

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4**

**COLUMBIA CARE NEW JERSEY, LLC**

**Employer**

**and**

**UNITED FOOD AND COMMERCIAL WORKERS,  
LOCAL 152**

**Petitioner**

**Case 04-RC-319930**

**DECISION AND ORDER<sup>1</sup>**

Columbia Care New Jersey, LLC (the Employer) operates a cannabis cultivation and processing facility at 50 Northwest Avenue in Vineland, New Jersey. On June 14, 2023, United Food and Commercial Workers Union, Local 152 (the Petitioner) filed a petition to represent a bargaining unit of the Employer’s full-time and regular part-time Cultivation Technicians, Senior Cultivation Technicians, Production Technicians, and Senior Production Technicians, excluding all other employees, supervisors, and guards as defined in the National Labor Relations Act (NLRA). On July 19, 2023, a hearing was held before a Hearing Officer of the National Labor Relations Board at which the parties were provided the opportunity to present evidence on the issues raised by the petition. On August 9, 2023, the parties filed post-hearing briefs.

The two issues before me for decision are (1) whether the employees in the petitioned-for unit are employees within the meaning of Section 2(3) of the Act, or agricultural laborers within the meaning of Section 3(f) of the Fair Labor Standards Act, and (2) whether the Employer has hired a representative complement of employees.

The National Labor Relations Act, 29 U.S.C. §§ 141 et seq., covers employees engaged in interstate commerce, with one exception being “any individual employed as an agricultural laborer,” NLRA, Section 2(3). In addition, since 1946, Congress has

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<sup>1</sup> The petition in this case was filed under Section 9(c) of the Act. 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. The parties stipulated that the Employer is engaged in commerce within the meaning of the Act, and that the Petitioner is a labor organization within the meaning of the Act.

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.

The Employer takes the position that all petitioned-for workers are exempt from the Act's coverage and therefore not properly included in the bargaining unit. The Employer argues that the Cultivation Technicians and Senior Cultivation Technicians are agricultural laborers within the meaning of Section 2(3) of the Act because the entirety of their work is agricultural in nature. In turn, the Employer argues that the Production Technicians and Senior Production Technicians are exempt because they perform a substantial number of agricultural functions within the meaning of Section 3(f) of the FLSA, which encompass a substantial portion of their job duties. To the extent that there is an appropriate unit, the Employer contends that it has not yet hired a representative complement of employees at the facility and thus it is not appropriate to conduct an election.

The Petitioner takes the position that the petitioned-for unit is appropriate and leaves to the Employer the burden of proving its claims that the workers are exempt from the Act's coverage. On the issue of whether the Employer has hired a representative complement of employees, the Petitioner takes the position that the Employer has provided insufficient evidence of any planned expansion.

For the reasons discussed below, I find that the Cultivation Technicians and Senior Cultivation Technicians are agricultural laborers exempt from the Act's coverage, that the Production Technicians and Senior Production Technicians are employees covered by the Act, and that the Employer has not sufficiently supported its claim that the current composition of the petitioned-for unit is not representative. However, because the Petitioner stated on the record at hearing that it will only proceed to an election in the petitioned-for unit, and no alternative unit, I will dismiss the petition.

## **I. RECORD EVIDENCE**

The Employer operates a facility at 50 Northwest Avenue in Vineland, New Jersey, where employees in the petitioned-for unit engage in the cultivation and processing of cannabis and cannabis products for medical and adult recreational use. The Employer has been in business since 2020 and is regulated and licensed by the New Jersey Cannabis Regulatory Commission. The 34 workers at issue are 12 Cultivation Technicians, 4 Senior Cultivation Technicians, 17 Production Technicians and 1 Senior Production Technician. The Employer maintains job

descriptions for each of those positions, as well as a manual of standard operating procedures (SOPs) for the cultivation and processing of cannabis at the facility. The cultivation and processing work is conducted by two separate departments at the Vineland facility. All work is handled indoors in an environment that is climate and temperature controlled and is not affected by seasonal changes. After products are packaged for sale at the facility, they are driven to two offsite retail dispensaries operated by the Employer and about 15 wholesalers.

