Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BUNDEN NURSERY, Inc. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 88-RC-3-SAL 14 ALR3 No. 18

DECISION AND ORDER ON CHALLENGED BALLOTS

On March 10, 1988, the United Farm Workers of America, AFL-CIO (UFW or Union), petitioned for an election among all the agricultural employees of Bunden Nursery, Inc. (Employer). A representation election was conducted on March 17, 1988, and the official Tally of Ballots showed the following results:

UFW.	5
No Union	0
Challenged Ballots	15
Void	0
TOTAL.	20

As the number of unresolved challenged ballots was sufficient to affect the outcome of the election, the Regional Director (hereinafter, RD) conducted an investigation and issued his Report on Challenged Ballots on August 3, 1983. In his report, the RD recommended that challenges to the ballots of eight voters be sustained on the ground that those voters, as members of the family headed by the sole shareholders of the employing entity,

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are rendered ineligible to vote by Title 8, California Code of Regulations, section 20352(b)(5)[1/] and applicable precedents of the National Labor Relations Act (NLRA)[2/]. He also recommended overruling the challenges to six voters who the Employer claimed were commercial packing shed workers and therefore non-agricultural workers ineligible to vote. Finally, the RD recommended that the challenge to the ballot of one voter be placed in abeyance, pending the outcome of the other challenges, due to conflicting evidence as to the supervisory status of that voter.

The Employer timely filed an exception and brief in support thereof to the RD's recommendation that the Agricultural Labor Relations Board (ALRB or Board) overrule the challenges to the ballots of the alleged commercial workers.[3/] It contends that, under precedents of both the NLRA and the Agricultural Labor Relations Act (ALRA), employees are not agricultural "where a company does not exclusively grow and ship all the product itself." Bunden Nursery, Inc., is said to be engaged in such

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[1/] On page 1 of the RD's report, this section of the California Code of Regulations is erroneously designated as section 20352(a)(3).

[2/] Section 1148 of the Agricultural Labor Relations Act provides that this board shall follow applicable precedents of the National Labor Relations Act, as amended.

[3/] The Employer requests that the Board delay the opening and counting of those ballots while the Employer seeks a ruling from the National Labor Relations Board (NLRB) on its petition to have the NLRB assert jurisdiction over the workers in question. However, during the pendency of the Employer's exceptions before this Board, we received a communication from the Employer which advised us that its petition to the NLRB had. been withdrawn. The Employer's request is therefore deemed moot.

commercial activity "since a significant amount of the packing and shipping of flowers done at their packing shed . . . comes from growers whose flowers are transported to the [nursery]." However, contrary to the Board's regulations, the Employer's exception in this regard is not supported by any declarations or documentary evidence (see Cal. Code Regs., tit. 8, § 20363(b).)[4/] Under such circumstances, the Employer's conclusory statements in its brief are insufficient to rebut the RD's recommendation in this regard. (Sequoia Orange Co. (1987) 13 ALRB No. 9). We therefore adopt the RD's recommendation that the challenges to the ballots of the six alleged commercial workers be overruled and hereby order that said ballots be opened and counted.

No exception was filed with respect to the RD's determination that eight of the challenged voters were employer family members and therefore ineligible to vote as agricultural workers. Nevertheless, we find his analysis in this regard to be fundamentally erroneous and therefore cannot accept his recommendation.[5/]

[4/] We note that the RD similarly did not receive any such declarations or documentary evidence from the Employer during the course of his investigation.

