

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TONY LOMANTO,)	
)	
Employer,)	Case No. 80-RC-77-SAL
)	
and)	
)	
UNITED FARM WORKERS OF)	8 ALRB No. 44
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 26, 1980, a representation election was conducted on October 7 among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW	39
No Union.	18
Challenged Ballots.	<u>8</u>
Total	65

The Employer timely filed 52 post-election objections. Of these objections, 43 were dismissed by the Executive Secretary and nine were set for investigative hearing. In its remaining objections, the Employer alleges that it is a labor contractor and therefore not an employer within the meaning of Labor Code section 1140. 4(c); that Union organizers violated the access regulation, 8 Cal. Admin. Code section 20900(e), on the morning of the election; that a Board agent improperly allowed people to vote without an

employee eligibility list and without requiring identification; and finally, that the Agricultural Labor Relations Board (Board) intentionally opened the polls late to allow the Union an extra opportunity to campaign.

A hearing was held before Investigative Hearing Examiner (IHE) Joe H. Henderson in September 1981. In a Decision issued on January 8, 1982, the IHE recommended that the Board find that Tony Lomanto is not the employer within the meaning of Labor Code section 1140.4 (c) and, therefore, recommended that the petition be dismissed. Based on this recommendation, the IHE did not consider the other objections.

The Petitioner filed exceptions to the IHE Decision and a brief in support of its exceptions.^{1/} The Employer filed a brief in reply.

Pursuant to Labor Code section 1146, the 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, and conclusions, only to the extent consistent herewith.

Custom Harvester Issue

The Petitioner excepts to a number of the IHE's factual findings and to his conclusion that Tony Lomanto is not an

^{1/}The Employer has moved the Board to strike Petitioner's exceptions on the basis that said exceptions were filed one date late. Since the Petitioner has substantially complied with the timeliness requirements and since the Employer has shown no prejudice, the Employer's motion is hereby denied. See George Arakelian Farms, Inc. (Feb. 14, 1979) 5 ALRB No. 10.

agricultural employer. We find merit in these exceptions. Whether Lomanto is an employer within the meaning of section 1140.4 (c) depends on its characterization as either a labor contractor or a custom harvester. Based on our review of Lomanto's whole activity, we find that Lomanto is a custom harvester and, therefore, the employer of the tomato harvest employees who voted in the instant certification election.

The term "agricultural employer" is defined in the Agricultural Labor Relations Act (Act), Labor Code section 1140.4(c), as:

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

Labor Code section 1682, referred to in this provision, defines a labor contractor as any individual, firm, partnership, association, or corporation that provides labor for a fee. A "fee" is further defined as the difference between the total compensation paid for the labor contractor's services and the amount which the contractor pays out to the employees provided.

Since the early days of this Act, we have encountered agricultural enterprises which provide labor, but provide "something more as well." Kotchevar Brothers (Mar. 2, 1976) 2 ALRB

No. 45. These enterprises, which we have termed "custom harvesters," typically do not own or lease land; rather, they provide various agricultural services, particularly harvesting, to one or more land owners. Since the activities of these enterprises vary greatly depending on the crop, geographical region, and farming methods used, it has been difficult to consistently distinguish between labor contractors and custom harvesters.^{2/} Our general approach in each case has been to review the whole activities of the enterprises involved and determine which enterprise has the most significant attributes of an employer, including the capacity to enter into a stable collective bargaining relationship. Napa Valley Vineyards (Mar. 7, 1977) 3 ALRB No. 22; Joe Maggio, Inc. (Apr. 10, 1979) 5 ALRB No. 26.

The specific criteria used to determine custom harvester status, however, have varied from case-to-case. In Kotchevar Brothers, supra, 2 ALRB No. 45, we found custom harvester status where the company employed to harvest wine grapes provided both labor and costly equipment, such as trucks and gondolas, and also assumed complete responsibility for the harvest and transport of the crop. In Napa Valley Vineyards, supra, 3 ALRB No. '22, a land management company was held to be an agricultural employer where it had year-round responsibility for all agricultural functions, was

^{2/}We have consistently rejected the simplistic assertion that an entity is a labor contractor within the meaning of the Act, simply because it possesses a labor contractor's license. The statutory goal of encouraging collective bargaining in agriculture would certainly be frustrated by such a narrow interpretation of the term "agricultural employer." Gourmet Harvesting and Packing (Mar. 29, 1978) 4 ALRB No. 14.

paid a per-acre management fee over the cost of labor and rental on equipment, made the day-to-day managerial decisions, and handled all employee relations, including supervision. In Joe Maggio, Inc. supra, 5 ALRB No. 26, however, a harvesting enterprise was not held to be a custom harvester where the enterprise received payment on a per-ton basis (indicating a risk of loss), supervised and paid the workers, and provided specialized harvesting equipment. The Board found it more significant that the grower/landowner controlled the pace and timing of the harvest and had a continuing relationship with the harvest employees before and after the carrot harvest.

These cases have been decided on the basis of different factors in different circumstances and no conclusive factor or combination of factors has emerged to control all "custom harvester" cases.^{3/} Rather than make a specific rule, given the variety of business relationships encountered in agriculture, we think it more prudent to encourage a full inquiry in each case into every factor that bears upon the labor contractor/custom harvester distinction and upon the ultimate goal of attaching the collective bargaining obligation to the entity which will promote the most stable and effective labor relations. See, San Justo Farms (Oct. 2, 1981) 7 ALRB No. 29. This inquiry should include, but not be limited to, the following:

^{3/} Our attempts, in Sutti Farms (Feb. 19, 1980) 6 ALRB No. 11, to reduce the custom harvester issue to two factors: provision of specialized equipment and exercise of managerial judgment, proved unsatisfactory on second review. We therefore vacated 6 ALRB No. 11 in Sutti Farms (Nov. 23, 1981) 7 ALRB No. 42 and set the custom harvester issue for hearing on the whole activity of the parties.

