Camsco Produce Company, Inc. *and* Local 951, United Food and Commercial Workers, AFL-CIO-CLC, Petitioner. Case 7-RC-17935

March 15, 1990

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held on February 18, 1986, in the above-captioned proceeding On March 28, 1986, the Regional Director issued a Decision and Order in which he concluded that the petitioned-for employees are exempt from the Act's coverage because they are "agricultural laborers" within the meaning of Section 2(3) of the Act and dismissed the petition Thereafter, in accordance with Section 102 67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision By Order dated June 26, 1986, the Board granted review of the Regional Director's decision solely with respect to whether the Employer's fresh pack department workers are employees within the meaning of Section 2(3) of the Act, in all other respects, the request for review was denied

The Employer, a wholly-owned subsidiary of Campbell's Soup Company, is an Ohio corporation engaged in the business of growing, harvesting, and packaging mushrooms at various farms across the country, including Glenn Farm in Fennville, Michigan, the facility involved

When Glenn Farm is unable to fill customer orders by means of its own harvested mushrooms, additional mushrooms are obtained from the Employer's other farms According to the Employer's farm manager this could occur as often as two to three times a week or not at all in a particular week, depending on the level of production as compared to the level of current orders The farm manager testified that "I couldn't give you a number that it could happen regularly" In 1985, Glenn Farm imported approximately 6 69 percent of its total stock from four other Employer-owner farms Of these four, only the Employer's Evansville, Pennsylvania farm purchases mushrooms from non-Employer growers The Evansville farm, however, does not keep these outside mushrooms separate but commingles them with its own stock In 1985, Glenn Farm received roughly 4 07 percent of its total mushrooms from the Evansville farm which, in turn, received 55 5 percent of its total stock from outside growers [1]

The only employees who handle non-Glenn Farm mushrooms are the fresh pack department employees This department includes the sorting line employees and the heavy equipment operators who transport the mushrooms from the loading dock directly to the fresh pack area where the mushrooms are dumped onto the sorting line along with the Employer-grown mushrooms Employees on the line sort the mushrooms by hand, place them into packages, and weigh the packages Plastic wrapping is applied to the packages by machine The wrapped packages are quick-cooled to retard further maturation and placed in a holding cooler From there, the packages are loaded onto trucks of independent carriers for delivery to customers The majority of the mushrooms grown at Glenn Farm are sold as fresh produce, the remainder is sold to Campbell Soup's plants

The parties stipulated that should a question concerning representation exist, the appropriate unit for collective-bargaining purposes would consist of all full-time and regular part-time hourly paid employees employed at Glenn Farm, including employees in the compost, filling, pasteurization, spawning, casing, harvesting, fresh pack, material handling, and maintenance areas, janitors, lab technicians, and timekeepers, excluding office clerical employees, confidential employees, casual employees, and guards and supervisors as defined in the Act The Regional Director, however, dismissed the petition because he found that all of these individuals are "agricultural laborers" specifically excluded from the definition of "employee" in Section 2(3) of the Act

In concluding that fresh pack department employees are agricultural laborers, the Regional Director found that the work they perform—sorting, grading, quick-cooling—is agricultural and that under *Employer Members of Grower-Shipper Vegeta-*

[1] Although there was testimony from one employee who stated that according to his supervisors and some independent carrier truckdrivers, Glenn Farm sometimes receives mushrooms directly from non-Employer farms, this testimony was vague as to the frequency and size of the alleged shipments Additionally, this testimony, which was hearsay, was contradicted by the direct testimony of other witnesses

This employee also testified that in approximately 100 instances during the past year Glenn Farm had reshipped mushrooms that it had received from one Employer-farm to another Presumably this evidence was intended to show, by inference, that it is conceivable that other Camsco farms engaged in the same practice and, therefore, Glenn Farm actually received, from these other Camsco farms, mushrooms that they in turn had received from Evansville, i e , more outside mushrooms If true, the Employer could conceivably have received more than the estimated 2 26 to 4 07 percent of its mushrooms from outside farms This evidence, however, was directly contradicted by other testimony that, in light of the short shelf life of fresh mushrooms (approximately 5 days), it was "highly unlikely" that mushrooms received at Glenn Farm from other Employer-farms were ever reshipped

ble Assn,[2] Glenn Farm's purchase of independently grown mushrooms constituted an insufficient amount of its aggregate yearly volume of mushrooms to divest the fresh pack department employees of their agricultural status In so concluding, the Regional Director rejected the Board's holding in *DeCoster Egg Farms*[3] that the handling of *any* farm product not grown by the employer or on the employer's farm will result in the loss of exempt status for any employees who handle the outside product We granted review with respect to the fresh pack department employees to resolve this conflict between the two different rules that the Board has applied, that of *Employer Members* and that of *DeCoster*

