

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Stockton, California)

AGRICULTURAL RESEARCH DEPARTMENT
(HEINZ U.S.A.)¹

Employer

And

Case 32-RC-4967

CANNERY WORKERS, PROCESSORS,
WAREHOUSEMEN & HELPERS, LOCAL 601
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO²

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the 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 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 parties stipulated and I find, that the Employer is engaged in commerce within the meaning of the Act and, accordingly, the assertion of jurisdiction is appropriate herein.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated that should a question of representation exist, the appropriate unit for collective bargaining purposes would consist of all full-time and regular part-time employees employed by the Employer at its

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Petitioner appears as corrected at the hearing.

Agricultural Research Facilities located at Stockton and Colleeville, California, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act. However, the Employer contends that no such question of representation exists because all of the individuals in the stipulated unit are agricultural laborers under Section 2(3) of the Act. The Petitioner, on the other hand, contends that none of the individuals in the stipulated unit is an agricultural laborer so there is a question of representation. Thus, the primary issue before me is whether some or all of the individuals in the stipulated unit are agricultural laborers under Section 2(3) of the Act and, therefore, not subject to the jurisdiction of the Board. Since, as discussed below, I have found all the individuals in the stipulated unit to be agricultural laborers under the Act, I find that no question concerning representation exists.³

FACTS

The Agricultural Research Department (ARD) is a department of Heinz U.S.A. (Heinz) The principle function of ARD is the development of new and improved varieties of tomato seed. Once ARD develops a new and marketable seed variety, Heinz sells the seed to customers around the world.⁴ In order to develop new seed varieties, ARD operates an 80 acre research farm in Colleeville, California,⁵ and three greenhouses, a research lab, research seed room, a pathology lab and short process kitchen on the property of Heinz's production facilities in Stockton, California.⁶ In these facilities, ARD employs 15 hourly workers of which eleven are full-time and four are seasonal.⁷

ARD's supervisory hierarchy is as follows. Benjamin George is the manager of ARD and Ron Ryan is his operations manager. Robert Stahmer, who reports to George, is chief horticulturist and in charge of the research lab. Osmand Bukowski, who also reports to George, is chief plant breeder and the plant breeder and plant pathologist⁸ report to him. Armando Martinez is the supervisor of the farm and reports to Ron Ryan. Ann D'Abruso is the supervisor of the greenhouses and short process kitchen and reports to Robert Stahmer.⁹

³ I have also concluded that even if a couple of the individuals were employees with regard to the nonagricultural work they perform, they would not constitute an appropriate unit and that thus no question of representation exists.

⁴ Once a new marketable seed variety is developed, Heinz sends the seed to another country such as China to be mass produced. The mass produced seed is then shipped back to Heinz's Stockton facility for testing and marketing.

⁵ The research farm is located 15 miles east of Heinz's Stockton facilities.

⁶ ARD rents its Stockton facilities from Heinz.

⁷ While all of these individuals are provided to ARM by Polaris Staffing Agency, at the hearing, the Employer and Petitioner stipulated that the Employer is a joint employer of these individuals. Polaris is not named in the petition and it did not intervene in the proceeding.

⁸ The plant breeder and pathologist have advanced degrees and are not included in the stipulated unit.

⁹ The parties stipulated that George, Ryan, Martinez and D'Abruso are supervisors under the Act. While there was no stipulation regarding Stahmer and Bukowski, neither party contends

The Research Farm

The research farm is a complete farming operation and each year devotes about 25 of the farms 80 acres to growing tomatoes. The farm season runs from about late February through September or early October, although some operations continue year around. Workers at the farm perform all of the basic farming operations, including, preparing the soil, planting seeds and transplants, pollinating and cross-pollinating the plants, spraying the soil with insecticides, irrigating the plants, applying fertilizer and harvesting the tomatoes. Once the tomatoes are harvested, farm workers extract the seeds from them and clean and dry them. In addition, ARM operates a lab on the farm to test samples of the tomatoes for such characteristics as ph, consistency, soluble solids and purity of seed. In order to test the tomatoes, the farm lab workers produce a tomato juice by cooking the sample tomatoes in microwave ovens and then running the cooked tomatoes through a pulper to remove the seeds. The juice is tested and canned and the results are given to the plant breeders who evaluate the seed for future marketing possibilities.¹⁰

The Short Process Kitchen

ARM operates a short process kitchen at its Stockton facilities from about mid-July through mid-October. In this kitchen, workers make tomato juice for testing from raw tomatoes brought in from the research farm or growers' trials.¹¹ Workers make the tomato juice by chopping the tomatoes, cooking them and then running them through a pulper which extracts all the seeds. At each step of the process, the tomatoes are weighed and precise records of the results are kept, which are sent to the lab. The workers then can the juice, which is sent to the lab for testing to evaluate the seeds for possible future marketing.

