UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

NEW ENGLAND TREATMENT ACCESS, LLC **Employer** **And** **UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1445, AFL-CIO, CLC** **Petitioner**	**Case 01-RC-264290**

DECISION AND ORDER[1]

New England Treatment Access, LLC (the Employer) operates a cannabis cultivation and processing facility. United Food and Commercial Workers Union, Local 1445, AFL-CIO, CLC (the Petitioner) seeks to represent a bargaining unit of all full time and regular part-time employees of the Employer at its Franklin, Massachusetts facility, but excluding all casual employees, office clerical employees, confidential employees, team leads, coordinators, managers, guards, and supervisors as defined in the National Labor Relations Act (NLRA).

The sole issue before me is whether some of the petitioned-for employees are agricultural laborers under Section 2(3) of the NLRA and/or agricultural laborers under Section 3(f) of the Fair Labor Standards Act (FLSA). The National Labor Relations Act, 29 U.S.C. §§ 141 et seq., covers employees engaged in interstate commerce with the exception of "any individual employed as an agricultural laborer," NLRA, Section 2(3). In addition, since 1946, Congress has annually reaffirmed this exclusion of agricultural occupations by attaching a legislative rider to the National Labor Relations Board's appropriation measure, which provides that no part of the appropriation should be used in connection with bargaining units of "agricultural laborers" as agriculture is defined in the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

[1] The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer. Parties were given the opportunity to file post-hearing briefs, and both parties did so.

The Employer takes the position that none of the employees in question are agricultural laborers. The burden to establish that the petitioned-for employees are agricultural laborers excluded from the protections of the NLRA, therefore, falls on the Petitioner.

The Petitioner initially sought to represent these employees through a Petition for Certification by Written Majority Authorization filed with the Commonwealth of Massachusetts Department of Labor Relations ("DLR") in Case Number WMAP-20-8074. The petition was filed pursuant to Section 5A of Chapter 150A of the Massachusetts General Laws, which allows for union representation of workers "engaged in agriculture," defined therein to include "horticulture, floriculture and any other commercial enterprise involving the production of food or fiber, Mass. Gen. L. c. 150A, § 5A. The Employer challenged the petition on the ground that it employs no "agricultural laborers" and is subject to the jurisdiction of the NLRB. Thus, the DLR has placed the matter in abeyance until such time as the NLRB specifically declines jurisdiction over all or part of the petitioned-for unit.

In the current proceeding, the Petitioner has stated for the record that it will only proceed to an election in the petitioned-for unit and no other.

For the reasons discussed below, I find that the majority of the employees in question are agricultural laborers, and, accordingly, I am dismissing the petition.

The Employer's Business

The Employer serves both medical and adult recreational use customers at its retail locations in Northampton, Massachusetts and Brookline, Massachusetts. The Employer manufactures its own goods at its Franklin, Massachusetts production facility (Employer's Franklin facility).[2] The Franklin facility, which employs roughly 300 individuals, is the only facility at issue here.

When seeds arrive at the Franklin facility, they are wrapped in damp paper towels until they sprout roots. At this time, the seedlings are placed beneath plastic domes and planted in small cubes of rockwool substrate. The seedlings are then moved to a clone room, where they receive fluorescent light and water. The seedlings also receive individual metric tags as part of the Employer's "seed-to-sale" tracking system, as mandated by the Massachusetts Cannabis Control Commission.

After approximately two weeks in the clone room, the plants are taken to the nursery, where they are transferred to larger blocks of rockwool substrate. The plants' domes are removed, as are some of the plants' nodes. The removal of nodes is known as "topping." This process stimulates the growth of hormones in a plant as the plant focuses its energy on its remaining nodes.[3] The plants continue to receive light and water.

[2] The Employer sells goods produced by other entities as well as selling goods produced in-house.

[3] Some plants are also "cloned," that is, grown from a removed node rather than from a seed.