[5/] Pursuant to Title 8, California Code of Regulations, section 20363(b), the conclusions and recommendations of the Regional Director set forth in his Report on Challenged Ballots are deemed final unless exceptions to the conclusions and recommendations are filed with the Executive Secretary of the Board. As the Employer has filed exceptions with respect to at least part of the RD's report, we do not feel constrained to accord finality to individual conclusions and recommendations that are not the subject of an exception. Even in those contexts where the NLRB

(fn. 5 cont. on p. 4)

The RD cites Supreme Court and National Labor Relations Board (NLRB) precedent for the proposition that close relatives of management, particularly those in closely-held family businesses, are subject to exclusion from bargaining units "on the basis that because of their special status as family members their interests are more closely aligned with family interests than with the interests of other employees in the unit." In his assessment of federal case law, the RD is correct. (See NLR3 v. Action Automotive, Inc. (1985) 469 U.S. 490 [105 S.Ct. 984, 118 LRRM 2577]; Pandick Press Midwest, Inc. (1980) 251 NLRB 473 [105 LRRM 1161].) However, in concluding that such precedent is fully applicable under the ALRA and should be followed by this Board, the RD overlooks key differences between the ALRA and the federal act with respect to employee status and unit determinations.

The parameters of voting eligibility under the NLRA are established by sections 2(3) and 9(b). In defining the term "employee", section 2(3) specifically excludes any individual employed by his parent or spouse. Section 9(b) serves to further circumscribe eligibility by giving the NLRB great flexibility in determining the appropriate bargaining unit:

> The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising

(fn. 5 cont.)

attributes such finality, i.e., consent elections, the finality is not "absolute." (See Lowell Corrugated Container Corp. (1969) 177 NLRB 169, 171 [72 LRRM 1419].) Thus, in its investigative capacity pertaining to certification matters, the Board will overturn such otherwise final determinations or conclusions of a Regional Director's report when it deems them to be arbitrary, capricious, or not consonant with Board policy or the statutory design of our Act. (See ibid.)

> the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

As a result of the broad discretion given to the NLRB by section 9(b), "community of interest" considerations have come to be the principal guide for unit determinations under the NLRA. In the context of such considerations, voting eligibility for those family members who have not already been excluded as employees by section 2(3) is determined by whether such individuals enjoy a "special status" with their employer.

In sharp contrast to the framework for voting eligibility under the NLRA, the ALRA itself contains no family-based exclusion from its definition of "agricultural employee";[6/] and aside from a narrow geographic-based exception, section 1156.2 of the ALRA requires every bargaining unit to include "all the agricultural employees of the employer." Thus, employer family members who fall within our Act's definition of "agricultural employee" are presumptively entitled to vote in unit elections. Section 20352(b)(5) of our regulations removes voting eligibility for the closest relatives of the employer -- parent, child and spouse-- but there is no other basis for invoking community of interest considerations in establishing voting eligibility under

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[6/] Through a duly adopted regulation, the ALRB has incorporated into its voting procedures a limited form of family-based exclusion from voting eligibility. Section 20352(b)(5) removes voting eligibility from

> [t]he parent, child, or spouse of the employer or of a substantial stockholder in a closely held corporation which is the employer.

our Act.[7/] .

In light of the significant differences between the two statutes as they relate to employee status and unit determinations, we cannot conclude that MLRA precedent regarding voting eligibility for employer family members is "applicable" precedent which we are mandated to follow pursuant to section 1148 of the ALRA.[8/] As the ALRA itself contains no family-based exclusions from voting eligibility and affords us only limited discretion in determining appropriate bargaining units, we are unwilling to expand the family-based exclusions from voting eligibility beyond those already set forth in Title 8, California Code of Regulations, section 20352(b)(5).[9/]

[7/] As a possible counterweight to the minimal restrictions on voting eligibility of family members, our Act, unlike the NLRA, contains a specific provision, section 1154.6, making it an unfair labor practice for an employer or labor organization to willfully arrange for persons to become employees for the primary purpose of voting in elections.

[8/] This conclusion had previously been reached by the Board in Agri-Sun Nursery, (1987) 85-RC-4-F in its February 7, 1986 Order Setting Challenged Ballot for Hearing. There we held that "if the evidence shows [the voter in question] to be an agricultural employee, her eligibility to vote will not depend on a 'community of interest' determination (see Action Automotive, Inc. (1985) 105 S.Ct. 984) as section 1156.2 of the Agricultural Labor Relations Act mandates that the relevant bargaining unit shall be all the agricultural employees of the employer." We noted that "Section 1156.2 contains a single exception, concerning two or more non-contiguous geographical areas, which is not relevant here." (Ibid.)