The Greenhouses

After the season ends at the farm, ARM shifts its tomato growing operations to its Stockton greenhouses. The work at the three greenhouses begins in about October and is completed by the following April. At the greenhouses, as at the farm, ARM carries out a complete farming cycle. The cycle at the greenhouses starts with the planting of seeds in flats and ends with the harvesting of the fruit but also includes, the transplanting, pruning, staking, fertilizing, pollinating, and spraying the plants at various stages of their development. As at the farm, once the fruit is harvested, the seeds are extracted.

that either of these two individuals should be included in the unit. I conclude, therefore, that they are not part of the stipulated unit.

¹⁰ In testing the juice, the individuals working in the lab use certain equipment including refractometers, quantifiers and consistometers.

¹¹ When the Employer develops a very promising tomato seed variety, it will give some of the seed to growers to plant for free to see how it performs in actual farm conditions throughout the California tomato growing area.

The Research Lab

At its Stockton facilities, ARD also operates a research lab. The lab tests the tomato juice produced in the short process kitchen as well the seed that is mass produced out of the country for Heinz. The juice is tested for, among other things, ph, consistency, color and soluble solids. The data produced by the tests is provided to the plant breeders on a daily basis. Based on this data, the breeders decide whether a particular seed variety is promoted or discarded. Seed that is mass produced for Heinz out of the country is subject to DNA or purity testing at this lab to determine if the seed carries the characteristics of the plant, namely disease resistance. Lab workers also evaluate the purity of seed from the Employer's seed safe to make sure that the new seed is better than the seed it previously developed.

Research Seed Room/Pathology Lab

At its Stockton facilities, ARD operates both a research seed room and an adjacent pathology lab. The seed room contains small packets of all the seed used in the developmental process and it is the repository for much of the seed data developed at its labs as well as the documentation of the pedigrees of the various seed lines. The pathology lab is run by a pathologist with a masters degree in plant pathology who evaluates the seed for disease resistance and who passes on the information to the plant breeder to make assessments of the disease resistance of the new seed varieties being developed.

The Individuals Employed in the Stipulated Unit

In order to determine whether some or all of the individuals in the stipulated unit are agricultural laborers, it is necessary to identify each individual and to describe the activities in which each is engaged. There are 15 individuals employed in the stipulated unit. Those who work full time are: Karla Maupin, Lupe Rangel, Edith Corrales, Pedro Guzman, Jose Guzman, Sharon Walls, Maria Guzman, Lidia Montejano, Arturo Guzman, Samuel Cardona and Salvadore Allatore. Those who work seasonally are: Francisco Ramirez, Jose Allatore, Celia Guzman and Luz Maria Ceja.

1. Karla Maupin

Karla Maupin spends 60% of her time working in the greenhouses and 40% of her time working in the research lab at the Stockton site.¹² Most of

¹² With regard to the 15 individuals in the stipulated unit, the breakdown in this document of the percentages of time spent by each individual working at the farm, the greenhouses, the research lab, the research seed room and the short process kitchen come from a document introduced by the Employer at the hearing. According to the Employer, the document was prepared from its record of each individual's work during the past three years. Petitioner did not challenge these percentages at the hearing or in its brief. As to the breakdown of work within each of the five categories, I relied on the testimony of the witnesses at the hearing.

Maupin's work in the green house is devoted to pollinating and cross-pollinating the tomato plants but she also participates in the harvesting the fruit and seed extraction. Her lab work includes performing all the tests described above in the section on the Stockton research lab.

2. Lupe Rangel

Lupe Rangel spends 40% of her time working on the research farm, 45% working in the greenhouses, and 15% of her time working in the Stockton research lab. Of her time spent at the farm, Rangel spends about half of this time at the farm research lab performing the tests described above and the other half primarily pollinating and cross-pollinating the plants in the field. Most of her time spent in the greenhouses is devoted to pollinating and cross pollinating the tomato plants, although she also participates in the harvest of the plants and the seed extraction. Her work in the Stockton lab includes performing all the test described above in the section on the Stockton research lab.