Next, after about three weeks in the nursery, the rockwool substrate blocks containing the plants are transported to the vegetative (veg) room. In the veg room, the plants undergo further topping as well as stripping and defanning. Stripping involves the removal of tertiary branches to further focus the plant's energy; defanning involves the removal of the fan leaves (also called water leaves) used for photosynthesis. Defanning changes the chemical structure of the plant by increasing secondary metabolites.

Finally, after roughly three weeks in the veg room, the plants arrive in the flower room. Once in the flower room, the substrate blocks are placed onto trays and connected to irrigation equipment. All aspects of artificial light, nutrient reservoirs, air temperature, and humidity are carefully monitored and controlled. The plants remain in the flower room for approximately two months.

After plants complete their growth process, they are removed from their rockwool substrate blocks, weighed, and cut into pieces. The plant material is placed in a bin which is transported to the trim room. In the trim room, additional water and fan leaves are removed and placed in separate bins for curing and drying.[4] Meanwhile, stems, flowers, and sugar leaves are transported to the cure room. In the cure room, the plant material undergoes a chemical curing process. The processed plant material is hung on floor-to-ceiling drying racks. The humidity and temperature are controlled so that cellulose and chlorophyll will not become trapped in the plant, thereby creating a less desirable end product. The curing process lasts for ten to twelve days.

The cured plant material is placed in storage bins and transported to the trim room. In the trim room, the leaves, buds, and stems are organized by product type; inspected for any pathogens; and assigned a quality rating. The plant material is then sent to one of several departments for further processing. For example, some plant material is taken to the extraction department, where oils are extracted from leaves to make various products. Other plant material is taken to the Marijuana Infused Products lab, in which technicians create concentrates for vaporizers. Still other plant material is taken to the kitchen department for use in baked goods and candies. The fresh packed department puts finished flowers into units for sale, while the joint rolling department grinds flowers for use in pre-rolled joints.

Job Classifications

The parties dispute the agricultural laborer status of twelve petitioned-for job classifications: cultivation team member, cultivation technician, cultivator, R&D data analyst, R&D technician, cure room technician, harvest production specialist, harvester, IPM licensed applicator, IPM scout, IPM team member, and IPM technician.

[4] This work is performed by trimmers, whose agricultural status is not at issue in this proceeding. The parties are in agreement that trimmers are employees pursuant to Section 2(3) of the NLRA.

- Cultivator, Cultivation Team Member, and Cultivation Technician

Matthew Lowther, the Employer's Senior Director of Operations, testified that the terms "cultivation team member" and "cultivator 1" describe the same position. The Employer's documents also refer to this position as "cultivation technician." The Employer's written position description for Cultivation Team Member reads:

> The Cultivation Team Member assists in the growing and cultivation of medical marijuana. Performs select tasks in the cultivation process. This is a "hands-on," entry-level role in the cultivation process.

Cultivators are responsible for cleaning and filling the reservoirs, which are stock tanks containing water for the plants. Cultivators also place nutrients in the reservoirs. Additionally, cultivators transport plants from room to room and identify plants with their seed-to-sale tags. Lowther testified that cultivators engage in "plant work," including stripping, defanning, topping, and cloning. Cultivators work only with live plants. They work in the nursery, the cloning rooms, the vegetative rooms, and the flower rooms.

- Harvester

Harvesters physically remove plants from the medium in which they have grown. Harvesters then remove branches, flowers, and buds before placing the newly harvested plant material in bins.

- Harvest Production Specialist

Harvest production specialists weigh plants after the plants are harvested. They sort and store the harvested plants. They are responsible for recordkeeping as pertains to the seed-to-sale tracking system; they may also take samples for third-party testing requirements. Finally, they are responsible for various packaging processes, including those involving flower packages.

Harvest production specialists are supervised by and work within the Employer's Inventory Department. They work closely with the inventory specialists whose status as employees covered by the NLRA is not in dispute.

- Cure Room Technician

After plants are cut into pieces, cure room technicians hang the stems, flowers, and sugar leaves on racks to dry. They move the racks across the room as needed, and monitor the climate of the room. Upon the completion of the drying process, the cure room technicians manage the inventory of dried products and place them in bags.

