

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

W. G. PACK, JR.,)	
)	
Employer,)	Case NO. 80-RC-72-SAL
)	
and)	
)	
UNITED FARM WORKERS)	8 ALRB No. 30
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 September 22, 1980, a representation election was conducted on September 29 among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW.	21
No Union	<u>6</u>
Total.	27

The Employer timely filed one post-election objection, which was set for hearing. In its objection, the Employer states that it was at less than 50 percent of peak agricultural employment during the payroll period immediately preceding the filing of the Petition for Certification, and for that reason the election should be set aside.

A hearing was held before Investigative Hearing Examiner (IHE) Beverly Axelrod on June 17, 1981. In a Decision issued on December 22, 1981, the IHE found that the petition was timely filed

and therefore recommended that the Employer's objection be dismissed and that the UFW be certified as the exclusive representative of the Employer's agricultural employees.

The Employer filed timely exceptions to the IHE Decision and a brief in support of its exceptions. The UFW filed a timely response to the Employer's exceptions.

Pursuant to Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this case to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the IHE's rulings, findings,^{1/} and conclusions, and to adopt her recommendations .

Accordingly, the Employer's objection is hereby dismissed, and we shall certify the UFW as collective bargaining representative of the Employer's agricultural employees.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has 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

^{1/} We reject the IHE's finding that the Employer and Vessey Foods, Inc. did not orally recind their prior written contracts. The record is not clear as to the exact nature of the ultimate contractual relationship between the parties, However, as the IHE correctly noted, in cases of this sort, we do not rely exclusively on contractual terms; rather, we look to the whole activity of each of the parties to determine which is the employer for collective-bargaining purposes. San Justo Farms (Oct. 2, 1981) 7 ALRB No. 29.

of W. G. Pack, Jr., in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2 (a), concerning employee's wages, hours, and working conditions. Dated: April 16, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

W. G. Pack, Jr. (UFW)

8 ALRB No. 30
Case No. 80-RC-72-SAL

THE DECISION

Where two agricultural entities agreed to share the responsibilities of producing a garlic crop, but there were insufficient indicia of a joint employer relationship, the IHE concluded that the entity with greater continuity of relationship with the agricultural employees was the employer for collective bargaining purposes. Based on this conclusion, the IHE found that certain garlic harvest employees were properly considered employees of W. G. Pack, Jr., and therefore that the Employer was at 50 percent of peak agricultural employment in the week preceding the filing of the petition for certification.

BOARD DECISION

The Board adopted the IHE's findings, conclusions, and recommendation with the modification that no finding was made as to the exact, final contractual relationship between W. G. Pack and Vessey Foods. This change did not affect the decision, however, since the IHE correctly relied on the whole activity of the parties and not the parties' contractual terms alone.

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

* * *

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
)
W.G. PACK, JR.,)
)
Employer,) Case No. 80-RC-72-SAL
)
and) DECISION OF INVESTIGATIVE
) HEARING EXAMINER
)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)
)
Petitioner.)
)

A. Randall Smith
Sims & Plank
San Jose, California
For the Employer

Daniel A. Garcia
Sacramento, California
For the Petitioner

STATEMENT OF THE CASE

Beverly Axelrod, Investigative Hearing Examiner: This case was heard by me on June 17, 1981 in Hollister, California.

A petition for Certification was filed on September 22, 1980 by the United Farmworkers of America, AFL-CIO (herein "UFW"), to represent the agricultural employees of W.G. Pack, Jr. (herein "Employer"). On September 24, 1980 the Employer filed the mandatory response to the petition; in its response the Employer contended that the Employer was not at 50% of peak employment in the payroll period immediately preceding the filing of the petition. Payroll records were attached

to the Employer's response in support of this contention. On September 29, 1980 the Agricultural Labor Relations Board (herein "Board") issued a Notice and Direction of Election, to be held on September 29, 1980.

An election was held on September 29, 1980, with the following results:

UFW:	21
No Union:	6

On October 6, 1980, the Employer timely filed a petition objecting to the election, pursuant to Labor Code Section 1156.3(a) and (o), alleging that the Employer was not at 50% of peak employment in the payroll period preceding the petition for certification.