3. Edith Corrales

Edith Corrales spends 50% of her time working at the research farm, 30% of her time working in the greenhouses and 20% of her time working in the research seed room/pathology lab. Of her time spent at the farm, Corrales spends half the time working in the farm research lab performing the lab test described above. Since the kitchen and lab operations are combined at the farm lab, she is also engaged in the functions described above in the section describing the short process kitchen. Most of the rest of her time on the farm is spent pollinating and cross-pollinating tomato plants in the field. Most of her time working in the greenhouses is also spent pollinating and cross-pollinating the tomato plants. The record does not clearly describe the duties Corrales performs in the seed room/pathology lab but it appears that she helps the plant breeders and pathologist who work in these areas screen the new seed varieties developed at the farm and greenhouses for marketable characteristics.

4. Pedro and Jose Guzman

They spend 30% of their work time at the research farm, 45% at the greenhouses and 25% at the short process kitchen. At the research farm, the Guzmans are involved in all aspects of growing the tomato crop, including planting and thinning the crop and setting up the irrigation system. At the greenhouses, they are involved in most aspects of growing the crop, including pruning, staking, fertilizing, watering and spraying the tomato plants.¹³ They are the only persons who work in the short process kitchen during its mid-July to mid-October season and perform all the procedures described above.

¹³ Pedro and Jose Guzman are not involved in pollination procedures. Pollination and cross-pollination at the greenhouses are generally performed by the female workers, while the male greenhouse workers usually perform the other crop production procedures.

5. Sharon Walls

Sharon Walls spends 50% of her time working at the farm and the rest working in the greenhouses. At both locations, she is principally engaged in the pollinating and cross-pollinating operations.

6. Maria Guzman

Maria Guzman spends 50% of her time working at the research farm and 50% working at the greenhouses. At the farm, Guzman spends about half of her time engaged in pollinating and cross-pollinating the tomato plants and in seed saving¹⁴, and the other half working in the research lab performing the cooking and testing of tomatoes, as described above. At the greenhouses, she is primarily involved in the pollinating and cross-pollinating of the tomato plants but also participates in harvesting and seed extraction.

7. Lidia Montejano

Lidia Montejano also spends 50% of her time working at the research farm and 50% at the greenhouses. At the farm she spends most of her time engaged in pollinating and cross-pollinating tomato plants with an unspecified smaller part of her time working in the farm lab. At the greenhouses, she is primarily involved in the pollinating and cross-pollinating of the tomato plants but also participates in the harvesting and seed extraction.

8. Arturo Guzman

Arturo Guzman spends 100% of his time working at the farm and is there year around.¹⁵ He is involved in all aspects of the crop production during the season and spends the off-season servicing and maintaining the equipment used in the crop production, harvesting and seed extraction.

9. Samuel Cardona

Samuel Cardona spends 85% of his time working on the farm and 15% working at the greenhouses. At the farm, Cardona is engaged in all the crop production, harvesting and seed extraction operations and helps Arturo Guzman in the off-season with the servicing and maintaining farm equipment. At the greenhouses, he is involved in pruning and staking the tomato plants.

¹⁴ The record describes seed saving as the extraction of the seed from the tomato, fermenting the pulp, washing, drying and packaging the seed.

¹⁵ The Employer contends that Arturo Guzman is the foreman at the farm and a statutory supervisor. Since as discussed below, I have found him to be an agricultural laborer, I need not resolve the supervisory issue.

10. Salvadore Allatorre

Salvadore Allatorre works 60% of his time at the farm and 40% at the greenhouses. At the farm, Allatorre is engaged in all aspects of the crop production, harvesting and seed extraction operation. At the greenhouses, Allatorre is involved in pruning and staking the tomato plants.

11. Francisco Ramirez, Jose Allatorre, Celia Guzman and Luz Maria Ceja

These four individuals work only at the farm and only from about August to October and are engaged solely in harvesting the tomato crop.