Section 2(3) of the Act defines "employer" as excluding "any individual employed as an agricultural laborer" The Act does not define the latter term, but beginning July 26, 1946, with the passage of the "National Labor Relations Board Appropriation Act, 1947" (60 Stat 698), Congress has included in the Board's annual appropriation act a proviso 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 § 203(f), in construing the term "agricultural laborer" See *Bayside Enterprises v NLRB*, 429 U S 298, 300 and fn 6 (1977)

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 a secondary meaning[4] The primary meaning refers to actual farming operations, i e, 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[5]

The fresh pack department employees are not engaged in direct farming activities of the type enumerated under the primary meaning of "agriculture", thus, the question is whether they are engaged in operations included within the secondary definition of the term Clearly, as found by the Regional Director, the operations they perform, such as sorting and grading, have long been considered a secondary agricultural function Such practices do not change the Employer's product or enhance its value, rather these activities are merely part of preparing the mushrooms for marketing[6] Quick-cooling a product to enhance its shelf life has similarly been held to be agricultural[7]

These operations, however, must also meet the requirement that the practice be in conjunction with "such farming operations" The Department of Labor (DOL) regulation interpreting the phrase "such farming operations" from the section 3(f) definition of "agriculture" states that

> No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all of such commodities are the products of that farm Thus, the performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for considering the employees engaged in agriculture if the practice is performed upon any commodities that have been produced elsewhere than on such farm[8]

In *DeCoster*, the Board read this regulation as limiting the agricultural exemption to those processors who deal exclusively with their own goods Noting that an employer is not a "farmer" as to products that have been raised or produced by independent farmers, the Board concluded that although only approximately 1 7 percent of the 11 7 million eggs processed by the employer were received from contract farmers, the employer's employees were not engaged in activities falling within the secondary definition of agriculture because not "all" of the eggs processed by the employer were the products of his own farm[9]

On the other hand, in *Employer Members of Grower-Shipper Vegetable Assn*, relied on by the Regional Director, the Board held that employees will not be found to be exempt agricultural laborers if a "regular and substantial" portion of their

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[2] 230 NLRB 1011 (1977)

[3] 223 NLRB 884 (1976)

[4] See *Farmers Reservoir & Irrigation Co v McComb*, 337 U S 755, 762–763 (1949)

[5] Id See also Department of Labor Regulation § 780 105, 29 CFR § 780 105 (1985)

[6] *Rod McClellan Co*, 172 NLRB 1458 (1968), *D'Arrigo Bros Co of California*, 171 NLRB 22 (1968), *Bodine Produce Co*, 147 NLRB 832 (1964)

[7] *D'Arrigo Bros Co*, supra

[8] 9 C F R 780 141 (1974) This interpretive rule appears unchanged in the most recently published edition of 29 C F R (1986)

[9] See also *Wegman's Food Market*, 236 NLRB 1062 (1978), *Romar Carrot Co*, 228 NLRB 369 (1977), and *Draper King Cole Inc*, 226 NLRB 941 (1976), in which the Board cited *DeCoster* with approval Those cases, however, include the handling of large amounts of nonemployer products and, thus, the agricultural exemption would not have applied under either *DeCoster* or *Employer Members*

work effort is directed toward processing the crops of a grower other than the grower-employer by whom they are employed There the Board found that employees of employers who handled outside produce constituting less than 10 percent of their employer's total volume maintained their agricultural exemption as the amount of nonemployer produce handled was insubstantial [10] However, in light of the specific language of the FLSA regulation and the Board's findings in *DeCoster Egg Farms*, we think the decision in *Employer Members of Grower-Shipper Vegetable Assn*, emphasizing the quantity of outside products handled, is a misapplication of the regulation defining agricultural laborer Consequently, to the extent that it is inconsistent with this decision and with *DeCoster, Employer Members of Grower-Shipper Vegetable Assn* is overruled [11] However, our inquiry does not stop there