1. Who exercises managerial control over the various farming operations? Who has day-to-day responsibility?
2. Who decides what to plant, when to irrigate or harvest, which fields to work on?
3. Who is responsible for performing the farming operations?
4. Who provides the labor? Does the provider also supervise the labor?
5. Does someone provide equipment of a costly or specialized nature?
6. Who is responsible for hauling the crop to be processed or marketed?
7. Who owns or leases the land?
8. On what basis are any contractors compensated and who bears the risk of crop loss?
9. Do the parties have any financial or business relationships with each other, outside of the relationship at issue in the case? What form of business organization is each party to the case?
10. How do the parties view themselves, i.e., does the grower/landowner consider the contractor a custom harvester? If other growers enter into similar arrangements with the contractor, what are their views?
11. How long has each party been entering into arrangements of the kind at issue in the case? What is each party's investment in that line of business and how easily could that investment be liquidated?
12. What continuity of employment relationship exists between any of the parties and the agricultural employees involved in the case, e.g., did harvest employees also work before or after the harvest for one of the parties?
13. Ultimately, who is the "employer" for collective bargaining purposes and what is the correct legal status of each of the parties?

Based on our review of the instant record, we find that Tony Lomanto is a sole proprietorship with two separate divisions. The major portion of the business, in terms of total company profits, is a trucking business, engaged in hauling various

agricultural commodities. The remainder is a tomato harvest operation which supplies to tomato growers tomato harvesting machines, tractors, gondolas, and the workers to operate this equipment.

Lomanto owns the equipment and directly employs a field manager and several mechanics. The sorters and drivers who operate the machines are supplied to Lomanto by labor contractor Juan Hernandez. Hernandez is reimbursed by Lomanto for all labor costs, plus a ten percent contractor fee. Lomanto is paid by the grower a fixed amount per ton of tomatoes accepted by the canneries.

The grower, after consulting the cannery, decides when to harvest which fields and how much to harvest on a given day. The canneries are responsible for hauling the tomatoes from the field to the cannery and do not necessarily use Lomanto trucks where Lomanto does the harvesting.

Hernandez, who has supplied workers to Lomanto since 1978, hires and supervises the harvest workers with the help of several forepersons. Lomanto's mechanics stay with the harvest machines during the harvest and, in addition to servicing the equipment, oversee the quality of the harvest yield. This quality control sometimes requires counseling or reprimanding the harvest workers for sorting incorrectly. The harvest workers, through Hernandez, work for Lomanto throughout the tomato harvest season. Hernandez also supplies these workers to other agricultural enterprises, besides Lomanto. There is no indication that the workers worked for the tomato growers on other crops, outside of the tomato harvest.

Lomanto has been engaged in harvesting canning tomatoes by machine since 1966. The equipment owned by Lomanto represents a capital investment of several million dollars; however, there was evidence that the specialized mechanical harvesters are becoming obsolete. Lomanto harvests for different growers in different years, with some single-year and some multi-year contracts.

The contracts between Lomanto and the growers are generally oral. The written Petoseed contract, however, was introduced as representative of the standard agreement. The Petoseed contract referred to Lomanto as a custom harvester and called for Lomanto to provide all the equipment and labor for the harvest. A representative of Paul W. Bertuccio, one of the tomato growers, testified that Bertuccio considers Lomanto a custom harvester. Lomanto maintains that it only provides equipment and labor for a fee and that Hernandez is the only one who supervises the workers, making Lomanto a labor contractor.

Based on the foregoing facts, we conclude that Lomanto is the employer of the tomato harvest workers for collective bargaining purposes.

Lomanto is solely responsible for obtaining and paying the harvest labor and any supervision of that labor. Although it is not clear whether Lomanto's mechanics are supervisors in the sense of hiring, disciplining or assigning work, it is clear that they protect Lomanto's interest in the quality and quantity of the harvest yield by supervising the performance of the workers. Lomanto's interest in the harvest is reflected in his payment on

a per-ton basis, showing a risk of loss if some judgment is not exercised during the harvest.

Lomanto also has a substantial and specialized investment in tomato harvesting. It is Lomanto's only agricultural activity and Lomanto has been harvesting tomatoes for 16 years. The tomato harvest machines are only useful for picking canning tomatoes and Lomanto has 16 such machines. This represents a substantial investment in specialized equipment, whether or not the gondolas, bins, and forklifts are considered. This investment ties Lomanto to tomato harvesting from year to year, whereas a grower may decide not to plant tomatoes at all one year.

It is also significant that several growers view Lomanto as a custom harvester and that the harvest workers worked for Lomanto before and after the election, indicating continuity of employment.

The only evidence of employer status attributable to the grower is the managerial authority to decide when to harvest which fields. The grower has no direct contact with the workers or Hernandez. There is also no evidence that the workers have any continuity of employment with any tomato grower, outside of the tomato harvest.

We therefore reject the IHE's recommendation and dismiss the Employer's Objection No. 1.

