

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

UNITED FOODS, INC., d/b/a  
PICTSWEET MUSHROOM FARM

Employer

and

Case 36-RC-5912

TEAMSTERS LOCAL UNION #670, affiliated  
with INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, AFL-CIO, CLC

Petitioner

**SUPPLEMENTAL DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>1</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons:

In my earlier Decision in this matter issued on April 27, 1999, I found that all of the employees of the Employer, with minor exceptions, are agricultural employees. With respect to such exceptions, I tentatively concluded that slicing mushrooms is non-agricultural work. I

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<sup>1</sup> The parties filed briefs, which have been considered.

ordered that the hearing be re-opened for the purpose of making a full record concerning the slicing operation. Such record is now before me.<sup>2</sup>

The Employer has a Freshpack department wherein approximately 40 employees work under crew leaders Maria Cruz Diaz de Estrada (“Cruz”, herein) and Pedro Montero, who report to supervisor Cathay Cheung. Mushrooms arrive in Freshpack in three-pound baskets.<sup>3</sup> Two processes occur in Freshpack: slicing and “prepack.” Cruz oversees the employees who dump, sort or slice, weigh, and pack whole and sliced mushrooms, and two custodians. Montero oversees the cooler crews. The Freshpack employees work in a 5- to 6,000 square foot building adjacent to the growing rooms.<sup>4</sup>

In the slicing operation, one employee dumps whole mushrooms onto a belt. One removes debris. One feeds the mushrooms into the Lubot Walker slicer. One loads the sliced product into five-or ten-pound boxes which are then sent down another conveyor to be checked for weight by two employees. The boxes are then stacked onto pallets by two employees. In the alternative, sliced mushrooms are put into eight-ounce trays by four employees. The trays are then sent through an automated machine which wraps plastic over the top and then adds a label. The eight-ounce packages are then put into larger boxes and stacked on a pallet by two employees. All pallets are then loaded onto trucks by two employees from distribution. On any one day, approximately 11 employees perform (but not necessarily the same 11) the various functions associated with sliced mushrooms, from dumping through loading pallets onto trucks. The slicing operation is in progress for about four or five hours a day, every day, six days a week. During the remainder of their time, the employees handle whole mushrooms in the “pre-pack” process.

Pre-pack is also performed in the Freshpack area under crew leader Cruz. In pre-pack, mushrooms are removed from the baskets, sorted and graded by size, and packed accordingly into five-pound boxes, eight-ounce trays, or otherwise in accordance with customer preference, as determined by the sales and marketing department. There is an “array” of requests for container sizes and packing specifications. The record does not reveal any specifics in this regard. Petitioner is not seeking to represent any employees who work solely in pre-pack.

As stated in my earlier Decision in this matter, Section 2(3) of the act excludes from the definition of "employee" any individual employed as an agricultural laborer. Since 1947, Congress has added an annual rider to the Board's appropriation measure directing it to apply the definition

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<sup>2</sup> Petitioner initially sought a unit of all employees; in the re-opened hearing, Petitioner amended its petition to seek all employees involved in handling sliced mushrooms, including slicer-operators, carton fillers, casers, cooler loaders, stackers, drivers, delivery drivers, maintenance, and clean-up employees.

<sup>3</sup> A far larger proportion of mushrooms are packed by “direct pick,” that is, the pickers place them directly into the five-pound boxes in which they are shipped.

<sup>4</sup> The farm consists of 120 acres, with 764,000 square feet of growing area (33 acres of roof.)

of agriculture set forth in Section 3(f)<sup>5</sup> of the Fair Labor Standards Act, 29 U.S.C. Section 201, et seq. (FLSA), in determining whether an individual is an agricultural laborer. The Board's policy is to be guided in this regard by the interpretation of Section 3(f) of the FLSA adopted by the Department of Labor, currently found in Interpretive Bulletin, Part 780 (29 CFR § 780).

In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949), the Supreme Court set forth two distinct branches of the definition of agriculture:

First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in the primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental to or in conjunction with "such" farming operations.

"Primary" activities include cultivation, growing and harvesting of the commodity. Harvesting is the last step of the primary activities, and ends when the produce is severed from the ground or plant, and reduced to possession. (29 CFR § 780.110, 117, 118) "Secondary" agricultural practices include, inter alia, preparation for market, delivery to storage or to market or to carriers for transportation to market. This includes cooling and packaging. With respect to fruits and vegetables, it also includes, inter alia, assembling, ripening, cleaning, grading, sorting, drying, preserving, packing and storing. (29 CFR § 780.128, 151)

The issue herein is whether slicing mushrooms is secondary agricultural activity, or non-agricultural, industrial activity. In making such determination, all relevant factors must be considered, i.e., size of the ordinary farming operations; type of product resulting from the operation in question (that is, whether the raw or natural state of the commodity has been changed); investment in the processing operation as opposed to the ordinary farming activities; time spent in processing and in ordinary farming; degree of separation by the employer between the various operations; degree of industrialization; and what is ordinarily done by farmers in this type of operation. *Maneja v. Waiialua Agricultural Company*, 349 U.S. 254 (1955); see also, 29 CFR § 780.145, 147.