ANALYSIS

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 the Board to apply the definition of “agriculture” found in Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 203(f), in construing the term “agricultural laborer.” Section 3(f) of the FLSA provides:

“Agriculture” includes farming in all its branches...and any practices...performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Under this definition, “agriculture” has both a primary and secondary meaning.¹⁶ The primary meaning refers to actual farming operations, that is, those functions normally associated with farming such as cultivation, tilling, growing, and harvesting of agricultural commodities. The secondary meaning includes any practices which are performed by a farmer, or on a farm, as an incident to or in conjunction with such farming operations.¹⁷

Clearly, based on these definitions and the record as a whole, all 15 individuals at issue in this matter spend a large percentage of their work time engaged in primary agriculture activities at the research farm or the greenhouses or both.¹⁸ Thus, all of these individuals are involved in some phases in the

¹⁶ See *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949).

¹⁷ Id. See also Department of Labor Regulations Sec. 780.105, 29 CFR Sec. 780.105 (2002)

¹⁸ “Employment in ‘primary’ agriculture is farming regardless of why or where the work is performed.” 29 CFR Sec. 780.106 (2002) Thus, the fact that the research farm and the greenhouses are operated for experimental purposes is immaterial as to whether the individuals involved are engaged in primary agriculture. “It is also immaterial whether the agricultural ... commodities are grown in ... greenhouses...or in an open field.” Id.

cultivation, growing or harvesting¹⁹ of the tomato crops at the farm and/or greenhouses.²⁰ In addition, some of these individuals are engaged in secondary agricultural work. In this regard, Arturo Guzman and Samuel Cardona spend some time during the off-season servicing and repairing the farm equipment,²¹ and most of these individuals are involved to some extent in extracting the seeds from the tomatoes post harvest.²²

In view of the above and the record as a whole, I conclude that the following eight individuals spend all of their time engaged in either primary or secondary agriculture and are, therefore, exempt from the Act as agricultural laborers: Arturo Guzman, Samuel Cardona, Salvadore Allatorre, and Sharon Walls, Francisco Ramirez, Jose Allatorre, Celia Guzman and Luz Maria Ceja.

Regarding the remaining seven individuals who are engaged to varying degrees in kitchen or lab work, the issue is whether this work constitutes secondary agricultural work or nonagricultural work. As set forth above, secondary agricultural work includes any practices that are performed by a farmer or on a farm as an incident to or in conjunction with primary farming operations. As described above, the workers in the short process kitchen process the tomatoes into juice for testing at the Stockton lab. The workers in farm lab both prepare and test the tomato juice. At both locations, workers test the fruit and seed to determine if a new variety of seed developed at the farm or the greenhouses has the characteristics to make the new variety a marketable commodity.²³ If the tests reveal a new marketable seed variety, the new seed is sent to another country, such as China, to be mass produced. The seeds are then sent back to the Heinz Stockton facility to be tested, packaged and sold. In these circumstances, the preparation and testing of the tomato juice is incidental to Heinz's commercial seed operation and not to ARD's primary farming operations. In essence, the purpose of the testing is to identify commercially viable products, i.e., new seed varieties with better characteristics, for market,

¹⁹ The term "harvesting" is defined in 29 CFR 780.118 (2002) as "all operations customarily performed in connection with the removal of the crops by the farmer from their growing position."

²⁰ In its post-hearing brief, Petitioner contends that the individuals engaged in pollinating and cross-pollinating the tomato plants at the farm and the greenhouses (the "pollination crew") are not engaged in agricultural work at all. No case support is cited for this contention. I reject this contention because pollination and cross-pollination appear to be essential elements of the growing cycle of most agricultural commodities and the mere fact that this process is being done as part of experimental process using scientific methods to create new hybrids is immaterial. See for example, *Stark Brothers Nurseries & Orchard Co.*, 40 NLRB 1243 (1942).

²¹ In its post hearing brief, Petitioner contends that the servicing and repairing of the farm equipment constitutes nonagricultural work. However, 29 CFR Sec. 780.158 (2002) clearly states that such practices constitute secondary agriculture if they are done on a farm and the equipment repaired is used in performing agricultural functions.

²² It appears that the extraction of the tomato seeds post harvest would not be considered by FLSA to be harvesting and part of primary agriculture. See 29 CFR 780.118 (2002). However, the extraction of the seed on the farm by farmers, as is the case here, is definitely incidental to the primary farming and is, at least, secondary agriculture under the FLSA. *Id.*

²³ The plant breeders and not the lab workers evaluate the results of the test performed by the individuals at issue herein.

and not to improve primary farming activities at the farm or greenhouses. *Dr. Salisbury's Laboratories, Inc.*, 122 NLRB 559 (1958); *District 50, United Mine Workers of America*, 142 NLRB 930 (1963).²⁴ ²⁵ Thus, all of the remaining individuals are engaged in some nonagricultural work.