Alleged Access Violations at Greenfield Site

Uncontradicted testimony by Lomanto mechanic Greg Cabral, Juan Hernandez, and grower Stanley Dedini indicates that three UFW organizers appeared at the Greenfield election site on the morning

of the election. The organizers first arrived at 4:00 a.m., but when they saw that the harvesting machines had started, left the field. They came back at 6:45 a.m. when the workers were having a break and talked to the workers. When the machine began moving again, one organizer hung onto the machine for a few minutes and tried to keep talking to the workers. However, the workers ignored him and went back to sorting tomatoes. The organizers stayed in the field until a sheriff's deputy arrived, at which point they left. The organizers came back a third time shortly before the election at 9:00 a.m.; however, they were allowed to stay until the voting began.

The "access rule," 8 Cal. Admin. Code section 20900, allows union organizers to enter an employer's property for a period of up to one hour before work, at lunch, and after work. Two organizers may enter for each crew and if a crew has more than 30 workers, then one additional organizer may enter for every 15 additional workers. Since the organizers in this case took access at other than the authorized time (a mid-shift break) and in excess numbers (three organizers for a crew of 20), the access regulation was violated. However, the Board has consistently stated that access violations will not be grounds to set aside an election where the violations are not shown to have affected the outcome of the election. Toste Farms (Dec. 5, 1975) 1 ALRB No. 16. Here, the access was brief and uneventful, and the attempts of one organizer to distract employees from their work were unsuccessful. We therefore dismiss Objections 2 and 9.

Alleged Board Agent Misconduct at the Yuba City Site

The Employer objected to the election because the Board agent at the Yuba City polling site did not have a copy of the eligibility list; allowed people to vote without identification; and allowed someone to vote who had been passed a Social Security card by another prospective voter.

Board agent Roger Smith testified that it was true that he did not have a copy of the eligibility list; however, a list was not needed at the Yuba City site. In accordance with standard election procedure, all seven of the ballots cast at Yuba City were challenged by the Board. The challenges were later compared to the eligibility list at the final tally. This procedure is routinely used when there are multiple polling sites to prevent a worker from voting at more than one site.

As to voter identification, Smith testified in a thorough and consistent manner that he asked each voter for identification and that each voter showed a form of identification which the Board considers acceptable. The Employer's witness, election observer Anita Soto, testified that Smith gave her no instructions about election objections or ballot challenges and did not ask any voters for identification. We resolve this conflict in favor of Smith, since after 150 elections over five years with the Board, it is patently improbable that Soto's version is correct. Compared to Smith, Soto's testimony is also vague, confused, and suffers from

lapses of memory.^{4/}

As to the voter being handed a Social Security card, Smith testified that the prospective voter asked her mother for her card, which the mother carried in her purse. The employer's observer told Smith that the voter was not the person named on the Social Security card, but that she recognized the voter as an eligible employee. Smith informed the observer that the Employer had the right to bring any identification problems up at the final tally since the voter was being challenged in any event. However, after this discussion, the voter became frustrated and left without voting, despite Smith's urgings. Soto testified only that Smith tried to get a voter without identification to vote.

In the face of Smith's complete and plausible description of the event and the uncontradicted evidence that the voter did not vote, we dismiss Objection 38, along with Objections 33 and 34.

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 Tony Lomanto in the State of California for purposes

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^{4/}As the ALO did not discuss the allegations of Board agent misconduct in his Decision, we have reviewed the record de novo and have made credibility resolutions based on the inherent probability of the testimony taken as a whole. El Rancho Market (1978) 235 NLRB 468 [98 LRRM 1153]; Holtville Farms (July 8, 1981) 7 ALRB No. 15, review den. by 4th Dist., Div. 1 (Dec. 31, 1981) hg. den. by S.Ct. (Jan. 28, 1982) .

of collective bargaining, as defined in Labor Code section 1155.2(a), concerning employees' wages, hours, and working conditions.

Dated: June 18, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

TONY LOMANTO (UFW)

8 ALRB No. 44
Case No. 80-RC-77-SAL

IHE DECISION

The IHE found that the alleged employer, Tony Lomanto, was merely a provider of harvest equipment and a supplier of labor for a fee. He therefore concluded that Lomanto was not a custom harvester and not the employer of the tomato harvest workers who voted in the election. He further recommended that the UFW's Petition for Certification be dismissed and declined to consider the other objections which had been set for hearing.

BOARD DECISION

The Board reversed the IHE, finding that Lomanto supervised the workers, had a continuous employment relationship with the workers, was compensated on a per-acre-yield basis (requiring quality control), owned and operated costly and specialized equipment for 16 years, and was considered a custom harvester by various growers. The Board stated 12 factors to be considered in future custom harvester cases.

The Board went on to consider the objections involving excess access, and Board agent misconduct at the polls. Although technical violations of the access rule were committed, there was no showing of interference with voter free choice. As to the polling area allegations, the credited testimony of the Board agent showed that normal and proper procedures for identification of voters and dual polling sites were used in this election.

The Board therefore dismissed the objections and certified the UFW as exclusive representative of the tomato harvest employees of Tony Lomanto.

* * *

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

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STATE OF CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	Case No. 80-CE-270-SAL
)	& 80-CE-271-SAL
TONY LOMANTO)	
)	Hearing Office. Report
-and-)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO)	



STATEMENT OF THE CASE

This case stems from a representation election conducted by the Agricultural Labor Relations Board among the alleged agricultural employees at Tony Lomanto Trucking Company of Foster, California.

On September 26, 1980 the United Farm Workers of America AFL-CIO filed a petition for certification with the salinas office of the ALRB. The Board issued a notice and direction of election on October 6, 1980. The election conducted the following day. There were five (5) election sites in four (d) cities, Oxnard, Greenfield, Holister, and Yuba City.