### **A. The Cultivation Department**

The Cultivation Department, which is headed by Manager Alex Anthony, handles the cultivation of cannabis plants from germination to harvest and operates with four specialized teams: the Propagation Team, the Vegetation Production Team, the Bloom Team, and the Bloom Production Team. Each team consists of 3 Cultivation Technicians and 1 Senior Cultivation Technician, who perform substantially the same work and follow the procedures established in the SOPs.

The Propagation Team's work is done by hand with gloves, using pruners and bendable wires. The Team begins the cultivation process by cloning mother stock cannabis plants in the Mother Clone Venue, a room where they care for about 130 to 200 mother plants, and 800 to 1,200 clones. The team maintains the mother stock plants for up to 12 weeks, pruning them to remove branches and fan leaves, thinning them to increase light penetration and air movement, and bending their branches to improve their canopy. The Team then clones the mother plants by using pruning shears to remove the tops of the plants, which are placed in small cubes of soil where they grow for 8 weeks. The clones are then transplanted into larger bags of soil, which the Team prepares and fertilizes. They then continue to monitor and treat the plants for any pests or diseases. An irrigation system, which Manager Anthony regulates, is used to water the mother plants, but the Team waters the clones by hand.

The Vegetation Production Team transplants the clones, as well as the plants designated to become mother plants, in the hallway and another nearby room. They then move the plants into the Mother Clone Venue where they remain for three weeks of growth. During that time, the Team cares for the plants by pruning, defoliating, and topping, as needed, using the same tools used by the Propagation Team. When the plants are later removed from the Mother Clone Venue, the Vegetation Production and Bloom Teams work together to apply insect repellent on the plants out in the hallway. The plants then are moved to the Bloom Room.<sup>2</sup>

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<sup>2</sup> The Vineland facility contains two such rooms, designated "Bloom Room 1" and "Bloom Room 2." Currently, Bloom Room 1 is not in use due to decreased capacity. References to the "Bloom Room" in this decision, unless otherwise indicated, refer to "Bloom Room 2," which is currently in use.

The Bloom Team and the Bloom Production Team care for about 3,000 plants for eight weeks while the plants are in the Bloom Room. The Teams do much of the same work, including pruning, defoliating, watering, fertilizing, and monitoring the growth of the plants. In addition to most of the watering being done by the irrigation system, the system is also used for a weekly “drenching” that provides nutrient and chemical compounds to promote plant growth and development. After the eight weeks of growth, the plants are scheduled for harvest. To harvest the plants, the Bloom Teams use hand shears to remove all plant material above the soil line, break branches to dispose into bins, and hang the plants in the hallway near the Bloom Room. Plant residue, such as the broken branches, must be disposed of according to state regulations. After the Bloom Teams complete the harvest, the Production Department handles the post-harvesting stages of the process.

## **B. The Production Department**

The Production Department is overseen by Manager Gabriella Rotella and consists of 17 Production Technicians and 1 one Senior Production Technician who perform substantially the same work, follow the procedures established in the SOPs, and wear scrubs and gloves throughout the post-harvest processes. After the plants are harvested by the Cultivation Department and arrive to the Production Department, the plants are weighed, and then sent to hang-dry in the Dry Room, which holds between 2,500 to 3,000 plants. For a week, the Technicians monitor the drying by checking moisture content and marking any undesirable material. Once dry, the plants are “hand bucked” into bags by removing the cannabis buds. The Technicians then transport the bags by cart to the Trimming and Packaging Room, where they load the material into the trimming machine, which trims the bud and separates trimmed material from the physical bud. The Technicians then load the trimmed material into large bins, where they separate large and small buds, weigh them, and return them to their original bags.