In determining whether to assert jurisdiction over individuals who are engaged in primary agriculture as well as in nonagricultural work, the Board applies a "substantiality" rule: the Board will assert jurisdiction over such individuals, with respect to that portion of their work which is nonagricultural, if these individuals are engaged in a substantial amount of nonagricultural work. *Camsco*, 297 NLRB 905, fn. 18 (1990); *Bud Antle*, 311 NLRB 1352 (1993). At this point in time, there are relatively few cases in which the Board has had to determine whether individuals engaged to some degree in primary agriculture also worked a substantial amount of nonagricultural work. In *Camsco*, the Board cited two cases where the nonagricultural work performed by the individuals was not substantial enough to justify asserting jurisdiction over them. In one case, the individuals in question spent 10% of their total work time in nonagricultural work, and in the other case they spent 14% of their time in nonagricultural work. *Id.* In *Bud Antle*, *supra* at 1354, the Board held that it would not assert jurisdiction over individuals who spent a "large majority" of their time engaged in primary agriculture, without specifically defining "large" majority. In *Produce Magic*, 311 NLRB 1277, the Board asserted jurisdiction over "cutter-packers" who spent 50% of their time performing nonagricultural work.

In the instant case, the percentage of nonagricultural work performed by each of the seven individuals who works in the kitchen or the various labs ranges from a small undefined amount to 45%. I have found no case in which individuals who spend less than 50% of their time in nonagricultural work have been found to have engaged in a substantial amount of nonagricultural work as

²⁴ The Employer contends that all the kitchen and lab work performed by any of 15 individuals at issue herein is secondary agriculture. In support of this contention, it cites *Di Giorgio Fruit Corp.*, 80 NLRB 853 (1948). However, the Board's decision in *Di Giorgio* actually supports my conclusion in that it specifically excludes from the definition of agricultural work those tasks that are related to commercial activities. *Id.* At 855-856. Here, the lab and kitchen work is plainly directed towards Heinz's commercial marketing of new seed varieties which are mass produced in other countries.

²⁵ In addition, as set forth above, workers in the kitchen and lab at ARD's Stockton facilities process and test tomatoes and seeds that are not produced either at the farm or at the greenhouses. The record does not reveal the percentage of time that these individuals spend processing and/or testing such tomatoes and seed but the testing appears to be on a regular and on-going basis. In these circumstances, even assuming that the workers engaged in processing and testing tomatoes and seed grown on the farm or the greenhouses were engaged in secondary agriculture, the regular intermingling and handling of nonagricultural work (the work from other farms) with agricultural work in the kitchen and the Stockton lab, would result in the classification of all the work performed in those two facilities as nonagricultural. *Camsco Produce* *infra* at 908; *Aquacultural Research Corp.*, 215 NLRB 1 (1974).

defined in *Camsco*. I conclude, therefore, that none of the individuals at issue herein perform a substantial amount of nonagricultural work and further conclude that all 15 of them are agricultural laborers and not employees within the meaning of the Act. Even if I were to determine that Maria Maupin and Edith Corrales, who spend 40% and 45% of their work time, respectively, performing lab work, performed a substantial amount of nonagricultural work, it would be inappropriate for me to carve out a unit of two employees from a group of seven workers who perform essentially the same tasks in essentially the same conditions. I have found no cases where the Board has found a unit to be appropriate when, like here, only a portion of the workers in the job classification that would be covered by the unit description are to be included in the unit. Such a unit, where inclusion in the unit would be based on the percentage of time spent performing certain tasks rather than by the individual's job classification or by the type of work the individual performs, is not consistent with principles of a community of interest, would create significant roadblocks in bargaining and would not foster industrial stability.²⁶ Accordingly, I am dismissing the petition.

ORDER

IT IS HEREBY ORDERED that the petition 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, DC 20570. This request must be received by the Board in Washington by April 26, 2002.

Dated at Oakland, California this 12th day of April, 2002.

/s/ Bruce I. Friend

Bruce I. Friend, Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

32-1240

177-2484-1201
177-2484-1201-2500
177-2484-1225-1200
177-2484-1225-3700

²⁶ It should be noted that at the hearing the Petitioner did not indicate if it was willing to represent a unit other than the stipulated unit.

177-2484-1225-6700