Timely objections to the election were filed by Lomanto with the Agricultural Labor Relations Board. The Executive Secretary ruling on the objection filed by Lomanto set January 10, 1981 for the objection hearing. Thereafter, on July 1, 1981, Lomanto filed a request for review with the Executive Secretary asking that the remaining objections be set for hearing. The Executive Secretary on July 23, 1981, set one additional objection for hearing.

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 ADMINISTRATOR
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For W. Henderson
ARBITRATOR
1001 1001 1001

1 The United Farm Workers filed an unfair labor practice
2 charge against Lomanto on October 2, 1990. This was designated
3 case no. 80-CE-271-SAL. The charges alleged violations Sections
4 1153(a) and (c) by Lomanto.

5 On February 12, 1931, the Agricultural Labor Relations
6 Board filed a notice of hearing and complaint based on the above
7 charges.

8 On January 10, 1981, the Executive Secretary consolidated
9 the unfair labor practice hearing with the hearing on the
10 objections.

11 On September 15, 1981, a prehearing conference was held on
12 the consolidated cases. The respondent, the ALRB, and United
13 Farm Workers entered into a tentative settlement agreement on the
14 unfair labor practice charges. It was agreed by the parties that
15 if the settlement were approved by the Regional Director that the
16 unfair labor practice hearing and the hearing on the objections
17 would be severed. When the conditions of the settlement
18 agreement were fulfilled, the unfair labor practice complaint was
19 to be dismissed.
20

21 On September 30, 1931, during the hearing the Agricultural
22 Labor Relations attorney, James Sullivan, informed the parties
23 that the Regional Director had approved the settlement agreement.
24 The Complaint in case no. 80-CE-271 SAL would be withdrawn when
25 Lomanto complied with the terms of the settlement agreement.

26 The investigative hearing examiner than granted the motion
27 severing the two cases. The unfair labor practice complaint was
28 taken off calendar.

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1 Part of the settlement agreement involved the Company
2 withdrawal of certain objections set for hearing. Nine
3 objections were finally set for hearing.

4 OBJECTIONS:

5 The objections are as follows:

6
7 1. The Agricultural Labor Relations Board and the Regional
8 Director improperly and erroneously failed to dismiss the Petition for
9 Certification that the Employer, Tony A. Lomanto, is a labor
10 contractor, and, as such, he is by definition, not an agricultural
11 employer under Section 1140.4, subsection (c) of the ALRB, and
12 therefore, Section 1155, et seq., dealing with the representation
13 elections, are not applicable to him.

14 2. The Petitioner, United Farm Workers of America violated the
15 Access Rule before the election at the Greenfield site, thereby
16 intimidating the employees and depriving them of a free and
17 uncoerced election.

18 3. the Union unlawfully trespassed onto the property of the.
19 Employer at the Greenfield site before the election, thereby
20 intimidating the employees and depriving them of a free and
21 uncoerced election.

22 9. The Union committed unsafe acts in violating the Access
23 Rule by jumping onto the tomato machines while they were in
24 operation and while employees were working on them, thereby
25 intimidating employees.

26 33. The ALRB, through its representatives and agents,
27 interfered with the fair operation of the election process and
28 destroyed the necessary laboratory conditions by conducting the

1 election at the Yuba City site without a copy of the
2 employee list furnished by the Employer to the ALRB on
3 October 1, 1980.

4 34. The ALRB, through its representatives and agents,
5 interfered with the fair operation of the election process and
6 destroyed the necessary laboratory conditions at the Yuba City
7 election by allowing substantial number of voters to cast ballots
8 without presenting adequate and sufficient identification.
9

10 38. The ALRB, through its representatives and agents,
11 interfered with the fair operation of the election process and
12 destroyed the necessary laboratory conditions by watching one
13 employee give another employee a social security card and telling
14 her to go vote for the Union; hearing the Employer's observer
15 question the girl about whether the card was hers and, not
16 hearing any response, giving the girl a ballot and allowing her
17 to vote.

18 40. The Board has illegally and improperly allowed a
19 pattern to develop of conducting elections after the official
20 starting time, which pattern began at John R. and/or Alice S.
21 Kado case and continued through the election held in this case at
22 the Greenfield, Hollister and Oxnard sites.

23 During the hearing, pursuant to a motion for judgment filed
24 by the United Farm Workers, the investigating hearing examiner
25 dismissed objections 3 and 40.

26 **FACTUAL STATEMENT OF THE STATUS OF TONY LOMANTO TRUCKING.**

27 **The Company's Structure**

28 Tony Lomanto Trucking Company is a sole proprietorship wholly
owned by Tony Lomanto. The Company is divided into two

1 operations: (1) a trucking operation and (2) a picking
2 operation. The trucking portion of the Company operates as a
3 common carrier hauling mainly agricultural products in the State
4 of California. Mr. Peter Lomanto in the General Manager of the
5 trucking operation and has been with the Company for over 21
6 years.

7 The trucking business is by far the paramount income
8 producer of the Company. In fact, that section of the Company
9 generates between 75 to 85 percent of the gross profit of Tony
10 Lomanto Company.