[9/] The Board applied similar reasoning in Morika Kuramura (1982) 8 ALRB No. 86. There the Board upheld the RD's recommendation that it overrule the challenge to the ballot of the alleged commonlaw wife of the employer and also overrule challenges to the ballots of the daughters-in-law of the employer. It agreed with the RD that our regulations "exclude from eligibility only the spouse, parents and children of an employer, and [do] not apply to in-laws or friends of an employer." (Id. at p. 2.)

In accordance with the foregoing determinations, we reject the RD's recommendation that we sustain the challenge to the ballot of Kinuyo Bunden, daughter-in-law of the company's sole shareholders. Under the view we take of this matter, it is of no consequence that Kinuyo Bunden is the spouse of the individual who serves as the company's Vice-President, Secretary-Treasurer, and General Manager. That individual, while the son of the company's sole shareholders, is not a shareholder himself and thus his spouse does not come within the ambit of Title 3, California Code of Regulations, section 20352(b)(5).

We also reject that the RD's recommendation that we sustain the challenges to the ballots cast by Shuichi Bunden, Ryoji Bunden, James Lord, Jerry Lord and Charlene Lord, the five granchildren of the company's sole shareholder. Although their parents, as children of the company's sole shareholders, are ineligible to vote under the terms of Title 8, California Code of Regulations, section 20352(b)(5), the five grandchildren do not fall within the plainly-defined ineligible category.

We therefore conclude that of the eight family members who cast challenged ballots, only the children of the company's sole shareholders, Tsuyoshi (Ty) Bunden and Noriko Lord, should be deemed ineligible to vote.[10/][11/]

[10/]Member Gonot would find that the ALRA itself affords no basis for excluding any agricultural employee from participation in a unit election on the basis of his or her familial relationship to the employer. Consequently, he would have preferred to have the Board entertain further briefing from the parties as to whether Title 8, California Code of Regulations, section 20352(b)(5) is invalid as applied to the two family members whom the Board deems ineligible to vote.

(fn. 11 on page 8)

Finally, we adopt the RD's recommendation that a final, determination of the voting status of alleged supervisor Jose Luis Perez be held in abeyance pending the outcome of the revised tally of ballots.

ORDER

The challenges to the ballots of alleged commercial packing shed workers RAUL CERVANTES, EPNESTINA PEREZ JIMENEZ, MANUEL PEREZ ALFARO, GERARDO GARCIA SOTO, HILDA ALFARO and RODOLFO PEREZ ALEJO are hereby overruled in accordance with the recommendation of the Regional Director.

The challenges to the ballots of family members TSUYOSHI (TY) BUNDEN and NORIKO LORD are hereby sustained and the challenges to the ballots of KINUYO BUNDEN, RYOJI BUNDEN, SHUICHI BUNDEN, JAMES LORD, JERRY LORD and CHARLEME LORD are hereby overruled.

The Regional Director is directed to open and count the twelve ballots subject to the challenges which we have overruled, and thereafter to prepare and serve upon the parties a revised Tally of Ballots.

In accordance with the recommendation of the Regional

[11/]Member Ramos Richardson would have had the Board entertain further briefing from the parties on whether Title 8, California Code of Regulations, section 20352(b)(5) may be too narrowly drawn, thereby permitting close family members to be deemed eligible voters and excluding others based solely on their family ties. She believes it would be appropriate to consider applying, on a case by case basis, the factors used by the NLRB in determining if an employee's interests are too closely aligned with the employer, rather than arbitrarily deciding that a parent, child or spouse of the employer will always be excluded, as the regulations now state.

Director, the challenge to the ballot of alleged supervisor JOSE LUIS PEREZ is hereby placed in abeyance pending the results of the revised Tally of Ballots. If said challenge proves to be outcome determinative, it will be set for hearing.

Dated: December 21, 1988

BEN DAVIDIAN, Chairman[12/]

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[12/]The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. Member Ellis did not participate in this case.