As noted, *DeCoster* more accurately reflects the Department of Labor's strict interpretation of the agricultural exemption under the FLSA However, for reasons set out below, we do not believe that it should always automatically follow that employees who are deemed nonexempt from the coverage of the FLSA pursuant to the Department of Labor's interpretation of the agricultural exemption are also nonexempt under the NLRA In our view, the proper test for our statute should focus not on the *amount* of other-employer produce handled by the employees in question, but rather should rest on the *regularity* with which employees handle such outside produce Such a test has some support in Board precedent, and it is justified by the differences in purpose and framework between the NLRA and the FLSA

In *Olaa Sugar Co*, 118 NLRB 1442 (1957), the Board was faced with the question whether a truckdriver who spent part of his time transporting his employer's sugar cane to the employer's mill and part of his time transporting the cane of other farmers to the mill was entitled to file an unfair labor practice charge under the NLRA with respect to his allegedly discriminatory discharge by the employer In asserting jurisdiction, the Board announced 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" Id at 1443 (emphasis in original) The Board purported to be following a regulation of the Department of Labor for determination of eligibility for coverage under the FLSA, and it reasoned that it should give due respect to the views of that department on the agricultural exemption question because Congress had, in effect, singled out the Department of Labor as the "'primary' agency" on this issue Id at 1444

In fact, the word "regular" was not mentioned at all in the DOL regulation cited,[12] and, although the rule referred to "any" regular amount, the rule's partial coverage aspect necessarily implied a requirement of more than a de minimis amount of nonexempt work (It would make no sense, for example, to certify a collective-bargaining representative with respect to "unit" work that an employee performed perhaps no more than an hour or two each month)[13] Nonetheless, the Board's inclusion

[10] See also *Mario Saikhon Inc*, 278 NLRB 1289 (1986), in which the Board, citing *Employer Members*, found that the employer's field packing employees were not exempt agricultural laborers as approximately two-thirds of the products handled by these employees came from outside sources This case, however, like those cited in fn 9, involved substantial amounts of outside products, and thus did not raise the conflict between *DeCoster* and *Employer Members* See also *Mikami Bros*, 188 NLRB 522 (1971), *Kelly Bros Nurseries*, 140 NLRB 82 (1962), enf denied on other grounds 341 F 2d 433 (2d Cir 1965), and *Garin Co*, 148 NLRB 1499 (1964), in which the agricultural exemption was denied because outside goods constituted 18–20 percent, 28 percent, and 15 percent, respectively

[11] This opinion represents the views of Chairman Stephens and Member Devaney Member Cracraft, in a concurring and dissenting opinion, joins them in overruling *Employer Members*, but would affirm DeCoster and not add a requirement of regularity Member Oviatt, in a separate concurring and dissenting opinion, joins Chairman Stephens and Member Devaney in overruling *DeCoster*, but would affirm *Employer Members* and hold that the agricultural exemption is lost only if a "regular and substantial" portion of the employees work effort is directed toward processing the crops of a grower other than their employer Therefore, to the extent the plurality opinion embraces a requirement of regularity, Member Oviatt is in agreement with it

In its request for review, the Petitioner argued that the other Camsco farms are "outside" farms too and, therefore, mushrooms coming from them should be counted when determining what percentage of "outside" mushrooms are handled by the Employer's employees All members reject this contention for the same reasons as did the Regional Director Contrary to the Petitioner, they find *Stahmann Egg Farms*, 251 NLRB 1232 (1980), cited by the Regional Director, indistinguishable

[12] The Board relied on sec 780 5(b) of the FLSA regulations, 29 CFR § 780 5(b), which provided Where exempt and non-exempt work is involved, the general rule is that if in any workweek an employee performs exempt work and other work which is covered and not exempt, the wage and hour requirements do apply to him during that workweek" *Olaa*, 118 NLRB at 1444 fn 6

[13] Because the Board in *Olaa* was deciding only whether the employee in question, Banez, could file an unfair labor practice charge and not whether a union could petition to represent a unit of employees performing partly exempt work and partly nonexempt work, it had no reason to focus on relative amounts of exempt and nonexempt work The Board was probably induced to recite this 'pro tanto coverage rule because the case was on remand from the Ninth Circuit (*NLRB v Olaa Sugar Co*, 242 F 2d 714, 722 (9th Cir 1957)), which had questioned whether asserting jurisdiction over Banez' charge was proper, given the Board's decision in *Clinton Foods*, 108 NLRB 85 (1954), in which the Board had held that employees who spend a "substantial part of their time' performing an "agricultural function" would be deemed agricultural laborers *entirely* exempt from the Act notwithstanding evidence that they also engaged in a substantial amount of nonagricultural work for the employer Id at 88 The Board had, in fact, overruled *Clinton Foods* in *H A Rider & Sons*, 117 NLRB 517, 519–520 (1957), and thereby returned to the practice it had followed in cases overruled sub silentio by *Clinton Foods*—permitting dual-function employees to be included in a bargaining unit under the NLRA with respect to their nonagricultural work E g, *Pepeekeo Sugar Co*, 59 NLRB 1532 at 1540 (1945), *L Maxcy Inc*, 78 NLRB 525 (1948), *San Fernando Heights Lemon Assn*, 72 NLRB 372 (1947)