11 Lomanto employs between 80 and 85 persons; 70 percent of
12 which are seasonal, and all of which are involved in trucking.
13 The rest of the employees are full-time. All of Lomant's
14 employees (except management and clerical) are represented by the
15 International Brotherhood of Teamsters. Lomanto first signed a
16 contract with the Teamsters in the late 1940's. The Company has
17 continued to be signatory to a contract with the Teamsters ever
18 since. Lomanto Trucking primarily hauls agricultural products.
19 Most of Lomanto's business involves hauling for canneries and
20 packing sheds in California. Two of Lomanto's major contracts
21 are with Tri-Valley Canneries and California Canners and Growers.
22 Under the terms of these contracts, Lomanto hauls tomatoes from
23 the fields to the cannery. Lomanto does not haul for the
24 growers. The contracts for hauling are with the canneries. The
25 canneries instruct Lomanto each night how many loads and which
26 fields his trucks are to pick up the loads.

27 When Lomanto truck goes to the field to pick up a loan, the
28 tomatoes are in a bin, or a gondola, sitting on a trailer.

1 Lomanto may own some of these gondolas and/or trailers,
2 normally they are rented to the cannery. The cannery has
3 control over the gondolas and/or trailers.

4 The Picking Aspect of Tony Lomanto Trucking Company

5 Lomanto is divided into two separate operations, a
6 trucking operation and a picking operation. The two distinct
7 operations are operated separately and run by different general
8 managers. Robert Perry is the General Manager of the picking
9 operation.

10 Since 1977, Tony Lomanto has been a farm labor contractor
11 registered with the Department of Labor.

12 Robert Perry has been the General Foreman and Manager of the
13 picking operation for Tony Lomanto since its inception in 1966.
14 His responsibilities include keeping the tomato picking machines
15 in good working order, bringing parts to the mechanic who keeps
16 the maching running in the field, overhauling the machines in the
17 winter and generally seeing to it that everything stays in
18 running order. Furthermore, he not only is familiar with all of
19 the contracts the Company enters into in the picking operation,
20 one of his major duties it to make sure that these contracts are
21 fulfilled.

22 Except for two, the contracts Lomanto enters into with
23 individual growers are oral. Basically, the contracts call for
24 Lomanto to provide a machine and other equipment used in the
25 picking of tomatoes to the grower. During 1980 and 1981, Lomanto
26 had contracts to provide picking machines to Johnny Matia,
27 Bertuccio Farms, P & L Farms, Dedini Ranch, Mike Reed and Peto
28 Seed. Perry testified that the terms and conditions of the

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1 agreements Lomanto has with all of these companies are basically
2 the same.

3 The machines which Lomanto provides to these growers are a
4 mechanical type of machine. The machines are not considered
5 sophisticated within the agricultural industry. They require
6 approximately 20 workers per machine, consisting of sorters (12 to
7 18), machine drivers and tractor drivers. The machines pick
8 tomatoes and drop them onto conveyor belts. While the tomatoes
9 are on the conveyor belt, the sorters separate the green from the
10 ripe tomatoes. The tomatoes then go up another conveyor belt and
11 are dropped into bins or gondolas which are riding alongside the
12 machine.

13 These machines are not considered sophisticated within the
14 agricultural industry according to the witnesses. There
15 currently are available a much more sophisticated machine which
16 is called an "electric eye" machine. This machine, which costs
17 approximately one and one-half times that of the mechanical
18 machine, electronically sorts the green and ripe tomatoes.
19 Consequently, only six to seven workers are required to operate
20 each electronic eye machine.

21 The Field Workers

22 For each machine Lomanto provides a grower, there are
23 approximately 16 to 20 workers. Between 10 and 16 of these
24 workers are sorters. There is one machine driver and two tractor
25 drivers. Additionally, there is one foreman on each machine.

26 In the usual course of events, the growers with which
27 Lomanto has agreements ask Lomanto to see to it that there are
28 workers to man the machines. This, however, is not always the

1 case. Indeed, Robert Perry testified that Lomanto does not
2 always see to it that the crews are provided for the machines.
3 For example, Perry testified of instances where Peto Seed had a
4 crew of their own which they put on Lomanto's machine. There was
5 also a recent instance where John Matia placed his workers on
6 Lomanto's machines.

7 When Lomanto does provide the crew for the machine, it
8 arranged with a labor contractor to provide the workers. Lomanto
9 used labor contractor John Hernandez for most of the agreements.
10 Other labor contractors have been used. All of these employees
11 (the sorters, the machine driver and the tractor drivers) are
12 employees of John Hernandez (or whichever other labor contractor
13 Lomanto obtains) and are carried on Hernandez' payroll.

14 Aside from the grower, Hernandez testified that he is
15 the person who hires the workers. Neither Lomanto, nor anyone in
16 Lomanto's employ, may hire or fire any of the workers which are
17 supplied by the labor contractor.

18 Hernandez said he is totally responsible for the scheduling
19 of which employees would work where on a particular day. He is
20 responsible for hiring and/or firing any of his employees who are
21 in the field. The only other person who could possibly dictate
22 the firing of one of the employees is the grower. Neither
23 Lomanto nor anyone in Lomanto's employ has the authority to fire,
24 or demand the firing of, any of Hernandez¹ employees.

25 Hernandez as a labor contractor has agreements with many
26 different growers and entities to provide labor. Hernandez
27 decides where a particular worker will work on a particular day.
28 Hernandez testified that it is not necessarily true that if a

1 worker were working at a ranch at the beginning of the harvest
2 that the worker would stay working at the ranch until the harvest
3 was finished. In fact, a worker that is being moved around may
4 work one day on a Lomanto machine and another day on a machine
5 owned by someone else at a different ranch. Lomanto has no
6 control over where the workers are assigned.