Board law on slicing operations is scant and unhelpful. In *Michigan Mushroom Company*, 90 NLRB 774 (1950), the Board found the petitioner's "all or nothing" unit which included, inter alia, employees who sliced and canned mushrooms to be inappropriate, without directly addressing any issue with respect to the slicing operation. In *Campbells Fresh, Inc.*, 298 NLRB 432 (1990), the Board found direct store delivery drivers to be non-agricultural, where one of the products they handled was sliced mushrooms. However, the Board's finding of non-agricultural status was grounded solely on the fact that the employer regularly purchased

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<sup>5</sup> Section 3(f) provides in relevant part:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural ... commodities ... and any practice ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

mushrooms from an independent farmer; the Board's finding was unrelated to the slicing operation, regarding which the Board simply said that, "the record does not indicate that the nature of the mushrooms is changed in any other fashion."

Here, the farm consists of about 120 acres, with 764,000 square feet of growing area; the Freshpack area is 5,000 to 6,000 square feet, approximately 0.7 percent of the growing area, or about 0.1 percent of the total farm area. There are approximately 380 employees on the farm, and about 40 to 42 work in the Freshpack area, which includes slicing. Five or six percent of the mushrooms grown on the farm are sliced. The product resulting from the operation at issue is sliced raw mushrooms, as opposed to whole raw mushrooms; there is no chemical change to the produce. The total assets of the farm are six to seven million dollars; the Lubot Walker slicer cost about \$50,000 several years ago. Employees engaged in the slicing operation spend about 400 hours per week in that pursuit; other farm employees work an aggregate of about 18,000 hours per week. The record does not establish that farmworkers engaged in growing or growing-related operations regularly engaged in slicing or any of the related activities; however, every slicer also routinely performs work that is agricultural in the secondary sense. The slicing operation is an integral part of the Freshpack area. The Freshpack area is physically separate from the growing rooms, but in proximity. The process of feeding mushrooms into the slicer and the physical setup of the slicing operation does appear to be a substantially more "factory-like" activity than simply sorting and grading mushrooms. The slicing operation is functionally and physically integrated into the entire mushroom growing operation, and is not a separate administrative franchise of the Employer. The slicing does add some value to the mushrooms, and is not necessary for the preservation of the mushroom, pending sale; in fact, it apparently shortens shelf life. The record evidence with respect to slicing practices engaged in by other mushroom growers shows that the practice is very common amongst such growers.<sup>6</sup> It does not appear that a separate "mushroom slicing industry" exists.

Inasmuch as only a small proportion of the Employer's resources are devoted to the slicing operation, the raw, natural state of the mushrooms is essentially unchanged by slicing,<sup>7</sup> the slicing operation is not notably "factory-like," and slicing is a common practice among mushroom growers in general, I conclude that the employees involved in the slicing operations are agricultural employees.<sup>8</sup>

Accordingly, inasmuch as I have now found that all of the Employer's employees are agricultural employees, I shall dismiss the petition.

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<sup>6</sup> The Employer offered un rebutted evidence that only approximately eight out of 95 mushroom growers listed in the American Mushroom Institute (AMI) membership directory for 1998-1999 do not slice mushrooms. This testimony went unchallenged in the record. The witness appeared to have extensive experience in the industry.

<sup>7</sup> In this regard, I note that the Second Circuit held that sliced mushrooms were "vegetables in their natural state" in *A. Zanmati & Co. v. United States*, 153 F. 880 (1907), a case which arose under the Tariff Act of 1897.

<sup>8</sup> I note that in the *Maneja* case, *supra*, the issue concerned farm employees who processed the farm's sugar cane into sugar or molasses. The Supreme Court without consideration of certain language issues, and relying only on the "facts", found the sugar-making process a close issue as to whether it was "agricultural", or "industrial." The degree of change from cane to sugar, and the degree of industrialization, were certainly much more severe than the Employer's slicing operation; yet, the Court found the facility "close" to an agricultural operation.

**ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 28, 1999.

**DATED** at Seattle, Washington, this 14<sup>th</sup> day of June, 1999.

/s/ PAUL EGGERT

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