CASE SUMMARY

Bunden Nursery, Inc. (United Farm Workers of America, AFL-CIO)

14 ALRB No. 18
Case No. 88-RC-3-SAL

Regional Director's Report on Challenged Ballots

An election was conducted among all the agricultural employees of Bunden Nursery, Inc. (Employer). The official Tally of Ballots showed that the UFW received 5 votes and that the remaining 15 ballots were challenged. As the number of unresolved challenged ballots was sufficient to affect the outcome of the election, the Regional Director (RD) conducted an investigation and issued a Report on Challenged Ballots. The RD identified 3 categories of challenged ballots, viz., one ballot alleged to be that of a supervisor, 6 ballots alleged to be those of commercial rather than agricultural workers, and 8 ballots alleged to be those of family members or other persons having a special status with management. The RD found insufficient evidentiary documentation to sustain the challenges to the workers alleged to be commercial rather than agricultural. The RD did, however, sustain the challenges to family members and/or related persons, finding that two persons were ineligible under the terms of Title 8, California Code of Regulations, section 20352(b)(5) as children of sole shareholders of a family corporation, and that another 6 persons were ineligible as having special status by virtue of their relationship to the sola shareholders or officers of the company. The RD found a factual conflict to exist as to the status of the putative supervisor, and recommended his ballot remain uncounted pending the outcome of the resolved ballot challenges.

Board Decision

The Board upheld the RD on the supervisorial and commercial workers' challenged ballots. However, the Board overruled the challenges as to the six persons said to be ineligible due to their special status. The Board decided that, as the ALRA, in sharp contrast to the NLRA, contains no family-based exceptions to voting eligibility, and aside from a narrow geographic-based exception, provides that an appropriate unit for collective bargaining under the ALRA consists of all agricultural employees of the employer, the Board was without discretion to expand the category of persons ineligible to vote beyond those set forth in Title 8, California Code of Regulations, section 20352(b) (5). [1/]

[1/] Member Gonot would have the Board ask for briefing from the parties on the question whether Title 8, California Code of Regulations, section 20352(b)(5) is invalid for lack of statutory foundation in the ALRA. Member Ramos Richardson would have the Board ask for briefing from the parties on the scope and application of Title 3, California Code of Regulations, section 20352(b)(5).

The Board therefore ordered the ballot of the wife of *a.* corporate officer who was not a shareholder to be opened and counted, as well as those of the five grandchildren of the sole shareholders.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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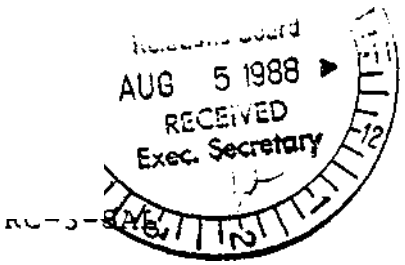
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	Case No. 88
BUNDEN NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO	)	REGIONAL DIRECTOR'S REPORT ON CHALLENGED BALLOTS

On March 10, 1988, a petition for certification was filed by the United Farm Workers of America, AFL-CIO (hereinafter called UFW), seeking an election in a unit of all agricultural employees of Bunden Nursery (hereinafter, Employer). The election was held on March 17, 1988. The tally of ballots issued on March 17, 1988 show the following:

UFW	5
No Union	0
Challenged Ballots	15
Void	0
	20

As the number of unresolved challenged ballots was sufficient to affect the outcome of the election an agent of the undersigned was directed to investigate the challenged ballots and the Union and the Employer were given an opportunity to submit their respective positions and evidence.

Eight persons were challenged by the ALRB and by the UFW as family members under the Title 8, section 20352(a)(3), of the

California Code of Regulations which states:

> . . . "Any challenge must be asserted prior to the time that the prospective voter receives a ballot and be limited to one or more of the following grounds:
>
> > (3) The prospective voter is employed by his or her parent, child, or spouse, or is the parent, child or spouse of a substantial stockholder in a closely held corporation which is the employer."