7 Hernandez has a supervisor present on each machine.

8 Basically, the duties of the forelady or foreman is to write down
9 the names of the people working on the machine and give them
10 instructions on what to do during the day. This foreman works
11 directly for Hernandez and provides for the supervision of the
12 sorters. Hernandez also testified that he supervises the machine
13 driver and the tractor drivers. However, the overall supervisory
14 authority lies with the grower. Hernandez testified that no one
15 from the Tony Lomanto operation ever supervises any of the
16 sorters, machine drivers or tractor drivers. Lomanto does not
17 have any control or supervisory authority over the people working
18 in the fields on the Lomanto machines.

19 All of the field workers get to their jobs via their own
20 automobiles. Neither Hernandez, Lomanto nor any of the growers
21 provide any transportation for any of the workers. Furthermore,
22 neither Hernandez, Lomanto nor any of the growers own, maintain
23 or arrange for housing for any of the workers.

24 The Mechanic

25 Lomanto does have one employee in the field with the tomato
26 picking machine. This employee is a mechanic. He is the only person in
27 the field who is an employee paid by Lomanto

28 //

1 Trucking. The mechanic is a member of the Teamsters Union. He is
2 covered by the collective bargaining agreement between Lomanto
3 Trucking and the Teamsters.

4 The mechanic's duties are very specific. It is his
5 responsibility to make sure that the tomato picking machine is
6 functioning properly.

7 Inherent in his duties of making sure that the machines are
8 operating properly, the mechanic will fix the machine if he
9 notices that something is mechanically wrong. In such an
10 instance, upon discovering the mechanical problem, he will speak
11 with either Hernandez or Hernandez' foreman and explain that the
12 machine is not functioning properly and must be repaired. The
13 foreman then stops the machine so the mechanic can repair it. In
14 the event there is a major breakdown of the machine it is
15 Hernandez who will speak with the grower. If the situation is
16 such that it will take the mechanic several hours to repair the
17 machine, the grower will make the decision as to whether or not
18 the employees remain at the field until the machine is fixed or
19 go home for the day. That decision is solely within the
20 authority of the grower. Neither Hernandez, the labor
21 contractor, nor Lomanto's mechanic have the authority to make
22 that decision.

23 The Role Of The Grower

24 Lomanto has contracts with various growers to provide
25 machines to pick their tomatoes. The state of the industry is such
26 that the vast majority of these agreements are oral. However, this does
27 not mean that there are never written agreements between Lomanto and a
28 particular grower. Lomanto has

1 an extensive agreement with Peto Seed, which has been reduced to
2 writing. The terms and conditions of that agreement are
3 representative of the oral agreements Lomanto enters into with
4 most of the other growers.

5 Prior to the time that the tomatoes are fully grown and
6 ready to be picked, Lomanto has no relationship with any growers.
7 Lomanto has nothing to do with the planting of any crop, the
8 tilling of the soil, irrigation, cultivating, or the growing of
9 any crops. All of these decisions lie with the individual grower.
10 Lomanto farms no land of its own. Lomanto has nothing to do with the
11 crop aside from picking them. Lomanto Co. has nothing to do with the
12 farming process for any of the growers.

13 The grower decides when the tomatoes are ready to be picked.
14 Lomanto picks tomatoes only when instructed to do so by the
15 individual grower or packing company. Lomanto does not make the
16 decision of which field to pick on a particular day. That
17 decision, once again, is always vested in the grower or cannery.
18 The practice is that on a day to day basis, the grower or
19 cannery will tell Lomanto which field to pick on each particular
20 day.

21 Each day, a decision must be made as to how much, or how
22 many loads, of tomatoes should be picked that day. Lomanto does
23 not make this decision. That decision normally is made jointly
24 by the grower and the cannery to which the grower sells its crop.
25 Once that decision is made, the grower or cannery informs the
26 Lomanto people how many loads are to be picked that day. The
27 grower, by stating the load to be picked controls how many hours the
28 workers will work on a particular day. The grower by his

1 decision on how much to pick also dictates how many workers will
2 work on a particular day. The number of loads to be picked on a
3 particular day also determines how many machines are required.

4 In the normal situation, the grower, or a representative of
5 the grower, is in the fields and has contact with Lomanto and the
6 labor contractor people every day that Lomanto machines are picking
7 the grower's tomatoes.

8 In addition to making all of the decisions with regard to
9 when, where, and how much to pick, the grower has the overall
10 supervisory authority over the workers and the harvest itself.
11 This authority is not vested in Lomanto. In the one contract
12 that Lomanto has with a grower that is reduced to writing (and is
13 representative of the other oral contracts), it states, in
14 paragraph 6, that the company (Peto Seed) shall "provide
15 supervision". Both Robert Perry and John Hernandez specifically
16 testified that the growers provide supervision in the fields.
17 Furthermore, Hernandez testified that it is the grower who makes
18 all of the decisions in the fields. Hernandez testified that if
19 anyone were to complain about the quality of work done by the
20 sorters, it would be the grower.

21 Mr. Perry, Lomanto's foreman, further stated that it is the
22 grower that makes the final decision on all of the aspects of
23 the picking procedure, from beginning to end. That power is not
24 vested in Lomanto. Mrs. Bertuccio, a grower, testified that it is
25 Bertuccio Farms which has the "overall managerial
26 responsibility" for the picking and harvesting of its crops.
27 It is Bertuccio which makes sure that everything is done properly,
28 not Lomanto.

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The Role Of The Canneries And The Hauling Of The Crops

The major portion of Tony Lomanto Trucking is a hauling, or trucking operation. Lomanto hauls- agricultural commodities, from the fields to the canneries under contracts with the canneries. Two of Lomanto's major contracts are with Cal-Can and Tri-Valley Canners. Lomanto also hauls for O.P. Murphy's packing shed.