of a "regularity" element in its test made sense and, whether unconscious or not, represented a reasonable policy of following DOL regulations not slavishly and mechanically, but "whenever possible"[14] and with appropriate modifications reflecting the differing purposes and applications of the FLSA and the NLRA[15]

The FLSA focuses on wage standards for particular workweeks, but, as the Second Circuit has observed "Labor relations know no such watertight compartments" *NLRB v Kelly Bros Nurseries*, 341 F 2d 433, 438 (2d Cir 1965) The NLRA is generally concerned with longer periods of time Thus, for example, when the Board certifies a collective-bargaining representative, it contemplates coverage by the Act for at least a year, barring unusual circumstances *Brooks v NLRB*, 348 U S 96 (1954) It would make little sense to deem a particular job classification nonagricultural for NLRA purposes if the nonagricultural work that caused the exemption to be lost occurred as a freak event on only 1 day—perhaps as a result of an emergency produced by the whims of nature to which farming is subject

Thus, the conflicting rules of *Employer Members* and *DeCoster* are, in our view, both deficient, because in neither case did the Board adopt a rule that represented a reasonable version, for the Board's purposes, of the relevant DOL regulation In *DeCoster*, where the Board focused on the work of employees who processed eggs laid by their employer's hens and a small amount of eggs from other farmers, the Board properly looked to a DOL regulation that concerned how to classify commodity handling under the FLSA definition of agriculture, but, we believe the Board erred insofar as it omitted a "regularity" requirement and held simply that the handling of any commodities from a farm other than the employer's would result in the loss of the exemption as to employees engaged in the handling of the commingled products 223 NLRB at 886[16] In *Employer Members*, the Board, citing *Olaa Sugar*, supra, properly included a regularity requirement, but improperly ignored the relevant DOL regulation and applied the partial coverage rule, a rule that makes sense only when the question is whether the NLRA covers employees who are conceded to be engaged in some agricultural work to which we cannot extend the NLRA

Thus, our choice is to borrow from both *DeCoster* and *Employer Members* and apply a rule that the Board will assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question[17] In such a case, the question, properly framed, is whether the commodity handling in question is agricultural work[18] To the extent that we apply a regularity test, we are returning to the *Olaa* rule and also taking due account of the different purposes for applying the FLSA and the NLRA And we are also faithful to *Olaa* by following the relevant DOL regulation to the extent "possible" (See fn 14, supra)

Finally, with respect to practical considerations, it is not unreasonable to conclude that a farmer-employer who handles the products of other producers on a regular basis, however small the quantity may be, has departed from the traditional model of the farmer who simply prepares his own products for market Extending the protections of the Act to employees who handle commodities for such an employer is, in our view, consistent with the intent of Congress[19] At the same time, for the reasons

[14] *Imperial Garden Growers*, 91 NLRB 1034, 1037 (1950), cited in *Olaa Sugar Co*, supra, 118 NLRB at 1444 fn 8 (Board's duty is to "follow, whenever possible, the interpretation of Section 3(f) adopted by the Labor Department and its Wage and Hour Division ")

[15] It is also well to keep in mind that the DOL regulations that the Board has typically followed, including the one we follow in this case, are simply interpretive rules, representing the Labor Department s view of how the statute should be construed, rather than regulations that Congress had directed it to promulgate in order to implement the statute As such they are entitled to deference as the views of an expert agency, but deference also depends on the validity" of the "reasoning" underlying them *Skidmore v Swift & Co*, 323 U S 134, 140 (1944) Accord *General Electric Co v Gilbert*, 429 U S 125, 141-142 (1976) As discussed, infra, although the reasoning underlying § 3(f) may be perfectly valid in the FLSA context, different considerations arise under the NLRA