- Research and Development (R&D) Technician and R&D Data Analyst

R&D technicians and R&D data analysts work in the R&D area on the Employer's second floor. Lowther testified that, in summary, technicians gather data points, while analysts analyze those data points.

Robert Chiasson, an R&D technician, testified that it is his job to optimize processes in the cultivation rooms, cure rooms, and harvest rooms. To that end, he and his fellow R&D technicians gather data relating to temperature, humidity, and wind speed in those rooms. This data establishes a baseline. R&D technicians then perform "mini experiments" and compare data sets in the hopes of discovering the standards which will result in the best final product. Chiasson has also run tests comparing nutrients. Two separate reservoirs serve the flower room, and so different nutrients can be added to each reservoir before the plants on one side of the room are compared to the plants on the other side of the room. The plants are measured with the ultimate goal of finding the optimal nutrient combination to create superior plants.

R&D data analysts use the raw data collected by R&D technicians to draw conclusions about, for example, which nutrients help plants grow. R&D data analysts sometimes work in the Employer's administrative offices.

- Integrated Pest Management (IPM) Licensed Applicator and IPM Team Member

Michael Campbell is a licensed applicator although he is currently titled IPM team lead.[5] Campbell testified that licensed applicators are responsible for any kind of applications to the plants, including a foliar, a spray, or a drench. The applications mitigate pest damage. Applicators may spray the blocks or trays with a product meant to smother pests. A foliar application of another product prevents pottery mildew. These applications are performed on growing plants in the flower room, the veg room, and the nursery.

Campbell described IPM team members as employees who are "at a waiting stage" before becoming licensed applicators and perform application duties accordingly.

- Integrated Pest Management (IPM) Scout

IPM scouts search for pests and pathogens, such as mold and bugs, on both growing plants and harvested plants. They also search for male parts on plants; as the female part of plants produces valuable buds, male parts are generally removed. Scouts examine plants just before and just after they are harvested.

One IPM scout is specifically assigned to the Employer's trim room and inspects wholesale cannabis plants purchased by the Employer. This IPM scout's position is unique; the

[5] The parties dispute the supervisory status of leads, but the Petitioner has not petitioned for leads in this proceeding and the issue is not before me here.

record makes it plain that no other employee at issue in this proceeding handles product purchased from outside growers.

- Integrated Pest Management (IPM) Technician

IPM technicians work in the flower rooms, the nursery, and the vegetative rooms. On a day-to-day basis, IPM technicians tape the sides of trays to monitor bugs and keep the rooms in which plants grow sanitary by, among other things, vacuuming trays. They are also responsible for spreading nematodes (multicellular insects which combat pest species) in the reservoir. Additionally, they distribute beneficial buds on the plants. Michele Lapierre, an IPM technician, testified that she has occasionally been directed to help the cultivators strip the plants.

ANALYSIS

Agricultural Labor in General

Section 2(3) of the NLRA explicitly excludes "agricultural laborers" from the definition of "employee." Since 1946, Congress has added to the Board's appropriation a rider requiring that agricultural laborer status be evaluated according to the definition of "agriculture" in Section 3(f) of the FLSA, providing:

> …That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935, and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3(f) of the Act of June 25, 1938 [i.e., Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f)]….

Section 3(f) of the FLSA defines agriculture as including:

> …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 or horticultural commodities… the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) 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.

Further, the definition of agriculture has two distinct branches, *Farmers Reservoir Co. v. McComb*, 337 U.S. 755, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949). One relates to the primary meaning of agriculture; the other relates to a broader secondary meaning, *NLRB v. Olaa Sugar Co.*, 242 F.2d 714 (9th Cir. 1957).

The primary definition includes farming in all its branches. Included in the primary meaning are specific farming operations such as cultivation and tillage of the soil; dairying; cultivation, growing, and harvesting of any agricultural or horticultural commodities; and the raising of livestock, bees, fur-bearing animals, or poultry. If an employees are employed in any of these activities, they are engaged in agriculture regardless of whether they are employed by a farmer or on a farm, *Farmers Reservoir Co. v. McComb*, supra; *Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398 (9th Cir. 1955).