The Production Technicians then “batch” the product into the inventory management system and move it by cart to the Cure Room, where 500 to 700 bags bagged product are maintained for one to three months to complete the curing process. During that time, the Technicians use a “burping” process, by which they open the bags and toss the buds to improve airflow. Once cured, the product is tested by an outside company. After testing, the Technicians prepare the product for packaging by inspecting it on the trim table where large buds are broken down by hand to fit into the “WeighPack” machine. The Technicians then weight the product, and any trim material and stem waste, return it to the bags, which they then place on a rack and move into a vault ready for packaging. To begin the packaging process, the technicians take the bags from the vault to the WeighPack Room, dump the bags into the WeighPack machine. The machine vibrates the product onto small scales and

weighs it before it drops into jars on a conveyor belt. The Technicians then cap the jars by hand, box them, print and attach labels, and the product is ready for sale. Working on separate production processes, the Technicians operate large and fine powder grinding machines, and the “JuanaRoll” machine, which places ground material into paper cones to make joints. The Technicians then inspect the joints and place them by hand into jars ready for sale.

### **C. Job Classifications**

The parties dispute the agricultural laborer status of 34 employees in four petitioned-for job classifications: 12 Cultivation Technicians, 4 Senior Cultivation Technicians, 17 Production Technicians, and 1 Senior Production Technician.<sup>3</sup>

#### **1. Cultivation Technician**

The 12 Cultivation Technicians are supervised by Cultivation Department Manager Anthony, and work in four teams that cover various stages of the cultivation and growing processes required to produce the Employer’s cannabis plants. Those teams are the Propagation Team, the Vegetation Production Team, the Bloom Team, and the Bloom Production Team.

The Employer’s written position description for the Cultivation Technician, which is consist with the testimony presented at hearing, provides this overview of duties:

The Cultivation Technician is responsible for plant care in all stages of the life-cycle cannabis growth to include germination, propagation, vegetative, flowering and harvest. The Technician, logs, monitors and tracks all observations of the different stages of the plants.

The position description also lists major areas of responsibility. Those include using hand tools and gardening tools for pruning, defoliation, cloning, planting, watering, and fertilizing, monitoring plants to detect insects or disease, and harvesting plants.

Cultivation Technicians work almost entirely in the Mother Clone Venue and Bloom Room, and only rarely are assigned tasks outside the Cultivation Department. Typically, they complete the same tasks on the same days of the week, on a schedule set by Manager Anthony, and adhere to the growing procedures outlined in the SOPs. For about half the week, the Technicians engage in pruning, defoliating, and

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<sup>3</sup> At hearing, the parties stipulated that the Senior Technicians are not Section 2(11) supervisors.

transplanting job duties. During the remaining time they engage in various aspects of plant care in either the Mother Clone Venue or the Bloom Room.

## **2. Senior Cultivation Technician**

The 4 Senior Cultivation Technicians work side-by-side with the Cultivation Technicians, one on each team. Approximately 85 percent of their time is spent performing the same cultivation tasks that the Cultivation Technicians perform, and they are also supervised by Manager Anthony. When needed, they train or guide the team members in cultivation tasks. The remainder of their time is spent on administrative work, and there is a desk and a computer available for them to use for product inventory, tracking, and compliance tasks.

The Employer's written position description for the Senior Cultivation Technician provides this overview of duties:

The Cultivation Technician, Senior is responsible for all tasks in the garden and providing guidance/training to the cultivation team in accordance with local and district laws, regulations, and standards set by the Company. The Cultivation Technician, Senior works autonomously and collaboratively under the supervision of facilities leadership. The Cultivation Technician, Senior leads an area such as bloom, veg or Mothers and clones and is responsible for ensuring the timely completion of tasks specific to their areas. As well as communicating needs for the spaces ex. Fertilizer, IPM, cleaning and other supplies.

The position description also lists major areas of responsibility. Those duties largely duplicate those of the Cultivation Technicians, but also include additional tasks, such as working with the Manager to develop a pest management plan, monitoring adherence to the SOPs for environmental targets, fertigation targets and methods, and other garden needs.

## **3. Production Technician**

The Production Technicians begin their work after the Cultivation Department completes the harvest of the cannabis plants. Through a series of processes, the Technicians transform the plant material, using both hand and machine processes, which result in jars of buds and joints ready for sale.