All of the contracts Lomanto enters into for hauling are independent of any contracts the Company has with growers to pick tomatoes. The procedure outlined at the hearing is as follows: The growers enter into contracts with someone to pick the tomato crop. The grower also enters into contracts with individual canneries to purchase the tomatoes. These two contracts are unrelated. The cannery, in turn, enters into a contract with a particular trucking company to pick up the tomatoes at the field and haul them to the cannery. The contracts are entered into and negotiated independent of one another. Lomanto Trucking hauls tomatoes for individual canneries and packers from many fields which are picked by entities other than Lomanto. There are, however, instances where Lomanto Trucking will haul tomatoes to a cannery from a field where the picking operation is a Lomanto picking contract with the grower. Examples given; the picking operation of Lomanto has a contract with Bertuccio Farms to pick their tomatoes. Bertuccio, in turn, has a contract with Sun Garden Cannery who purchases the crop. Macabee Trucking hauls for Sun Garden Cannery and picks up the crop that was picked by Lomanto machines.

//

1 The Dedini Ranch has a contract with Cal-Can to purchase its I
2 tomatoes. Lomanto has a contract to pick Dedini's tomatoes.
3 Lomanto has a separate contract with Cal-Can to haul their
4 tomatoes. Thus, by pure coincidence, Lomanto hauls those
5 Tomatoes.

6 There are also instances where two different trucking
7 companies may pick up a crop for two separate canneries from one
8 grower. In 1980, P & L Farms had a contract with Glorietta
9 (Cannery) to purchase its tomato crop. P & L Farms also had a
10 contract with Lomanto to provide the machines to pick their
11 tomato crop. Lomanto Trucking had a separate contract with
12 Glorietta to haul crops for them thus Lomanto hauled the
13 Glorietta tomatoes from the field. During that same year, P & L
14 Farms also sold tomatoes to Ragu. Wallace Trucking hauled for
15 Ragu and, thus, hauled those tomatoes out of the P & L fields.

16 None of Lomanto's contracts with any growers to provide the
17 picking machines are ever tied to which cannery a grower sells
18 his tomatoes. Many times the growers may change the canneries
19 they do business with from year to year. For example, in 1980
20 the Matia and Nicoletti Ranch sold tomatoes to Glorietta; in 1981
21 they sold to Del Monte and Northwest.

22 The tomatoes that are picked by Lomanto machines are
23 deposited into gondolas or bins that sit on trailers. It is the
24 cannery which decides whether bins or gondolas will be used. The
25 gondolas are owned or rented by the individual canneries. The
26 canneries which have control of the gondolas. Lomanto rents
27 gondolas and trailers to canneries and growers.

28 //

1 OBJECTION NO. 1:

2 AGRICULTURAL EMPLOYER

3 IS LOMANTO AN AGRICULTURAL EMPLOYER?

4 The Act: Labor Code

5 Labor Code 1140.4(c) The term "agricultural
6 employer" shall be liberally construed to include any
7 person acting directly or indirectly in the interest of
8 an employer in relation to an agricultural employee,
9 any individual grower, corporate grower, cooperative
10 grower, harvesting association, hiring association,
11 land management group, any association of persons or
12 cooperatives engaged in agriculture, and shall include
13 any person who owns or leases or manages land used for
14 agricultural purposes, but shall exclude any person
15 supplying agricultural workers to an employer engaging
16 such labor contractor or person shall be deemed the
17 employer for all purposes under this part.

18 Labor Code 1682(b) "Farm labor contractor"
19 designates any person who, for a fee, employs workers
20 to render personal services in connection with the
21 production of any farm products to, for, or under the
22 direction of a third person, or who recruits, solicits,
23 supplies, or hires workers on behalf of an employer
24 engaged in the growing or producing of farm products,
25 and who, for a fee, provides in connection therewith
26 one or more of the following services: furnishes board,
27 lodging, or transportation for such workers;
28 supervises, times, checks, counts, weighs, or otherwise

1 directs or measures their work; or disburses wage
2 payments to such persons.

3 The Board is responsible for determining who is
4 the agricultural employer and has addressed the question in several
5 cases. In San Justo Farms, 7 ALRB No. 29, the
6 Board said, "In determining which of several parties is the
7 employer of a group of agricultural employees, we look not to any,
8 single factor but consider the "whole activity" of each of the
9 parties in order to determine which should assume the collective
10 bargaining responsibilities". Joe Maggio, Inc. (April 10, 1979) 5
11 ALRB No. 26; Napa Valley Vineyards Co. (March 7, 1977) 3 ALRB No.
12 22. This approach best serves the purpose of the Act because it
13 provides the most stable bargaining relationship. Gourmet
14 Harvesting and Packing (March 29, 1978) 4 ALRB No. 14.

15 In Napa Valley Vineyards Co. 3 ALRB No. 22 (1977), the
16 Board has consistently looked at the "whole activity" of each
17 company focusing on what "it actually does", rather than applying
18 a rigid, mechanical formula.

19 The Board in Kotchevar Brothers 2 ALRB No. 45 (1976)
20 determined that a labor contractor who supplies costly equipment
21 and transportation of the crop to the market is a custom
22 harvester and employer. The same is true of a harvesting
23 association. One who provides workers for a fee who do manual
24 harvesting is a labor contractor as opposed to a custom
25 harvester Cardinal Distributing Co., 3 ALRB No. 23.