The secondary definition includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with farming operations, *Farmers Reservoir Co. v. McComb*, supra; *NLRB v. Olaa Sugar Co*., supra; *Maneja v. Waialua Agr. Co*., 349 U.S. 254, 75 S. Ct. 719, 99 L. Ed. 1040 (1955).

Employment not within the scope of either the primary or the secondary meaning of "agriculture" as defined in section 3(f) is not employment in agriculture. That is, employees not employed in farming or by a farmer or on a farm are not employed in agriculture.

The Board follows the Department of Labor's regulations relating to the definition of agricultural labor "whenever possible" as they comprise "the views of an expert agency," *Imperial Garden Growers*, 91 NLRB 1034, 1037 (1950); *Camsco Produce Co.*, 297 NLRB 905, 909 n. 15 (1990).

Agricultural status is analyzed by classification, not an employer-wide basis, and the party asserting an employee's agricultural status bears the burden of proving the exemption. *AgriGeneral L.P.*, 325 NLRB 972 (1998). The Supreme Court recognizes a distinction between farming operations and processing operations, the latter of which does not confer agricultural status. In *Holly Farms Corp. v. NLRB, 517 U.S. 392* (1996), the Court held that chicken catchers, forklift operators, and truck drivers are non-agricultural.

Prior to 1946, the Board did not deem cultivation and related functions performed in indoor industrial settings, such as greenhouses, to be agricultural work. *The Park Floral Company*, 19 NLRB 403, 414 (1940). *Great Western Mushroom Co*., 27 NLRB 352, 358-59 (1940); *Knaust Bros., Inc*., 36 NLRB 915, 917-18 (1941). However, these cases were decided prior to Congress' adoption of the rider that has been part of the NLRB's annual appropriations every year since 1946. Prior to that time, the Board was permitted to forge its own definition of "agriculture;" however, it can no longer do so. Indeed, the Board has not relied upon *Park Floral* since the passage of the appropriations rider and, although it has never unequivocally overruled the case, the Board has applied the FLSA definition to find greenhouse employees completing tasks similar to those here to be agricultural employees exempt from the Act. *See, e.g., William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948) In addition, in *Rod McLellan*, 172 NLRB 1458 (1968), the Board held that employees who cultivated, watered, fertilized, and cut plants as well as regulating the climate in the greenhouse were engaged in agriculture. Likewise, in *Hershey Estates*, 112 NLRB 1300 (1955), the employees who cared for

soil and plants, cut flowers, and harvested greenhouse crops. Again, the Board held that although the employees worked in a greenhouse and cared for plants under artificial conditions, and although they had some non-agricultural duties, they were nonetheless agricultural laborers. The Board's decisions in these and similar cases were based on the Department of Labor's view that under the FLSA it is "immaterial whether the agricultural or horticultural commodities are grown in enclosed houses, as in greenhouses or mushroom cellars, or in an open field," 29 CFR § 780.106.[6]

Notably, the Board has not ruled on whether employees of a marijuana enterprise are agricultural laborers or statutory employees, but as discussed below many of the employees at issue in this case perform functions similar to performed by employees in other industries who the Board found to be agricultural workers. *William H. Elliott & Sons Co.*, supra, 1078-80 (rose growers who cut, watered, tied, pinched, sorted for salability, and packed roses exempt); *Hershey Estates,* supra 1301 (employees who cut, harvested, watered, and fertilized flowers and maintained greenhouse temperature and ventilation exempt).

Considerable weight is given to whether employees significantly change the product from its raw, natural state. However, in *Pictsweet Mushroom Farm*, 329 NLRB 852 (1999) the Board found that mushroom slicers were agricultural laborers because slicing was only small part of operation, raw state of mushrooms was unchanged by slicing, the slicing operation was not "factory-like," and slicing was common among mushroom growers in general.