The Employer's written position description for the Production Technician, which is consist with the testimony presented at hearing, provides this overview of duties:

The Production Technician is responsible for all aspects of plant processing from post-crop harvest through packaging and labeling of the final product ready for customer sale as outlined by the management team and SOPs. These responsibilities include post-harvest tasks including the drying and curing stage all the way through trimming, packaging, and labeling the product. This position works in a timely manner and strives to increase productivity and acts with professional regard to the management and use of all production facilities and processing equipment.

The position description also lists major areas of responsibility. Those include fan leaf removal, drying, trimming, curing, weighing, packaging, labeling, recording, and inspecting the product, as well as cleaning and sanitation. The Technicians also operate processing machines, such as the WeighPack, grinding machines, and the JuanaRoll.

#### **4. Senior Production Technician**

The Senior Production Technician works side-by-side with the Production Technicians approximately 85 percent of the time, and in the remaining time is completing administrative tasks. Those tasks include inventorying product, checking labels, consolidating bags, ensuring compliance with state regulations, and creating manifests and invoices for the Employer's offsite dispensaries and its wholesale partners.

The Employer's written position description for the Production Technician provides this overview of duties:

The Production Technician, Senior, is responsible for all aspects of plant processing from postcrop harvest through packaging and labeling of the final product ready for customer sale as outlined by the management team and SOPs. These responsibilities include post-harvest tasks including the drying and curing stage all the way through trimming, packaging, and labeling the product.

Further, the Senior Production Technician is tasked with monitoring productivity and providing general leadership to the production team.

## II. ANALYSIS

### A. The Board's Standard for Agricultural Labor

The Act applies only to “employees,” and Section 2(3) of the Act explicitly excludes “agricultural laborers” from the definition of employee. *Holly Farms Corp.*, 517 U.S. 392, 397 (1996). Since 1946, Congress has directed the Board to derive the meaning of the term “agricultural laborer” from the definition of “agriculture” supplied by Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 203(f). *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977). In making an agricultural-laborer determination, the Board considers the totality of the circumstances, not isolated factors, and decides the status by classification, not on an employer-wide basis. *AgriGeneral L.P.*, 325 NLRB 972, 972 n.1 (1998). The burden of proving that individuals are exempt from the Act as agricultural laborers rests on the party asserting the exemption. *Id.* at 972.

Under Section 3(f) of the FLSA, “agriculture” includes agriculture in both a primary and secondary sense. Primary agriculture is “the cultivation and tillage of the soil . . . the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities.” 29 U.S.C. § 203(f). If workers are employed in any of these activities, they are engaged in agriculture regardless of whether or not they are employed by a farmer or on a farm. *See, e.g., Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949); *Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398 (9th Cir. 1955).

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, or whether cultivation occurs “in growing media other than soil as in the case of hydroponics,” 29 C.F.R. § 780.117(a). Thus, the Board has long applied the FLSA definition to find certain greenhouse workers to be agricultural employees exempt from the Act, where they care for plants under artificial conditions and despite having some non-agricultural duties. *See, e.g., William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948). In addition, the Board has held that employees who cultivated, watered, fertilized, and cut plants, and regulated the climate in a greenhouse, were engaged in agriculture. *Rod McLellan*, 172 NLRB 1458 (1968). Likewise, the Board has found that workers who cared for soil and plants, cut flowers, and harvested greenhouse crops were agricultural employees exempt from the Act. *Hershey Estates*, 112 NLRB 1300 (1955).<sup>4</sup>

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<sup>4</sup> Earlier in its adjudication, prior to the 1946 appropriations rider, the Board addressed the gray area between agricultural and industrial work presented by greenhouses in *Park Floral*, 19 NLRB 403 (1940). There, the workers at issue cultivated, watered, and cut plants in an indoor environment, and manipulated the environment to control factors such as temperature. *Id.* at 411. The Board held that



Secondary agriculture under the FLSA is any other work “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.” 29 U.S.C. § 203(f). In determining whether practices are secondary agriculture, the line between practices that are and are not performed as an “incident to or in conjunction with” farming operations is not susceptible to precise definition. 29 C.F.R. § 780.144. However, the Department of Labor regulations provide that generally a practice is incident to or in conjunction with farming operations only if it constitutes “an established part of agriculture,” “is subordinate to the farming operations involved,” and “does not amount to an independent business. *Id.* Additionally, processes that are “more akin to manufacturing than to agriculture” are not incident to or in conjunction with farming operations. *Id.*