On February 13, 1980, the Executive Secretary of the Board issued a Notice of Allegation Set for Hearing, and on April 10, 1981 the Executive Secretary of the Board issued a Notice of Investigative Hearing. In both documents the Executive Secretary stated that the issue for hearing was "Whether the Petition for Certification in this case was filed at a time when the Employer was at least at 50% of its peak agricultural employment for 1980."

On June 17, 1981, I conducted a Pre-Hearing Conference in this case. The parties agreed that the issue in this case centers on employees who worked in the 1980 garlic harvest in the Employers fields. The parties stipulated as follows:

If the employees [at issue] are attributable employees under the act to [the Employee.], then the Employer was not at one-half of his peak

agricultural employment for 1980 during the period immediately preceding the filing of the Petition for Certification.... If the employees [at issue] are not attributable as employees under the act to [the Employer], then the Employer was at one-half of his peak agricultural employment for 1980 during the payroll period immediately preceding the filing of the Petition for Certification." (Pre-Hearing Conference, Transcript pp. 1-2).

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 and the Relationship Between the Employer and Vessey Foods, Inc.

The Employer is a sole proprietorship, owned by Willis G. Pack, Jr. It is engaged in row crop farming in Hollister, California. Among the crops grown are tomatoes, bell peppers, and garlic.

The garlic crop is grown and harvested by the usual agricultural steps for garlic. The crop is planted, irrigated and cultivated. When the growing cycle is completed the garlic is allowed to sit and dry. When the tops of the plants are almost brown the garlic is "dug" or "undercut", "an operation performed mechanically by a tractor, a knife pass[ing] under the garlic undercutting it and lifting it free from the ground so that the garlic bulbs, themselves, are on top of the

ground." (Tr: 9).^{1/} After the garlic is dug, the bulbs are allowed to dry further. Then, absent unseasonal weather conditions, the garlic is "wind rowed", a procedure in which "a crew come in and ... collects the garlic from three beds and puts it in into a row on one bed, working from either side piling it into a center bed." (Tr: 9). The next step is to "top" the garlic, a procedure in which "a crew will come in ... to clip off with shears the roots and the tops. It's usually then placed in a hamper. The hampers are dumped into wooden bins." (Tr: 9), The wooden tins then usually remain in the field for several weeks, allowing further drying of the garlic. Than the bins are removed to a storage area.

Vessey Foods, Inc. is a company which made arrangements with the Employer concerning the garlic crop grew on the Employer's premises. The arrangements more made on behalf of Vessey Foods by Mr. Wayne Vessey.^{2/} for several years prior to 1980, the Employer made arrangements with Vessey in which Vessey "was responsible for the garlic harvest" in the Employer's fields. Tr: 30). Vessey would plant the crop, then the Employer would, cultivate, irrigate and grow it. Vessey would then come in with a labor crew and "do all the functions related to harvesting" the crop. (Tr: 31).

1/ References to the Reporter's Transcript are given "Tr.", followed by the page number.

2/ Vessey Foods, Inc. is hereafter referred to as "Vessey." Mr. Wayne Vessey is hereafter referred to as "Mr. Vessey" or "Wayne Vessey."

Vessey and the Employer shared the profits from the sale of the crop.

Prom 1972 until April, 1980, Vessey employed Mr. Peter Bourdet as its production manager in charge of field crops. Mr. Bourdet's job for Vessey was "handling all the field crops; contracting and supervising the growing and the harvest of it." (Tr: 51). Vessey paid Mr. Bourdet a salary for this job. In the years prior to 1980 in which Vessey harvested the garlic crop in the Employer's fields, Mr. Bourdet was in charge of supervising those harvests for Vessey.

B. The 1980 Garlic Harvest

On March 18, 1980 the Employer entered into written contract with Vessey. (ERX: 6).^{3/} This contract provided that the Employer "will assist Vessey Foods, Inc. in the growing and marketing" of the garlic crop, and stated that the Employer's obligations would be:

- "(a) Furnish the land necessary for growing said crop.
- (b) Prepare the land adequately for planting of such crop at such time as Vessey shall specify.
- (c) Provide adequate irrigation, fertilization, fumigation, hoeing weeding and cultivation of said crop."