In evaluating the status of employees who perform both agricultural and non-agricultural work, the Board applies a "regularity test in determining the significance of nonexempt work handled by employees who are engaged in agricultural work in the secondary sense" but applies a different "substantiality" rule in determining whether to assert jurisdiction over workers engaged in farming in the primary sense, *Camsco Produce Co*., supra; *Produce Magic, Inc.*, 311 NLRB 1277 (1993). In *Produce Magic*, the Board found cutter-packers to be employees under the NLRA because 50 percent of their time was spent performing non-agricultural work, which is substantial.

The Employer's State Law Argument

The Employer notes that is not regulated as an agricultural enterprise under Massachusetts state law. Specifically, the cultivation, harvesting, production, and sale of cannabis is regulated by the Massachusetts Cannabis Control Commission, rather than the Massachusetts Department of Agricultural Resources.

[6] The Employer argues that its premises do not constitute a farm within the legal meaning of the word, which includes, for example, greenhouses as well as traditional outdoor farms. This argument is not persuasive where the Employer is engaged almost exclusively in the cultivation of plants. The Employer further argues that because the plants are grown in rockwool substrate rather than soil, there is no soil to be "worked" or "tilled" as described in the FLSA. I note that the FLSA nonetheless applies where cultivation takes occurs "in growing media other than soil as in the case of hydroponics," 29 C.F.R. § 780.117(a).

Furthermore, Mass. Gen. Laws ch. 40A, § 3, which regulates commercial zoning, provides that "the terms agriculture, aquaculture, floriculture and horticulture shall not include the growing, cultivation, distribution or dispensation of marijuana." The Employer is also prohibited from operating in areas typically available to agricultural uses such as Rural Residential Districts by the Town of Franklin Bylaws art. II, §185-4(C)(1).

This argument is not persuasive. State regularity authority and zoning regulations warrant no weight in determining employee status under the NLRA or FLSA.

The Tobacco Industry

In their briefs, both parties draw comparisons between work in the marijuana industry and work in the tobacco industry, noting that similar processing activities occur after the plant is harvested, such as drying, stripping and sorting of the harvested plants.

Case law differentiates between the agricultural aspects of tobacco cultivation and the nonagricultural practices that occur after the tobacco has been dried. Department of Labor regulations state that "handling, grading, drying, stripping from stalk, tying, sorting, storing, and loading" of tobacco are among activities performed in the "preparation for market" fall within the exemption in Section 3(f) if they are performed by a farmer or on a farm, 29 C.F.R. § 780.151(i). Likewise, courts interpreting Section 3(f) have found these activities to be agricultural while finding later steps of tobacco processing to be non-agricultural. In *Mitchell v. Budd*, 350 U.S. 473, 76 S. Ct. 527, 100 L. Ed. 565 (1956), the Supreme Court held that the bulking (fermenting) of tobacco marks the dividing line between agricultural and non-agricultural activities. The Court determined that bulking substantially "changes the natural state of the freshly cured tobacco as significantly as milling changes sugar cane" and that bulking is therefore not an agricultural activity. The Court noted that "[t]he bulking operation is for the most part divorced from the cultivation of tobacco and from the drying operation in the tobacco barns on the farm" and determined that the agriculture operation ends "with the delivery of the tobacco at the receiving platform of the bulking plant." Ibid. at 481.

Job Classifications

- Cultivator, Cultivation Team Member, and Cultivation Technician

The Employer relies heavily upon *Park Floral*, supra, in support of its argument that the cultivators are not agricultural laborers. As noted above, however, *Park Floral* has been overruled sub silentio by the appropriations rider and the Board's use of the FLSA standards to evaluate employee agricultural employee status since 1946.

It is undisputed that the Employer grows plants beneath fluorescent lights inside a temperature-controlled building year-round rather than seasonally on an outdoor farm, or, indeed, in a greenhouse.

