harvesters would require them to negotiate two separate agreements, one with San Justo, and one with the neighbor, although the composition and supervision of the crew had not changed. On the other hand, a finding that Vessey is the employer would require employees working continuously on San Justo property under Duarte's supervision, to negotiate two separate agreements. Neither situation is ideal. Were Vessey a true custom harvester, which brought in its own crew, the balance would swing in the direction of finding it to be the employer. See Joe Maggio, Inc., supra, at p. 6, and cases cited therein. However, although Vessey had at least 200 employees during its peak season, none of the members of the crew working at San Justo was employed by Vessey at the time of its election just a few weeks before the San Justo harvest began. While the links between San Justo and the garlic harvesters may not be overwhelming, those between Vessey and the crew are remote and attenuated.

State of California.

Dated: June 1, 1981

AGRICULTURAL LABOR RELATIONS BOARD

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