Under the contract, Vessey's obligations were:

- "(a) Provide the seed, crack it, prepare it for planting and plant it ... and furnish the tractor, planter, and all labor and equipment necessary therefor."

3/ Employer's Exhibits are described herein as "ERX"; Petitioner's Exhibits are described herein as "PX".

Vessey would further:

"Harvest said crop, and will furnish and control all labor, materials, and equipment necessary therefor."

The March 18 contract provided that Vessey and the Employer would "share equally the total harvest cost " and share the cost of insurance. The contract stated that "this crop shall be grown for sale for seed or on the open market, as Vessey shall determine, and shall be sold there at the discretion of Vessey." The contract provided that Vessey and the Employer would split the profits equally. This contract was signed by Willis Pack, Jr. for the Employer, and Peter Bourdet for Vessey.

In July, 1980, the Employer had not received payments owed it by Vessey from the previous year's (1979) garlic harvest. The Employer attorney wrote a letter to Vessey "demanding reasonable assurance that [Vessey] will meet [its] obligations for payment to [the Employer] pursuant to the agreement of March 18, 1960," concerning the 1980 garlic harvest. (ERX: 8). As a result new written contract was entered into between the Employer and Vessey on July 15th, concerning the 1980 garlic harvest. (ERX: 7). Under this contract the Employer was to sell to Vessey the 1980 garlic crop at a price of 9.7 cents a pound, instead of splitting the profits from the sale of the garlic. A payment schedule was set out providing for four monthly payments from Vessey to the Employer, beginning thirty days after the garlic as delivered to Vessey.

The July 15th contract did not alter any of the arrangements for Vessey to harvest the garlic crop. Mr. Pack testified that:

"The difference between the two contracts is the payment....

The nature of the garlic harvest was not to change from one agreement to the other. They were to harvest the garlic for me. My specific responsibilities under the contract were terminated as of the completion of the growing portion." (Tr: 6,-8).

Mr. Pack testified that the 1980 garlic harvest began in August 1980. He further testified that he spoke with Vessey in August, 1980 and that Vessey was unable to begin prompt harvesting of the crop. Therefore an oral agreement was made rescinding the obligation of Vessey to harvest the crop:

"When it became apparent that prompt topping of my garlic, performed by Vessey Foods as required in the contract, would not occur, I spoke with Wayne Vessey, and we came to an agreement whereby I would harvest the garlic myself and that the garlic would be stored on my premises and be my sole possession, as a result of their inability to perform the harvest per contract." (Tr: 13).

This contract was never reduced to writing.

The 1980 garlic harvest began on August 29th, and lasted through September 4th. During this time approximately 80 workers harvested the garlic. The status of these workers is the crux of this case. As noted above, the parties have stipulated that if these 80 workers are attributable as the Employer's employees then the September 20th Petition, filed when the workforce was approximately 25 workers, was not filed at a time when the workforce was at least 50% of peak

employment; on the other hand, it. is also stipulated that if the garlic harvest workers are not attributable as employees of the Employer, the Petition was filed properly and the election should stand.

From the evidence and testimony in this case, I make the Following, findings concerning the 1980 garlic harvest.

1. The garlic was planted in Fall 1979 by Vessey.
(Tr:27).
2. The Employer grew the garlic from "time to time" Vessey employees inspected the garlic during the growing. (Tr: 29).
3. The garlic was dug by an employee of Vessey driving a tractor owned by Vessey. {Tr: 10-11).
4. In August, 1980, the Employer contracted with Peter Bourdet to provide harvest employees for the garlic. This is the same Mr. Bourdet who, for the previous eight years, had supervised harvests for Vessey. In April, 1980, Mr. Bourdet left the employ of Vessey and established himself as an independent labor contractor. Mr. Bourdet left Vessey "by mutual agreement. Vessey was looking for a way of reducing some overhead, and I [Mr. Bourdet was looking for a .. to get a ahead little bit.' (Tr: 51).
5. While working as an independent labor contractor in the Employer's garlic fields in 1980, Mr. Bourdet used the services of Vessey's bookkeeper to do the paperwork for his payroll. (Tr:54).