I return, then, to the primary definition of "agriculture," which explicitly holds that those engaged in the "cultivation, growing and harvesting of any agricultural or horticultural commodities" are engaged in agriculture. The Employer's cultivators work only with live, growing plants. All of the cultivators' duties—stripping plants, defanning plants, topping plants, cloning plants, and filling reservoirs with water for plants—are undertaken with the goal of allowing plants to grow strong and healthy. I find that the cultivators, cultivation team members, and/or cultivation technicians are engaged in primary agriculture within the meaning of Section 3(f) of the FLSA and Section 2(3) of the NLRA.

- Harvester

As was discussed above, Section 3(f) of the FLSA specifically includes "harvesting" in the primary definition of agriculture. The Petitioner notes that the FLSA definition of harvesting includes "all operations customarily performed in connection with the removal of the crops by the farmer from their growing position," 29 C.F.R. § 780.118, while the Employer emphasizes that by definition harvesting "does not extend to operations subsequent to and unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession," Ibid.

The harvesters at issue here do indeed remove plants from their growing positions; they also remove branches, flowers, and buds before placing the newly harvested plant material in bins. The Employer compares this physical alteration of the cannabis plant to the stemming of tobacco, which has been found to be non-agricultural, citing the First Circuit Court of Appeals' determination that the process of stemming tobacco, "where its central vein or rib was removed… change[s] its form." *P.R. Tobacco Mktg. Co-op. Ass'n* at 698-99 (1st Cir. 1950). The stem of a tobacco leaf is extremely thick and needs to be completely or partially removed before the leaves can be rolled into cigars. Workers remove all or part of the stem, either by hand or by using a machine designed for stem removal. The Petitioner argues that the work of the Employer's harvesters is akin not to the stemming of tobacco but to "stripping from the stalk," which occurs when cured tobacco leaves are removed from stalks, prior to stemming.

The First Circuit emphasized in *P.R. Tobacco* that stemming tobacco "draws a line of distinction" between agriculture and manufacturing work because "the leaf certainly was not in its natural state after its central vein or rib was removed." The Employer further cites *Mitchell v. Budd*, supra, where the Court held that "the bulking process changes and improves the leaf in many ways and turns it into an industrial product."

Here, the Employer's harvesters do not change the leaves and flowers of cannabis plants upon removing them from the stems. The leaves and flowers are not altered until after they are dried. Furthermore, the Board has previously acknowledged that that the FLSA definition of harvesting extends to other activities performed in connection with transporting severed crops, *Mario Saikhon, Inc.*, 278 NLRB 1291 (1986); *see also Produce Magic,* supra; *Allied Mills*, 96 NLRB 369 (1951). In *Allied Mills*, the Board held that cuttermen and loadermen were engaged in the agricultural operation of harvesting alfalfa where:

> Cuttermen operate the machines which mow the green alfalfa standing in fields "leased" by the Employer. The machines also chop up the alfalfa and blow it into trucks for transportation to the Employer's plant, where it is put through a dehydrating process. The Employer also purchases suncured alfalfa as it stands in stacks or windrows on the farmers' fields. Loadermen operate tractors equipped with special forks which gather such sun-cured alfalfa and place it on the Employer's trucks.

The same conclusion is warranted here. The minor physical alterations performed to the plant material after the harvesters remove the living plants from the substrate in which they grew does not so change the plants that the work performed becomes industrial in nature. Thus, I find that the harvesters are engaged in primary agriculture within the meaning of Section3(f) of the FLSA and Section 2(3) of the NLRA.

- Harvest Production Specialist

Harvest production specialists are not engaged in any of the activities encompassed by the primary definition of agriculture. They begin to interact with plants only after the plants have been harvested, although the plants have not yet been altered in any significant way. Some of the harvest production specialists' duties— such as handling, sorting, and storing of the recently harvested plants— fall under the secondary definition of agriculture, as they are performed in conjunction with farming operations. However, harvest production specialists also perform work, such as record-keeping and other inventory functions, which is certainly not agricultural in nature.