[16] The Board thereby relied on the same regulation—29 CFR § 780 141—that we rely on in the present case It would appear that this is a rule of longstanding under the FLSA, even though the Board apparently was unaware of it before *DeCoster* Thus, although it cited no particular regulation, a district court adjudicating an FLSA case ,in 1942 held that employees performing secondary farming functions on horticultural products partly grown by their employer and partly purchased from other growers were covered by the FLSA for the weeks in which [they] spent any of their time at such labor, however small the percentage of horticultural commodities purchased [by the employer] may be with respect to the total volume handled *Jordan v Stark Bros Nurseries & Orchards Co*, 45 F Supp 769, 771-772 (W D Ark 1942)

[17] To the extent *DeCoster* is inconsistent with this formulation of the appropriate rule, it is overruled

[18] A different rule for assessing the significance of the proportion of nonexempt work is properly applied when the employees in question spend part of their time in what is concededly farming in the *primary* sense *NLRB v Kelly Bros Nurseries*, 341 F 2d 433, 438 (2d Cir 1965) The rule we have adopted in the present case cannot reasonably apply where an employee is engaged regularly in both primary agricultural work (e g , tilling or harvesting) and nonagricultural work In those cases a *small* amount of nonexempt work would be inadequate to tip the scales in favor of bringing men who would be regarded as farmers on any realistic view, within the National Labor Relations Act ' Id at 439 In such cases, the Board properly imposes a substantiality requirement See, e g , *Aquacultural Research Corp*, 215 NLRB 1 (1974) (jurisdiction asserted where agricultural and nonagricultural work intermixed and nonagricultural work was substantial), *Light's Tree Co*, 194 NLRB 229 (1971) (jurisdiction not asserted where 90 percent of total worktime was spend in agricultural work)

[19] In a case decided shortly after the NLRA exemption for agricultural laborers was linked to the FLSA definition through the appropriations rider (see fn 1 supra), the Fifth Circuit, apparently unaware of the rider, concluded that the Board should look to the definitions of agriculture" in both the Social Security Act and the FLSA, because those, like the

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stated earlier, it makes no sense, given the framework of our statute, to find the agricultural exemption inapplicable simply because on a single occasion, under circumstances that might never occur again, a few commodities from another employer's operation were handled by the employees at issue In thus modifying the DOL standard, we reasonably exercise our discretion to assert, or decline to assert, our jurisdiction in a manner that will best effectuate the policies of our Act See *NLRB v Olaa Sugar Co*, supra, 242 F 2d at 719 (acknowledging Board's discretion to determine the degree to which it will follow the Labor Department's constructions of the sec 3(f) exemption)

In applying the aforementioned test in the instant case, we find the facts presented weigh in favor of our asserting jurisdiction The evidence shows that the employees in question handled mushrooms produced by a farmer other than the Employer, and the Employer has not demonstrated that its handling of such mushrooms occurred very rarely, on only an emergency basis Because the one asserting such an exemption has the burden of proving its application,[20] the record does not establish that the work of the "fresh-pack" employees is within the agricultural exemption [21] We therefore assert jurisdiction, reinstate the petition, and remand the case to the Regional Director for further processing [22]

MEMBER CRACRAFT, concurring and dissenting in part

I agree with Chairman Stephens and Member Devaney that the definition of secondary agricultural laborer in *Employer Members of Grower-Shipper Vegetable Assn*, 230 NLRB 1011 (1977), should be overruled as overly broad and a misapplication of the Department of Labor's regulation defining agricultural laborer I disagree, however, with Chairman Stephens and Member Devaney's addition of a regularity standard to the definition set out in *DeCoster Egg Farms*, 223 NLRB 884 (1976) Instead I would continue to strictly apply the *DeCoster* "exclusively" principle to secondary agricultural laborers and find on that basis that the Board should assert jurisdiction over the employees at issue I believe that adhering to *DeCoster's* strict limitation of the definition of secondary agricultural laborer fulfills the purpose of the agricultural exemption in Section 2(3) of the Act, better accords with the Department of Labor's definition of agricultural laborers, and provides a more precise standard to follow [1]

As my colleagues discuss, the agricultural exemption has both a primary and a secondary definition Primary agricultural laborers are engaged in traditional agricultural work and are exempt Secondary agricultural laborers are not engaged in agricultural work but in processing or marketing work such as sorting and packing and are exempt only if the work is incidental to an employer's farming operations Thus, the proper focus for determining secondary agricultural status is on the nature of the employer's operations rather than on the nature of the work of the laborers in question [2]