6. During 1980, Mr. Bourdet supervised employees in the harvest of other garlic fields in the area besides the Employer's. Mr. Bourdet used the same workers for the different fields, shifting crews from field to field as needed. Mr. Bourdet testified that a number of the other harvests he supervised in 1980 were controlled and supervised by Vessey. (Tr: 73-74).

7. The employees used by Mr. Bourdet in 1980 had no other relationship with the Employer. They moved from field to field for different harvests under the direction of Mr. Bourdet. They had worked in previous years for Vessey. As noted in point 6, supra, Mr. Bourdet testified that a number of the 1980 harvests at which they worked were controlled and supervised by Vessey. Three of the employees were called by Petitioner to testify at the hearing. They all testified that they considered themselves to be working for Vessey at all the 1980 harvests, including the harvest at the Employer's fields. The same Vessey supervisors were present and supervising them at all the harvests, including that at the Employer's fields. No other 1980 harvest employees were called by the Employer. There was no testimony that any of the harvest employees considered themselves to be working for anyone other than Vessey. There was no testimony that any of the employees had any continuing relationship with the Employer. (Tr: 73-74; 89; 111-112; 119-121).

8. Vessey provided the bins into which the garlic was placed in the Employer's 1980 harvest. (Tr: 21).

9. The punch cards used by the workers (indicating how many loads of garlic they gathered) were provided by Mr. Bourdet. (Tr: 21).

10. Mr. Pack (owner of the Employer) was present in the fields, overseeing the operations, during the harvest. (Tr: 21).

11. Vessey supervisors were also present in the fields, overseeing the operations, during, the harvest. (Tr: 111-112; 120-121; 125-126).

In addition to the above findings concerning the 1980 harvest procedures and employees. I make the following findings concerning the financial arrangements for the harvest:

12. A net weight of 297,654 pounds of garlic was harvested in the Employer's fields in 198 J. (T: 34). After dirt, trash and defects were taken out, available net weight of 197,344 pounds of garlic was left. (Tr: 34).

13. Of the 197,344 pounds of garlic harvested, the Employer sold 2,000 pounds to a wholesaler, receiving \$1,400 in payment. (Tr: 24; ERX: 10).

14. The remaining 195,344 pounds of garlic was sold by the Employer to Vessey, at a rate of 9.7 cents a pound. (Tr: 34).

15. The wage rates paid to the harvest employees were worked out by Mr. Pack and Mr. Bourdet. The Employer, through Mr. Pack, borrowed money from Mr. Pack's mother and from a credit agency to initially pay the costs of the harvest. (ERX: 4, 5, 9).

16. The Employer was reimbursed by Vessey for the cost of the harvest. (Tr: 39).

ANALYSIS AND CONCLUSIONS

The Board has frequently dealt with the issue of which of two possible businesses is the employer of the workers for the purposes of the Agricultural Labor Relations Act. In a series of cases, the Board has set out guidelines for resolving this issue.

First, it is possible in certain circumstances for there to be a finding of the two businesses as joint employers. See Arbatti Farms, Inc., 3 ALRB No. 83; San Justo Farms, 7 ALRB No. 29, p. 5, n.1. However those circumstances involve situations of common ownership and virtually total overlapping of the agricultural operations, and are thus not applicable to the instant case.

Where one of two possible employers is to be determined, the Board has stated that no single factor is to be considered. Rather, in a series of cases the Board has repeated that the "whole activity" of each of the parties is to be looked at. Napa Valley Vineyards Co., 3 ALRB No. 22; Gourmet Harvesting and Packing, 4 ALRB No. 14; Joe Maggio, Inc., 5 ALRB No. 26; San Justo Farms, 7 ALRB No. 29.