A determination as to whether practices are incident to or in conjunction with farming operations requires an examination and evaluation of all relevant factors. 29 C.F.R. § 780.145. One of the most important factors is the type of product resulting from the practice. If the raw or natural state of the commodity has been changed, this is a strong indication that the practice is not agricultural work. 29 C.F.R. § 780.147. The legislative history suggests that this marks the dividing line between processing as an agricultural function and processing as a manufacturing operation. *Maneja v. Waialua Agr. Co.*, 349 U.S. 254, 268 (1955).

The Federal courts, in addressing the secondary agriculture aspect of Section 3(f), and have frequently looked to whether the Employer’s operation substantially transforms the product. In *Mitchell v. Budd*, 350 U.S. 473 (1956), the Supreme Court examined tobacco bulking, a fermenting process, and determined the employees at issue were not engaged in secondary agriculture because the bulking process transformed the product from its original or raw state. *Id.* at 481; see also *Maneja v. Waialua Agr. Co.*, 349 U.S. 254, 268 (1955) (employees engaged in sugar milling are not agricultural laborers). Several years prior to *Mitchell v. Budd*, the First Circuit considered the process of stemming tobacco, which entails removing the central vein or rib from the tobacco leaf, and determined workers engaged in that task were not agricultural workers because they fundamentally changed the form of the tobacco leaf. *Puerto Rico Tobacco Mktg. Co-op. Ass’n v. McComb*, 181 F.2d 697, 698-99 (1st Cir. 1950).

Under the FLSA, additional factors that may be relevant to determining whether a process is secondary agriculture include, among others, the value added to the product as a result of the process, the length of the time during which the process is performed, the amount of interchange of employees between the operations, the

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due to the industrial character of the growers’ work – cultivation not done on a farm, but instead removed from natural conditions – the growers were not “agricultural laborers.” *Id.* at 414.

degree of separation established between the activities, and the degree of industrialization involved. 29 C.F.R. § 780.145; 29 C.F.R. § 780.147.

## **B. Job Classifications**

### **1. Cultivation Technician**

At hearing, the Employer called Manager Alex Anthony to testify regarding the operations of the Cultivation Department and the duties and responsibilities of employees working in the Department. Petitioner cross-examined Anthony, but presented no witnesses of its own. The later testimony of Volley Hayhurst, the Employer's Vice President of Regional Operations, was generally consistent with Anthony's testimony when the two were asked about the operations of the Cultivation Department and the roles of employees working in the Department.

The record evidence demonstrates that the Cultivation Technicians are engaged in all phases of the cultivation of the cannabis plants from germination to harvest. They do no post-harvest work, and only in a small handful of cases have they assisted in the Production Department. Their work includes cloning mother stock cannabis plants, caring for 130 to 200 mother plants and 800 to 1,200 clones in the Mother Clone Venue for three or more months, and tending 3,000 plants in the Bloom Room for eight weeks, prior to harvesting them. To accomplish that work, they use hand tools and gardening tools for pruning, defoliation, cloning, planting, watering, transplanting, fertilizing, and harvesting plants. All of the Cultivation Technicians' duties are undertaken with the goal of allowing the plants to grow strong and healthy and achieve a high-quality agricultural product at harvest.

Given the weight of that record evidence, the work of the Cultivation Technicians falls within the primary definition of "agriculture" under the FLSA, which explicitly states that those engaged in the "cultivation, growing and harvesting of any agricultural or horticultural commodities" are engaged in agriculture. 29 U.S.C. § 203(f). Indeed, they perform functions similar to those performed by employees in other industries whom the Board has found to be agricultural workers. See, e.g., *Rod McLellan*, 172 NLRB 1458 (1968) (employees who cultivated, watered, fertilized, and cut plants in a climate-regulated greenhouse, were exempt); *William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948) (rose growers who cut, watered, tied, pinched, sorted for salability, and packed roses were exempt); *Hershey Estates*, 112 NLRB 1300, 1301 (1955) (employees who cut, harvested, watered, and fertilized flowers in greenhouse were exempt).

