

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of)	
)	
KOTCHEVAR BROTHERS,)	
)	
Employer,)	
)	
and)	No. 75-RC-80-F
)	
)	
)	2 ALRB No. 45
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO ,)	
)	
Petitioner.)	

On September 30, 1975 the United Farm Workers of America, AFL-CIO ("UFW") filed petition for election among agricultural employees of the employer in Tulare County. The regional office conducted an election pursuant to the petition on October 7, 1975, and the UFW received a majority of the votes cast. The employer protested prior to the election that the petition was not timely filed in relation to seasonal peak, and after the election filed objections seeking to have the election set aside on that ground.^u

The employer is a partnership comprised of two brothers. Each brother owns certain land in Tulare County which is farmed through the partnership. Together they own 320 acres, most of

^uThe regional director inadvertently noticed the hearing in this matter on all allegations contained in the employer's objections petition, and these included an allegation that the union did not have the requisite showing of interest. Matters relating to showing of interest are not litigable in a post-election proceeding under Labor Code Section 1156.3 (c), Emergency Regulations section 20315(c), and no evidence was received on that issue.

which is devoted to the cultivation of grapes. Eighty acres contain Emperor grapes, which are table grapes; there are 40 acres of Carringanes and 102 acres of Malvasias, both wine grapes; and 80 acres of Thompson Seedless grapes, which are used for table, wine, and raisins.

The employer employs only one person on a year-around basis, and he is the son of one of the partners. All other employees are seasonal. There are two main seasons: the pruning season, which occurs during December and January, and the picking season, which occurs during September, October, and part of November. For pruning the employer typically employs between 30 and 60 workers. For the picking of table grapes the employer employs workers directly, working under the supervision of a crew foreman. For the picking of wine grapes the employer for the last three years has engaged a harvester whose operations are described more fully below.

The employer operates on a weekly payroll. The payroll period immediately preceding the filing of the UFW's petition ended September 26. During that payroll period the employer employed approximately 39 workers on a regular basis in the picking of Emperor table grapes. These were the workers among whom the election was conducted. The employer contends that the UFW's petition was premature, in that the number of workers employed at that time constitutes less than 50% of the number to be employed at peak of season, which it asserts was to occur shortly thereafter.

This assertion is based upon the number of workers engaged each year in the picking of wine grapes. Due to time limitations typically imposed by the wineries, the nature of the equipment required, and the unpredictability of the weather, it is of convenience both to the employer and to the harvester that the wine grapes be picked quickly using a relatively large number of workers. Accordingly, each year for the past several years there have been occasions in which between 60 and 80 pickers were employed for between 5 and 10 days to pick the wine grapes. These days are not necessarily consecutive, however, and may occur in different weeks. When the wine grape picking crew and the table grape picking crew overlap, as they apparently do on occasion, the total number of workers engaged in picking grapes on the employer's property has been between 90 and 120. The employer contends this regularly occurs in early October, and has submitted payroll records which in part support that contention. There is evidence that in 1975 approximately 95 wine grape pickers were supplied by Mr. Ranse Walker for one or two days of work beginning September 29, which was the day prior to the filing of the petition but after expiration of the applicable payroll period; and that a similar number was employed for two days of work a week or two later. In both instances it appears that the work of the wine grape pickers overlapped to some extent with the work of the table grape pickers.

Were we to undertake determination of the timeliness of the petition on the basis of the employer's assertion we would have considerable difficulty on this record. In Mario Saikhon, Inc., 2 ALRB No. 2 (1976), we concluded that the proper method for

measuring level of employment for purposes of determining peak employment is to take the average of the number of employee days worked on all the days of a given payroll period. While the employer's records pertaining to his own employees are in a form which permit such a computation to be made, those of the harvester who supplied the workers for picking of wine grapes in past years and for 1975 indicate only the dollar amounts paid to each worker during a payroll period, and do not reflect the number of days worked. Moreover, unlike the situation in Mario Saikhon, where it was the employer's contention that the peak period for the calendar year had already occurred, we deal here with the contention that the peak period had yet to occur. Labor Code Section 1156.4 provides that in such a situation the peak agricultural employment for the prior season shall alone not be a basis for the determination, but rather the Board "shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data." The UFW, in that connection, placed in evidence a Farm Labor Report prepared by the State Employment Development Department which shows the peak for wine grapes in Tulare County as occurring between September 8 and October 25.

We do not find it necessary to resolve the issue of timeliness on the basis of the employer's assertion, however, since we find that the wine grape pickers upon whom the employer relies for his contention as to seasonal peak are not employees of the employer within the meaning of the statute, but rather employees of the harvester, Mr. Walker.

The term "agricultural employer" is defined in Labor Code Section 1140.4(c) to mean:

- (c) "The term 'agricultural employer' shall be liberally construed to include 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 persons 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." (Emphasis added.)

The term "labor contractor" is defined in Labor Code Section 1682(b) as follows:

- (b) "'Farm labor contractor' designates any person, who for a fee, employs workers to render personal services in connection with the production of any farm products, to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payment to such persons." (Emphasis added.)

Finally, the term "fee" as used in subsection (b) of Section 1682 is defined in subsection (e) to mean:

- (1) "The difference between the amount received by a labor contractor and the amount paid out by him to persons employed to render personal services to, for or under the direction of a third person; (2) any valuable consideration received or to be received by

a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him and the amount paid out by him for or in connection with the rendering of such services." (Emphasis added.)

The role of the labor contractor defined by Section 1682 has been likened to that of a middleman – one who contracts with growers to provide labor when needed. See, California Senate Fact Finding Committee on Labor and Welfare, California Farm Labor Problems, Part I, 177-84 (1961). The fee is normally a percentage override of the actual cost of labor. Thus, a labor contractor is one who collects his fees and makes his profits from the laborers actually doing the work. See, Johns v. Ward, 170 Cal. App. 2d 780 339 p2d 926 (1959).

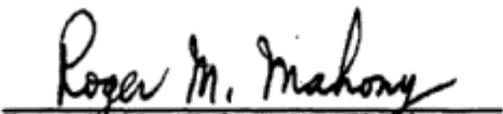
While Walker may be a "labor contractor" within the meaning of Labor Code Section 1682, it is clear that he is something more as well. It is Walker's ability to supply costly equipment used in the harvesting operations, and to assume responsibility for getting the grapes to the winery, which primarily accounts for his relationship to this employer. The amounts which he charges per ton are not simply or even directly related to labor costs, but rather constitute the payment for an entire service. In the understanding of the industry, Walker is a custom harvester.

In our judgment, a custom harvester falls within the statutory definition of "agricultural employer" even though some of the functions which he performs are those typically associated with a labor contractor. Labor Code Section 1140.4(c) provides that the term "agricultural employer" should be liberally construed.

It also includes within the definition of that term a "harvesting association", which we understand to be an association of persons who engage in the same or similar type of harvesting function as Walker. We do not believe the Legislature intended that the characterization of an entity performing independent harvesting functions should turn upon whether the entity happens to be part of an association. Rather, we view the reference to "harvesting association" as an example of the type of entity which, in terms of function, the Legislature intended to include within the category of agricultural employers.

Since Walker's employees were not those of the employer, it is clear that the petition was timely filed in relation to seasonal peak. Accordingly, we certify the United Farm Workers of America, AFL-CIO, as bargaining representative for all agricultural employees of the employer in Tulare County.

Dated: March 2, 1976



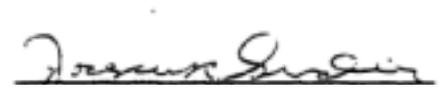
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