The recent case of San Justo Farms, Supra, is closely on point to this case. There, Vessey Foods was also involved in a garlic harvest operation on a grower's land. In San Justo Farms the Board found that the employees were attributable

to the grower. However, the very factors which the Board found decisive there are all precisely the opposite in this case, and the opinion in San Justo Farms is very strong authority for a finding that in the installs case the employees are attributable to Vessey and not to the Employer.

In San Justo Farms the Board noted:

"Evidence presented at the hearing indicates that both San Justo [the Employer] 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."
(7 ALRB No. 29, p.4).

The Board then went on to discuss the significant factor in its decision:

"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 Juste before arid after the garlic harvest, the evidence introduced at the hearing indicates, however, that none of the garlic harvesters worked for Vassey at any time before or after the garlic harvest." (7 ALRB No. 29, p.6).

Finally, the Board rejected the Employer's claim that a contract in which it way stated that Vessey was in control of the employees was conclusive:

"It is not the legal relationship established by the contract that make 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., 4 ALRB No. 4; Grow-Art, 7 ALRB No. 19." (7 ALRB No. 23, p.7).

Applying these guidelines to the instant case, I have no trouble concluding that the primary relationship here is between the employees and Vessey.

The Employer's argument is based on its assertion that:

(1) The final, verbal contract stated that the harvest responsibilities were entirely the Employer's; and

(2) The Employer hired and paid for the harvesters through the independent contractor, Peter Bourdet.

I find that this argument fails for a number of reasons. First, as noted above in San Justo Farms, the contract would not be conclusive; rather, it is the actual happenings in the harvest that are determinative. As to those events, I find that there is a much more significant relationship between the employees and Vessey than between the employees and the Employer. In fact, virtually the entire relationship is between the employees and Vessey. I have found that both the Employer and Vessey supervisors were in the fields. However the employees believed that they were working for Vessey, They were working for Vessey in their other operations that summer. Whereas in San Justo Farms the employees had a continuing relationship with the Employer, the exact opposite is true here. The employees had always worked for Vessey before, and had no relationship at all with the Employer other than this harvest.

Second, I conclude that there was no verbal rescission of the written contracts. The written contracts called for Vessey to supervise the harvest and to pay the Employer 9.7

cents a pound for the garlic. The Employer argues that Mr. Pack and Mr. Vessey verbally abrogated the contract and arranged that the garlic would belong entirely to the Employer. In support of this assertion, the only tangible proof offered by the Employer is the fact that it sold 2,000 pounds of garlic to a wholesaler. I find that this is strictly de minimus compared with the 195,344 pounds of garlic it sold to Vessey at the contracted price of 9.7 cents a pound.

Third, although the Employer initially paid Mr. Bourdet, the Employer was reimbursed for the harvest costs by Vessey.^{4/}

In sum, Vessey planted the crop and sent observers to check on it during the Employers period of growing. Vessey sent supervisors to oversee the harvesting along with the Employer. Vessey bought the crop. Vessey had a continuing relationship with the employees and the Employer had none.

For these reasons, viewing the "whole activity" of both parties and looking at the actual events that took place in the harvest, I find and conclude that the workers who took part in the 1980 garlic harvest in the Employer's fields were attributable to Vessey Foods, Inc. and were not attributable to the Employer, within the meaning of Section 114C.4(c) of the Agricultural Labor Relations Act.

There were no objections by the Employer to the tally of the votes in the election on September 29, 1980 or to the conduct of the election. The Employers sole objection.

4/ In view of my findings and conclusion, I do not find it necessary to determine whether Mr. Bourdet was truly acting as an independent contractor, or whether, in view of his extensive past and present involvement with Vessey, he was acting for Vessey.

was that the Petition for Certification was filed in violation of the 50% of peak requirement. The Employer stipulated that if the garlic harvest employees are not attributable to the Employer, the Petition was filed correctly.

Accordingly, I find and conclude that the Petition for Certification was properly filed, and that the election was properly conducted.

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 W.G. PACK, JR. in the State of California.

Dated: December 22, 1951

AGRICULTURAL LABOR RELATIONS BOARD

By

Beverly Axelrod

Beverly Axelrod
Investigative Hearing Examiner