Accordingly, I find that the Cultivation Technicians are engaged in primary agriculture within the meaning of Section 3(f) of the FLSA. They are therefore exempt

from the definition of employee in Section 2(3) of the Act, and are ineligible to be included in the unit.

## **2. Senior Cultivation Technician**

For much of the same reasons, I find that the Senior Cultivation Technicians also are engaged in primary agriculture within the meaning of Section 3(f) of the FLSA. The record evidence demonstrates that their major areas of responsibility duplicate those of the Cultivation Technicians. They work on teams alongside the Cultivation Technicians, and undertake the same cultivation work approximately 85 percent of their time. The fact that the remainder of their time is spent on administrative work is not to the contrary, given those tasks support the cultivation process, including ensuring compliance with laws and regulations for cultivating and growing cannabis, and monitoring adherence to the SOPs for environmental targets, fertilization methods, and other garden needs. Accordingly, I find that the Senior Cultivation Technicians are exempt from Section 2(3)'s definition of employee, and are ineligible to be included in the unit.

## **3. Production Technician**

At hearing, the Employer called Manager Gabriella Rotella to testify regarding the operations of the Production Department and the duties and responsibilities of employees working in the Department. Petitioner cross-examined Rotella, but presented no witnesses of its own. As with Manager Anthony, the later testimony of Vice President Hayhurst generally was consistent with Rotella's testimony when the two were asked about the operations of the Production Department and the roles of employees working in the Department.

The record evidence demonstrates that the Production Technicians begin their work only after the Cultivation Department completes the harvest of the cannabis plants. Through a number of processes, they then transform the raw cannabis product into forms ready to distribute to their offsite dispensaries and wholesale partners. The Production Technicians' responsibilities include all post-harvest tasks, including fan leaf removal, the trimming of unusable or damaged material, drying, curing, weighing, packaging, labeling, recording, and inspecting the product, as well as cleaning and sanitation tasks. During the final phases of production, the Technicians operate processing machines, including large and fine powder grinding machines, and the WeighPack and the JuanaRoll, which alter the composition of the product and prepare it for jars ready to be labelled and boxed for sale. There is no evidence that the Technicians have any responsibilities for the cultivation or growth of the cannabis plants.

Given the weight of that record evidence, the Production Technicians are not engaged in any of the activities encompassed by the FLSA's primary definition of agriculture. I have therefore examined whether the Production Technicians perform work "incident to or in conjunction with" farming operations that would exclude them from the Act's coverage for engaging in secondary agriculture.

I find that the Production Technicians are not engaged in the secondary definition of agriculture within the meaning of Section 3(f) of the FLSA. As noted, if the raw or natural state of the commodity has been changed, this is a strong indication that the practice is not agricultural work. 29 C.F.R. § 780.147. Here, the Production Technicians transform the raw harvested cannabis plants into ready-for-sale products that leave the facility directly to the Employer's dispensaries and those of its wholesalers. That transformative processing is far closer to a manufacturing operation, than an agricultural function. *See Maneja v. Waialua Agr. Co.*, 349 U.S. at 268. Moreover, the Technicians carry out the Production Department's key processing functions, which are separately organized and independent from the Cultivation Department's agricultural activities. *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. (1949).

The Employer's contentions that the functions performed by the Production Technicians fit the definition of secondary agriculture are contrary to the weight of the evidence and the relevant legal authority. Ignoring the clearly delineated functions with which the separate Departments are tasked, it argues the work of the Production Technicians is integrated with the cultivation and harvesting activities of the Cultivation Technicians, and that all tasks of both Departments are done to prepare raw cannabis plant for market without changing its natural state. Those claims are contrary to the extensive testimony of the Employer's own witnesses at hearing, as well as the applicable job descriptions and SOPs. Moreover, the transformation of the harvested cannabis plants to the ultimate packaged products ready for market in this case is far more substantial than processes that the courts have found not to be secondary agriculture under the FLSA. *See, e.g., Mitchell v. Budd*, 350 U.S. at 481 (tobacco bulking); *Maneja v. Waialua Agr. Co.*, 349 U.S. at 268 (sugar milling); *Puerto Rico Tobacco Mktg. Co-op. Ass'n v. McComb*, 181 F.2d at 698-99 (stemming tobacco).