As harvest production specialists are engaged both in agricultural functions and those that are not agricultural, I must apply the Board's regularity test in determining the significance of nonexempt work handled by employees who are engaged in agricultural work in the secondary sense. In *Olaa Sugar Co.*, 118 NLRB 1442 (1957), the Board determined that a truckdriver who spent part of his time transporting his employer's sugarcane to the employer's mill and part of his time transporting other farmer's sugarcane to the mill was entitled to file an unfair labor practice charge under the NLRA. In asserting jurisdiction, the Board held a rule that "employees who perform any regular amount of nonagricultural work are covered by the Act with respect to that portion of the work which is nonagricultural."

Thus, the Petitioner has not met its burden of establishing that harvest production specialists are engaged only in agricultural labor and could not be included in an appropriate unit under the NLRA to the extent that they perform nonagricultural work. They are, however, also engaged in secondary agriculture within the meaning of Section3(f) of the FLSA and Section 2(3) of the NLRA.

- Cure Room Technician

After newly harvested plants are cut into pieces, cure room technicians hang the stems, flowers, and sugar leaves on racks to dry. The drying process fundamentally alters the chemical composition of the cannabis, and the cure room technicians must carefully monitor the room's humidity and temperature so that the curing process is successful. As was discussed above, such changes in the nature of a product are often seen as the dividing line between agricultural function and manufacturing.

Even where there is some change from the raw or natural state in preparation for market, workers managing drying processes are engaged in secondary agriculture where the work is performed as an incident to or in conjunction with farming operations. The FLSA itself deems secondary agriculture in preparation of tobacco for market to include "handling, grading, drying, stripping from stalk, tying, sorting, storing, and loading," 29 C.F.R. § 780.151. However, workers handling drying processes do not perform agricultural labor where the plants have been significantly altered from their raw and natural state, as during the bulking of tobacco, *Mitchell v. Budd*, supra.

The Employer compares the curing of cannabis to the dehydration of alfalfa in *Wyatt v. Holtville Alfalfa Mills, Inc*., 106 F. Supp. 624 (S.D. Cal. 1952). In *Wyatt v. Holtville*, the United States District Court for the Southern District of California determined that that employees engaged in field work for the purpose of recovering alfalfa were pursuing agricultural activities but that employees working within the mill were not, because "the commodity handled by the mill employees [was] not an agricultural commodity, but one produced by an industrial process." The Wyatt court concluded that "[t]here has been a change in the chemical content of the commodity, the change being due to the dehydration process."

However, in *Wyatt v. Holtville,* the alfalfa passed through the various processes at the plant without being handled manually by any of the mill employees as it was sucked or blown from one piece of machinery to another. Thus, the handling of the alfalfa by the employees occurred after the dehydration and pulverizing processes. The process at issue here is easily distinguishable. When the cure room technicians begin the drying process, the plants have just been harvested and cut. They arrive in the cure room in their natural state. Any internal chemical changes occur as a result of the cure room technicians' manual work as they hang the plant material on racks and move the racks as needed. The cannabis does not undergo the extreme changes found in the bulking of tobacco or the dehydration and pulverization of alfalfa. The drying of cannabis is much more comparable to the initial drying of tobacco, which is established by statute as an agricultural activity.

Accordingly, I find that the cure room technicians are engaged in secondary agriculture within the meaning of Section3(f) of the FLSA and Section 2(3) of the NLRA.

- Research and Development (R&D) Technician and R&D Data Analyst

R&D technicians are often found in the Employer's cultivation rooms gathering data regarding, for example, which nutrients best help plants grow. However, R&D technicians are not involved in the direct care and handling of the plants. They are clearly not engaged in agricultural labor. The R&D data analysts, meanwhile, are even more detached from the direct care of the plants and sometimes work in the Employer's administrative offices. The Petitioner argues that their activities are so closely aligned and subordinated to the agricultural activities as to be considered agricultural themselves, quoting *Farmers Reservoir & Irrigation Co. v. McComb,* 337 U.S. 755, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949):

> The question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.

However, the Petitioner cites no case, and I can find none, in which R&D analysis was found to be agricultural labor within the meaning of the FLSA. I find that the Petitioner has not met its burden to establish that the R&D technicians and the R&D data analysts should be excluded from the protections of the NLRA as agricultural laborers.