NLRA, were New Deal statutes *NLRB v John W Campbell, Inc*, 159 F 2d 184, 186–187 (5th Cir 1947) The court discerned in "the general legislative pattern of those times" an intent of Congress 'to relieve distressed farmers from burdens which it well knew they were "not equipped to carry" In fact, the definitions in the statutes to which the court referred were not the same, but each was offered for consideration by Congress The version of the rider offered by Representative Elliott, which the House first adopted, would have defined 'agricultural labor' as it was defined in the Social Security Act Amendments of 1939, 53 Stat 1377, 92 Cong Rec 6689–6692 (1946) As Senator McCarran later reported, however, the House and the Senate "were in complete disagreement on what is known as the Elliott rider," and the conference committee finally agreed to substitute a provision referring to the definition of agriculture in sec 3(f) of the FLSA 92 Cong Rec 9514 (1946) Senator Ball, a member of the conference committee, characterized the definition of "agricultural laborer" in the Social Security Act as "very broad" and the FLSA section as "a much narrower definition" to which counsel for the NLRB had no real objection because only "a few minor changes in [the Board's] present procedure and definition" would be called for Id Thus, although it might be fairly said that the "1946 rider was the product of heated debate and of sharp conflict between the two houses, which unfortunately sheds relatively little light on its interpretation" *NLRB v Kelly Bros Nurseries*, 341 F 2d 433, 435 fn 2 (2d Cir 1965), it is at least noteworthy that the exemption chosen was apparently perceived as the one that would permit more extensive coverage of employees by the NLRA

[20] *Corning Glass Works v Brennan*, 417 U S 188, 196–197 (1973), *Phillips, Inc v Walling*, 324 U S 490, 493 (1945)

[21] Member Oviatt, in dissent, makes the point that it is unfair now to find that the Employer did not carry its burden of meeting the test we are applying because the Employer had reasonably relied on *Employer Members* as authority for the proposition that the evidence it introduced was sufficient to show that it came within the agricultural exemption Because *Employer Members* did not expressly overrule *DeCoster*, however and because, even after the issuance of *Employer Members*, *DeCoster* was cited (albeit in dictum) as if it were still viable precedent (see, e g, *Wegman's Food Market*, 236 NLRB 1062 (1978), *Stahmann Egg Farms*, 251 NLRB 1232 (1980)), we do not agree that an applicable rule had been clearly established by any line of authority In our decision today we are attempting to resolve the problem of the competing lines of precedent In any event, this is an issue of statutory jurisdiction, which can be raised at any time *Gateway Motor Lodge*, 222 NLRB 851, 852 (1976) If circumstances at the present time are such as to divest the Board of jurisdiction under the regularity test set out above, the Employer is free to make an appropriate proffer We see no value, however, in remanding for reconsideration of the evidence as it existed in 1985

[22] Member Cracraft joins in this conclusion, for the reasons set forth in her separate opinion

[1] Additionally, I disagree with Member Oviatt's retention of the *Employer Members* standard In my view, that standard lacks precision and predictability in application as well as varying from the Department of Labor's definition Although the *Employer Members* standard has been in existence for over 12 years, the same is true of *DeCoster* In fact, on at least one occasion the Board found no exemption under either the *Employer Members* standard or the *DeCoster* standard See *Valley Harvest Distributing*, 294 NLRB 1166 fn 2 (1989)

[2] Technically, there is no such thing as secondary agricultural work In contrast, there is primary agricultural work for which the focus is on the nature of the work Thus, the Board has found that a coal mining firm's revegetation laborers are "engaged in agricultural activities regardless of whether they are employed by a farmer or on a farm" *Drummond Coal Co*, 249 NLRB 1017, 1018 (1980)

I believe the Act's agricultural exemption was designed to apply to traditional farming operations Although no clear line is entirely satisfactory, I believe that *DeCoster's* "exclusively" principle draws the appropriate line *DeCoster* draws the line between a farmer who prepares exclusively his own products for market and a farmer who handles any produce from other growers In the latter case I would find that the focus of the employer's operations has shifted from that of a farmer seeking to dispose of his own produce to that of a marketer seeking produce from other growers to satisfy marketing concerns such as pleasing customers or fulfilling contracts Furthermore, I believe that the nature of the latter employer's operations has changed even if the change was due to a fire, flood, freeze, or "other whims of nature" Thus, I dissent from my colleagues' addition of regularity to *DeCoster*