Accordingly, I find that the Cultivation Technicians are not exempt from Section 2(3)'s definition of employee, and are eligible to be included in the unit.

#### 4. Senior Production Technician

For much of the same reasons, I find that Senior Production Technicians are not engaged in primary or secondary agriculture within the meaning of Section 3(f) of the FLSA. The record evidence demonstrates that their major areas of responsibility duplicate those of the Production Technicians. They work on teams alongside the Production Technicians, and undertake the same work approximately 85 percent of their time. As noted, in their remaining time they complete administrative tasks that include inventorying product, checking labels, and creating manifests and invoices for the Employer's offsite dispensaries and its wholesale partners, most of which are activities of a manufacturing nature. Accordingly, I find that the Senior Production Technicians are not exempt from Section 2(3)'s definition of employee, and are eligible to be included in the unit.

### III. REPRESENTATIVE COMPLEMENT

The Employer contends that it has not yet hired a representative complement of employees at the Vineland facility and thus, to the extent that there is an appropriate unit, an election should not be conducted at this time. It asserts that it has immediate plans to expand its operations and double its workforce by the end of this calendar year, and has existing space at the Vineland facility to accommodate the expansion. Further, the Employer states that it is discussing plans to supply cannabis to numerous additional retail operations that recently have been issued conditional licenses by New Jersey, and that it is continuously engaging new wholesalers for contract.

The Petitioner argues that the Employer submitted only speculation and conjecture in support of its claim that the unit will expand and that it provided no supporting evidence. In the alternative, the Petitioner asserts that even if the Employer's statements of conjecture were credited, the number of anticipated new hires would not be sufficient to meet the Board's standards on what constitutes an expanding unit that would warrant dismissing the petition.

It is well settled that the Board will direct an immediate election, notwithstanding an employer's plan to expand its workforce, when the employer's current complement of employees is "substantial and representative" of the unit workforce to be employed in the near future. See *Yellowstone Int'l Mailing*, 332 NLRB 386 (2000); *Toto Indus. (Atlanta)*, 323 NLRB 645 (1997); *General Cable Corp.*, 173 NLRB 251 (1968). In general, the Board finds an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Custom Deliveries*, 315 NLRB 1018, 1019 n.8 (1994); see, e.g., *Gerlach*

*Meat Co.*, 192 NLRB 559 (1971). The Board will look at the employer's projected plans and will not dismiss a petition where the plans for expansion are mere speculation or conjecture. See, e.g., *In Re Laurel Assoc., Inc.*, 325 NLRB 603, 604 (1998) (expanding unit claim found speculative where "record is devoid of any evidence regarding the rate of expansion in the future or any evidence of anticipated real increases in capacity"); *Scroll Casual*, 278 NLRB 10, 15 (1986) (if projected plans are mere speculation or conjecture, the substantial and representative complement test will be satisfied).

At hearing, the Employer called Volley Hayhurst, Vice President of Regional Operations, to testify about the Employer's expansion plans. He stated that the expansion would take place during the third or fourth quarter of calendar year 2023, and "potentially double the staff we have now" in the Cultivation and Production Departments, all of whom would be employees in the petitioned-for unit. He testified that the currently unused Bloom Room 1 could be put to immediate use, essentially duplicating the current work being done in Bloom Room 2. On the number of additional hires, Hayhurst stated he "would probably put a number about 20 in the next quarter," and "an additional 15-20 in the fourth quarter." He stated that they would begin posting for jobs in the next 30 days, but no hiring would be done until later. On the impetus for expansion, Hayhurst stated that the cannabis market was growing because New Jersey was issuing more licenses, that the Employer was always "looking to put new products out there" and considering whether to do more "bulk wholesale," but as of yet had no new wholesale contracts. Regarding potential additional dispensaries, he testified that the Employer is "in pursuit [of one] down in Black Horse Pike area, . . . and then possibly up into the Cherry Hill area as well," which, "if open and successful," would require increased supply. He testified that there were no written expansion plans, no internal emails discussing expansion that he could recall, and no new hiring plan or metrics developed. Neither Manager Anthony nor Manager Rotella testified about plans to expand their departments or increase the size of their staffs.