26 The "degree of control" exercised by one helping in the
27 harvest was held not sufficient to make the party a custom
28 harvester in The Gain Co., 5 ALRB No. 4.

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1 When a party exercises "managerial judgment", provides some
2 equipment and receives a per-acre management fee, he is an
3 employer. Jack Stawells, Jr., 3 ALRB No. 93.

4 In looking at the whole activity of the party in Napa Valley
5 (supra) the Board made comparisons in holding the party an
6 agricultural employer:

- 7 1. Performs "all major farming operations throughout the
8 year";
- 9 as opposed to spot jobs;
- 10 2. Has complete responsibility for the day-to-day
11 operations and decisions;
- 12 3. Receives a per-acre management fee, rather than
13 just a percentage amount above the cost of labor;
- 14 4. One who acts as both a labor contractor and is in
15 the inclusionary language as an agricultural employer is not
16 necessarily excluded as an agricultural employer;

17 The test of a contractor, employer is the relationship in its
18 entirety.

19 Summarizing the cases the Board in determining the "whole
20 activity" considered the following matters in making their
21 determination as to who is the employer:

- 22 1. Who exercises management control, i.e. makes the
23 day-to-day decisions on: (a) employee conditions, (b) crops
24 grown, (c) time to harvest, (d) amount to be harvested, and (e)
25 which fields are to be harvested?
- 26 2. Who performs the major farming operations?
- 27 3. Who provides the equipment?
- 28 A) Harvester

- 1 B) Gondolas
- 2 C) Tractors in the field.
- 3 D) Trucks to transport crops.
- 4 E) Is it a specialized equipment or useful in
- 5 other activities.
- 6 4. Who arranges to get the crop to the market?
- 7 5. Who supervises the workers?
- 8 6. Who arranges and supplies housing for the workers?
- 9 7. Who arranges and supplies transportation for the
- 10 workers?
- 11 8. Who owns the land?
- 12 9. What is the method of payment of the parties for the
- 13 crop?
- 14 A) Percentage of total harvest.
- 15 B) Per acre or ton.
- 16 C) Free for each worker, ton, acre.
- 17 10. Who has the risk of loss if the crop fails?
- 18 11. Are there other financial arrangements between the
- 19 parties?
- 20 12. How does the grower, contractor/harvester view the
- 21 relationship?
- 22 13. Is the party involved in other enterprises?
- 23 If yes, how similar or different are the other
- 24 enterprises?
- 25 14. Not mentioned in the case I reviewed, but should be
- 26 considered:
- 27 1) Is there an existing labor agreement with
- 28 the party considered to be the

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agricultural employer?

A) If yes, with what Union?

2) If the party is other than the grower, is there an existing or past labor agreement between the Union and the grower?

A) If yes, what Union?

3) Is there is potential conflict between two or more competing Unions?

15. Who will provide the most stable bargaining relationship.

USING THE ABOVE CRITERIA AS TO LOMANTO WE FIND THE FOLLOWING:

1. Lomanto is not engaged in agriculture the year around.

2. Lomanto does not exercise any managerial control over the agricultural enterprise. The grower, not Lomanto, plants, cultivates, irrigates, harvests, and sells the crop.

3. Lomanto did not hire or supervise the field workers. It was Hernandez who hired and supervised the workers and provided foremen in the field.

Lomanto contracts to pick tomatoes with his machines on a per acre or ton basis. Hernandez or another labor contractor is then contracted to provide the workers.

4. Lomanto provides a mechanic with the machine in the field. There was testimony by one witness that the mechanic criticized her mother about the mother's work.

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1 This was the same mechanic that called Hernandez when the
2 Union organizers appeared at the field.

3 5. Lomanto's employees, mechanics, and truck drivers belong
4 to the teamsters union.

5 6. Lomanto does not decide when to harvest, how
6 much, what fields, or any other harvesting related
7 decisions. These decisions are made by the grower or
8 cannery.

9 7. The growers have the responsibility for the day-
10 to-day decisions.

11 8. Lomanto provided the gondolas and in some cases
12 transports the tomatoes to the cannery. But, this was done
13 under separate contracts with the canneries and not under
14 contracts with the growers that Lomanto's machines were used
15 to pick tomatoes.

16 9. The grower under its contracts with the cannery
17 arrange to have the crop transported to the cannery.
18 Lomanto's trucks under separate contracts sometimes haul the
19 tomatoes to the canneries.

20 10. The grower and/or cannery has the risk of loss, not
21 Lomanto.

22 11. Lomanto provides trucks to canneries, growers,
23 and others to transport agricultural products. All drivers
24 are teamster members.

25 Lomanto also provides trailers, gondolas for canneries
26 and/or growers these gondolas for most part are pulled by
27 Lomanto trucks, but in some cases independent trucks haul
28 Lomanto gondolas.

1 12. Lomanto's contract with the grower is limited to
2 providing the machine to pick the tomatoes for the growers.

3 13. Hernandez provides the workers'-and supervises
4 them.

5 14. The workers provide their own transportation and
6 housing.

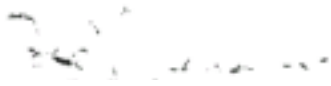
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8 RECOMMENDATION:

9 Based upon the above, as the Investigative Hearing Officer,
10 recommend that the Board find that Respondent TONY LOMANTO is
11 not an agricultural employer within the Labor Code Section
12 1140.4.

13 Based upon the above recommendation the Hearing Officer did not
14 consider the other objections.

15
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17 DATED: 1/2/92

Respectfully submitted,

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21 Joe H. Henderson,
22 Hearing Officer
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Joe H. Henderson
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