- IPM Licensed Applicator; IPM Team Member; IPM Scout; IPM Technician

Most employees in the four Integrated Pest Management (IPM) classifications work directly with growing plants. Among other duties, they clean the plants' trays, keep the plants free of pathogens, and spray the plants with products meant to dissuade pests.

One IPM scout is specifically assigned to the Employer's trim room and inspects wholesale cannabis plants purchased by the Employer. This IPM scout's unique work cannot be agricultural in nature because he handles product which does not originate with the purported employer-farmer, *Camsco Produce*, supra.

Regarding the other IPM employees, federal regulations hold that employees of an employer who is engaged in servicing insecticide sprayers in the farmer's orchard and employees engaged in such operations as the testing of soil or genetics research are not included within the terms "production, cultivation, and growing," 29 C.F.R. § 780.117. However, the IPM employees are directly employed by the farmer, not by a separate employer specializing in the provision of insecticide. That being the case, pest management is classified as an activity engaged "on the farm" that "is an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business," 29 C.F.R. § 780.144.

Some courts have held that spraying herbicides and insecticides on crops are primary agricultural activities. The Petitioner cites several such cases, including *Reich v. Tiller Helicopter Servs., Inc.,* 8 F.3d 1018, 1027 (5th Cir. 1993), which holds that the application of pesticides comprises part of "cultivation and tillage of the soil" and *Rodriguez v. Pure Beauty Farms, Inc*., 503 F. App'x 772 (11th Cir. 2013) which holds that when employees kept plants insect-free while in the staging areas, employees' work was subordinate to the farms' own. Similarly, *Adkins v. Mid-Am. Growers, Inc.,* 167 F.3d 355 (7th Cir. 1999) holds that pest control is non-agricultural when insecticides are applied to the farmer's house and yard instead of the crops, but such employees are otherwise engaged in secondary agricultural labor.

The law is inconsistent as to whether the spreading of pesticides by employees of a farmer constitutes primary agricultural labor. However, it is impossible to deny that these practices have been performed in conjunction with farming operations. The sole purpose of cleaning trays and eliminating pathogens is to cultivate healthy plants.

I find that the IPM licensed applicators, IPM team members, IPM technicians are engaged in secondary agriculture within the meaning of Section3(f) of the FLSA and Section 2(3) of the NLRA, as are the IPM scouts with the exception of the IPM scout assigned to inspect plants purchased by the Employer.

Conclusion

I find that the following petitioned-for employees are agricultural laborers under Section 2(3) of the National Labor Relations Act and Section 3(f) of the Fair Labor Standards Act: cultivation team members, cultivation technicians, cultivators, cure room technicians, harvesters, IPM licensed applicators, IPM team members, IPM technicians, and some IPM scouts. Agricultural laborers are exempt from coverage under the National Labor Relations Act and cannot be included in any unit.

I further find that the harvest production specialists are engaged in a combination of secondary agricultural labor nonagricultural work and are covered by the Act only with respect to that portion of the work which is nonagricultural. Finally, I find that the R&D data analysts, R&D technicians and one IPM scout are not engaged in agricultural labor.

The Petitioner has already declined to represent a unit comprised only of R&D data analysts, R&D technicians, one IPM scout, and harvest production specialists to the extent that they are not engaged in agricultural labor.

Accordingly, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition be dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: October 23, 2020

Paul J. Murphy, Acting Regional Director
National Labor Relations Board
Region 01

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

NEW ENGLAND TREATMENT ACCESS, LLC **Employer** **and** **UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1445, AFL-CIO, CLC** **Petitioner**	**Case 01-RC-264290**

AFFIDAVIT OF SERVICE OF: DECISION AND ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on October 23, 2020, I served the above documents by electronic mail upon the following persons, addressed to them at the following addresses:

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October 23, 2020
Date

Elizabeth C. Person, Designated Agent of NLRB
Name

Elizabeth C. Person

Signature