The eight challenged persons include:

RYOJI BUNDEN	CHARLENE LORD
SHUICHI BUNDEN	JERRY LORD
NORIKO LORD	TSUYOSHI TY BUNDSN
JAMES LORD	KINUYO BUNDEN

The investigation revealed the following facts regarding these eight challenged persons:

1. The Employer is a California corporation. The sole shareholders of the Company are Takuma and Chiyko Bunden.

2. Ken Bunden is the son of Takuma and Chiyko Bunden and is the Vice-President, Secretary-Treasurer and General Manager of Bunden Nursery.

3. NORIKO LORD is the daughter of shareholders Takuma and Chiyko Bunden.

4. TSUYOSHI BUNDEN is the son of shareholders Takuma and Chiyko Bunden.

5. KINUYO BUNDEN is the wife of Vice President, Secretary-Treasurer and General Manager, Ken Bunden.

6. RYOJI BUNDEN and SHUICHI BUNDEN are the sons of Vice President, Secretary-Treasurer and General Manager, Ken Bunden, and grandsons of shareholders Takuma and Chiyko Bunden.

7. JAMES LORD, JERRY LORD, and CHARLENE LORD, are the grandsons and granddaughter of Shareholders Takuma and Chiyko Bunden.

Further facts derived from payroll records submitted by the Employer and from statements submitted by these challenged voters indicate the following:

1. KINUYO BUNDEN worked regularly in April and May of 1987 but did not work again until the eligibility week which ended 3/5/88. The payroll record does not indicate the number of hours worked that week but does indicate that she had gross earning of $100.00. Further evidence indicates that KINUYO BUNDEN works in both the green house and the packing shed, lives with her husband Ken Bunden and with her parents-in-law, Takuma and Chiyko Bunden, sole shareholders of the company on the nursery property, and takes her breaks and lunch with her husband at their home.

2. SHUICHI BUNDEN and RYOJI BUNDEN work between six and twelve hours a month; they earn approximately $1.00 per hour. Both live with their father Vice President, Secretary Treasurer and General Manager Ken Bunden and their grandparents Takuma and Chiyko Bunden, sole shareholders in the company, on the nursery property. SHUICHI BUNDEN works in both the packing house and the green house. RYOJI BUNDEN works exclusively in the greenhouse.

3. JAMES LORD, CHARLENE LORD, and JERRY LORD work approximately between four to twelve hours per month and are paid

approximately $1.00 per hour. They all live in the same residence with their uncle, Vice-President, Secretary-Treasurer and General Manager Ken Bunden and their grandparents Takuma and Chiyko Bunden, sole shareholders in the Company. All three persons work in both the packing shed and the green house.

4. The five children, SHUICHI BQNDEN, RYOJI BUNDEN, JAMES LORD, JERRY LORD, AND CHARLENE LORD, are all school aged, dependent children under the age of twelve.

ANALYSIS AND RECOMMENDATION

In regard to NORIKO LORD and TSUYOSHI TY BUNDEN, the ALRB regulations provide that ineligible voters include:

> "The parent, child, or spouse of the employer or of a substantial stockholder in a closely held corporation which is the employer." (REGULATIONS §20352(b)(5).)

As children of sole shareholders Takuma and Chiyko BUNDEN, NORIKO LORD and TSUYOSHI TY BUNDEN are not eligible voters under the above section of the Code and it is recommended that the challenges to their ballots be sustained.

Apart from the statutory exclusion of the family members cited above, under longstanding National Labor Relations Board and court precedent close relatives of management, particularly those in closely held family businesses, have been excluded from bargaining units on the basis that because of their special status as family members their interests are more closely aligned with family interests than with the interests of other employees in the unit. That policy was recently approved by the Supreme

Court of the United States in the case of NLRB v. Action Automotive, Inc. 118 LRRM 2577 (1985). In upholding the Board policy in that decision, the Court found that it was not necessary to show that the disputed family members enjoyed special on the job privileges to warrant exclusion from the unit.