As more fully explained in *DeCoster*, 223 NLRB at 885, since 1946 Congress has mandated that the Board define agricultural laborers in accord with section 3(f) of the Fair Labor Standards Act that in turn defines secondary agricultural laborers as performing work "on a farm as an incident to or in conjunction with such farming operations" The Department of Labor's regulation[3] interpreting the FLSA definition of agricultural laborer states

> No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all such commodities are the products of that farm Thus, the performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for considering the employees engaged in agricultural if the practice is performed upon any commodities that have been produced elsewhere than on such farm

In *DeCoster* the Board held that this regulation must be read as limiting the exemption to those processors who deal exclusively with their own goods This interpretation fully accords with the specific language of the regulation [4]

Although the Department of Labor's administration of the FLSA involves different considerations than the Board's administration of our Act, deference to the department's interpretation is not to be lightly disregarded, especially as Congress has required that we follow the FLSA definition As the Department of Labor's regulation properly focuses on the nature of the employer's operations rather than on the nature or regularity of the work of the laborers in question, I would find that there is neither need nor good reason for the Board to apply a different standard I would not, as do my colleagues, depart from the Department of Labor's standard by adding a requirement for regularity

Finally, I believe that my colleagues' appendage of regularity, the meaning of which is not defined or readily apparent, unnecessarily creates new uncertainty I prefer the clearer, although stricter, ruling of *DeCoster*

I would apply *DeCoster* and find that the Employer's fresh pack department employees are employees within the meaning of Section 2(3) of the Act From 2 26 to 4 07 percent of the mushrooms handled by the Employer's fresh pack department employees came from outside farms As these employees do not handle the Employer's mushrooms exclusively, they are not engaged in activities falling within the secondary definition of agricultural laborers, and the agricultural exemption should not apply to them Accordingly, in agreement with Chairman Stephens and Member Devaney, but for different reasons, I would reverse the Regional Director's decision, reinstate the petition, and remand the case

MEMBER OVIATT, concurring and dissenting in part

The issue is whether farm workers who sort, grade, and pack mushrooms, nearly all of which are grown on their employer's mushroom farms, are employees covered by our statute or "agricultural laborers" whom Congress explicitly excluded Unlike my colleagues, I would continue to apply the *Employer Members*[1] rule of substantiality and regularity and find that these workers are agricultural laborers [2]

The Employer's Glenn Farm grows, harvests, and packs mushrooms, most of which are sold as fresh produce The workers in question are in the fresh pack department, where mushrooms are sorted, weighed, and quick-cooled All but some 2 to 4 percent of the mushrooms the Employer ships to customers are ones it grows itself Only when Glenn Farm does not have enough mushrooms to fill customer orders does the Employer obtain additional mushrooms, both from other farms it owns

[3] 29 CFR § 780 141 (1974)

[4] In applying this interpretation to the facts of the case in *DeCoster*, the Board found that although only about 1 7 percent of the 11 7 million eggs processed by the employer were received from contract farmers, the processing employees were not engaged in activities falling within the secondary definition of agriculture because they did not deal exclusively with eggs produced by their employer

[1] *Employer Members of Grower-Shipper Vegetable Assn*, 230 NLRB 1011 (1977)

[2] I would overrule *DeCoster Egg Farms*, 223 NLRB 884 (1976), because it is clearly inconsistent with *Employer Members*

and from farms it does not own Use of mushrooms grown outside Glenn Farm occurs on an intermittent basis—as much as two to three times a week or not at all in a particular week Our concern here is only with mushrooms that the Employer does not grow itself on Glenn Farm or on other farms owned by the Employer

Applying the rule announced more than 12 years ago in *Employer Members*, and thereafter followed by the Board and recently by at least one court,[3] the Regional Director found that the amount of other growers' mushrooms handled by the fresh pack department workers was insufficient to turn these agricultural laborers into employees covered under Section 2(3) of our Act In *Employer Members*, the Board held that the agricultural exemption will be lost only if both a "regular and substantial" portion of the agricultural products the workers handle is grown by a farmer other than their employer There, the Board found that workers who handled outside produce constituting less than 10 percent of their employer's total were exempt as agricultural laborers because the amount of nonemployer produce they handled was insubstantial [4]