On the basis of that testimony, I find that the Employer's claim that the petition warrants dismissal on the basis that it has "immediate plans to expand its operations by the end of this year," thereby "doubling its workforce" of Cultivation and Production Technicians, (Br 24), is speculative in nature and insufficient to support its claim. The Employer's contention concerning the expanding unit is based entirely on the self-serving testimony of Vice President Hayhurst, with no corroboration from the other managers who testified, and with no documentary support. Also calling the claim into question is the apparent lack of evidence that sound business planning is underway. As Vice President Hayhurst confirmed in his testimony, the Employer's predictions of expansion are unsupported by any written expansion plans, internal emails discussing expansion, new hiring plans, or

reorganizational plans, all despite supposedly being on the verge of doubling the work of the Cultivation and Production Departments. Moreover, the justifications for the expansion are dependent on such matters as unsupported and generalized predictions of market forces, a claim that its wholesale contracts would greatly increase, despite having not one to provide as an example at hearing, and the opening of additional dispensaries, which are yet to be realized. Also speculative are Hayhurst's less than definite computations that he "would probably put a number about 20 in the next quarter," and "an additional 15-20 in the fourth quarter," characterizations closer to on-the-spot estimates than figures developed in support a planned expansion. See *W. Penn Hat & Cap Corp.*, 165 NLRB 543, 548 (1967). Accordingly, I conclude that the Employer has failed to establish its claim of an expanding unit.

Even assuming that the Employer's projected expansion is not too indefinite or speculative to serve as the standard against which to measure the present complement of employees, and assuming that all of the employees hired as a result of the expansion would be included in the unit, the current number of employees in the petitioned-for unit (34), would constitute 46 percent of the highest eventual projected workforce claimed by the Employer (74). Additionally, it is undisputed that there would be no new job categories created by the Employer, and that the current employees are employed in 100 percent of the ultimate job classifications. Under these circumstances, I conclude that the Employer's present complement of employees would be substantial and representative, notwithstanding the Employer's anticipated expansion of its operations.<sup>5</sup>

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<sup>5</sup> It would require additional guesswork to predict whether a representative complement of employees might exist given my finding that only the Production Department employees (18) are eligible to be included in the unit. However, if one half (20) of the Employer's highest estimate of new employees (40) were assumed to be Production Department employees, the current number of employees in the petitioned-for unit (18), would constitute 47 percent of the revised eventual projected workforce that might be claimed by the Employer (38). Thus, under such a revised prediction, it appears that the Employer's present workforce would constitute a substantial and representative complement.

#### IV. CONCLUSION

After a thorough examination of the record and the arguments of the parties, I make the following findings:

- The Cultivation Technicians and Senior Cultivation Technicians are engaged in primary agriculture within the meaning of Section 3(f) of the FLSA. They are therefore exempt from the definition of employee in Section 2(3) of the Act, and are ineligible to be included in the unit.
- The Production Technicians and Senior Production Technicians are not engaged in primary or secondary agriculture within the meaning of Section 3(f) of the FLSA. They are therefore employees within the meaning of Section 2(3), and are eligible to be included in the unit.
- The Employer has failed to establish its claim of an expanding unit. The present complement of employees would be substantial and representative and dismissal of the petition on that basis would be unwarranted.

However, the Petitioner stated on the record at hearing that it will only proceed to an election in the petitioned-for unit, and no alternative unit.

Accordingly, I will dismiss the petition.



**ORDER**

IT IS HEREBY ORDERED that the petition be dismissed.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.71(a) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.71(c) of the Board's Rules and Regulations and must be filed by **September 20, 2023**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.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.

Dated: September 06, 2023



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Kimberly E. Andrews, Regional Director  
National Labor Relations Board  
Region 04