Like Chairman Stephens and Member Devaney, I find that we are not required to, and should not, apply the pertinent Department of Labor (DOL) interpretive rule[5] mechanically I do not agree with them, however, that the Board should assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are regularly handled by the workers in question In my view, *Employer Members* provides a practical and common sense approach to determining whether an employer is engaged in "farming operations" within the meaning of section 3(f) of the Fair Labor Standards Act Thus, where a farmer has in effect become a jobber or wholesaler for other products the *Employer Members* rule recognizes that fact any *substantial* amount of agricultural goods from another producer that are handled by that farmer's workers on a regular basis will forfeit the agricultural exemption But the *Employer Members* rule also implicitly recognizes that a farmer's "products are not manufactured, but are products of the soil, subject to the caprices of nature" *Wirtz v Jackson & Perkins Co*, 312 F 2d 48, 51 (2d Cir 1963), see *Damutz v William Pinchbeck, Inc*, 158 F 2d 882, 883 (2d Cir 1946) Unseasonably bad weather, insect blight, and disease must be considered because these conditions may limit a farm's production and thus substantially affect a farmer's ability to meet his obligations to his customers, not just over the short term, but over the course of a growing season Such unforseen events may require a farmer regularly to acquire small quantities of the product he farms from other farmers until his own farming facilities can once again provide all his customers' requirements But today's farmer is no less engaged in "farming operations" because, in the circumstances I have described, he regularly ships quantities of the product he farms that contain very small amounts of that same product coming from other farmers [6] Thus, I would continue to follow the *Employer Members* rule and to exempt farm laborers who happen to work on products from other farmers, unless the work on outside products is regular and substantial

In this case, the Employer obtained no more than some 4 percent of its mushrooms from other growers, an insubstantial amount [7] Although in my view this alone would be enough to warrant the Board's declining jurisdiction over this Employer, I note that the Employer did not receive mushrooms from other growers every week, the shipments were intermittent Thus, even under the plurality's more restrictive "regularity" test, there is a question whether the Board should assert jurisdiction The plurality asserts jurisdiction because the Employer did not satisfy its burden of demonstrating that it handled outside mushrooms "very rarely, on only an emergency basis" But I do not equate a lack of regularity with a very rare happening Something can happen irregularly without taking place very rarely And even if the Board now wants to apply this new, more restrictive test, it is unfair simply to assume that the intermittent mushroom shipments from other farmers were not in re-

[3] See *Valley Harvest Distributing*, 294 NLRB 1166 (1989), *Spirit Mountain Farms*, 259 NLRB 1016, 1017 fn 1 (1982), *Careau Group v United Farm Workers of America*, 716 F Supp 1319, 1324 (C D Cal 1989)

[4] Even prior to *Employer Members*, the Board had followed a de minimis approach See *Lee A Consaul Co*, 192 NLRB 1130, 1135 (1971), enf denied on other grounds 469 F 2d 84 (9th Cir 1972), *John C Maurer & Sons*, 127 NLRB 1459 (1960)

[5] Congress has required that the Board be guided by the definition of "agriculture" in the Fair Labor Standards Act, sec 3(f), which is administered by DOL

[6] The DOL rule, 29 CFR § 780 141, interpreting the phrase such farming operations" in sec 3(f), states that, in order to retain the agricultural exemption, the farmer in question must not handle any commodities that have been produced elsewhere than on his farm The regulation thus appears to preclude a de minimis test For judicial authority, however, the regulation cites only *Mitchell v Gatesville Commission Co*, 263 F 2d 913 (5th Cir 1959) In *Mitchell*, the court of appeals in fact applied a de mimimis test The district court had found that individuals working in a cattle auction barn were exempt from provisions of the FLSA as agricultural workers On appeal, the Fifth Circuit reversed In doing so, however, the court noted that to bring himself within the exception, the appellee must prove that not merely some but *substantially all* of the farming operations to which the practices are incident were operations of the appellee farmer himself ' 263 F 2d at 917 (emphasis added) Plainly, substantially all is not "all '

[7] I do not necessarily agree with the finding in *Employer Members* that where 10 percent of the agricultural product comes from another farmer this amount is still insubstantial *Employer Members*, supra, 230 NLRB at 1015–1016 Here, however, the amount of mushrooms grown by others is less than 5 percent, plainly an insubstantial amount

sponse to emergencies at the Employer's farm The Employer participated in the representation hearing believing that Employer Members was good law At the very least, the Employer should have the opportunity to introduce additional evidence on this point

I would affirm the Regional Director's finding that the Glen Farm fresh pack department employees are agricultural workers exempt from the Act's coverage and also affirm his dismissal of the petition