Citing the Board's decision in Parisoff Drive-In Market, 201 NLRB 813, 314, 82 LRRM 1342 (1973), the Court noted that "Close relatives of management, particularly those who live with an owner or manager, are likely to 'get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees." The Court further noted that "it is reasonable for the Board to assume that the family member who is significantly dependent on a member of management will tend to equate his personal interests with the business interests of the employer." The Court pointed out that "the presence at union meetings of close relatives of management could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting."

Significantly, the Court did not find that the Board's policy in excluding such relatives ran afoul of the mandate that the Board remain neutral in representation elections. The Court stated, "Strictly speaking, the Board does not exclude a family member from a bargaining unit because he is likely to vote against the union. Rather the family member is excluded, if at all, because the Board determines on the basis of objective factors that he lacks common interests with fellow employees who

are not so related."

In Pandick Press Midwest, Inc. 251 NLRB 473 (1980) the National Board applied this policy and found that the daughter of the corporate employer's president was ineligible to vote even though her father had virtually no ownership in the company. The daughter lived at the home of her father and "presumably has daily contact with him." The Board concluded that the daughter:

> "Has access to management which, although it may not always result in easily indentifiable special privileges gives her a status an area of interest distinct from that of other employees. Accordingly, we conclude that, as the daughter of the Employers highest management representative in Chicago, Cathyan Garippa does not share a community of interest with the rest of the unit, and her inclusion in the unit would inhibit the other employees from enjoying the 'fullest freedom in exercising the rights guaranteed by this Act.' as provided in section 9(b)."

The undersigned finds that the precedent of the national Board, affirmed by the Supreme Court with respect to its policy dealing with the unit placement of relatives of management, is peculiarly suited to a resolution of the issues presented in this case.

The Agricultural Labor Relations Act was modeled after the National Labor Relations *Act* and the ALR3 "shall follow," where applicable in the agricultural setting, precedent of the National Labor Relations Act. (California Code of Regulations, Title 8 §1148.). The rationale of the Board in its policy regarding the eligibility of relatives of management as explained

by the highest court, is equally applicable, in my view, in resolving representation issues in the agricultural labor forum. The purpose of the Act in granting workers in the agricultural area the fullest freedom in exercising their rights under the Act would be no less inhibited by including close relatives of management in bargaining units than it would be under the NLRA.[1/]

Turning to the remaining family members whose ballots were challenged in this case,-it is clear that Kinuyo Bunden, the wife of Vice-President and General Manager Ken Bunden should be excluded from the unit. Her husband is the sen of the sole shareholders and is apparently the chief operating manager of the Employer, taking a major role in its operations. Surely, his wife's interest would be more aligned with those of her husband and the family than with the non-related bargaining unit employees and her inclusion in the unit would exacerbate the concerns of inhibiting workers' rights expressed in the above-cited precedent. Accordingly, it is recommended that the challenge to Kinuyo Bunden's ballot be sustained because of her special close familial and dependant relationship to the owners and management of the Employer.[2/]

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[1]The ALRB has recognized the applicability of the NLRB's "Special Status" rationale where it was raised with regard to challenges of relatives of management. Kern Valley Farms, 3 ALRB No. 4 (1977).

[2]The decision in Monka Kuramura, 3 ALRB No. 86 (1982) does not warrant contrary result. In that case there is no showing that the issue of NLRB policy was raised or argued. Nor is there any factual discussion of dependency factors as exist here.

The five minor grandchildren of the owners, SKUICHI 3UNDEN, RYOJI BUNDEN, JERRY LORD, CHARLENE LORD, and JAMES LORD are clearly dependent upon their parents and other family members who own and manage the Employer's business. They live in the same residence with them and are employed by their father or uncle as the case may be. Moreover, being of school age any work they perform must be accommodated to their school responsibilities. No doubt their concerns "would get a more attentive and sensitive ear" than those of other workers. Accordingly, because of their special status based on their close familial relationship, they are concluded to be not eligible voters and it is recommended that the challenges to their ballots be sustained.

The following six persons were challenged by the Employer as being commercial packing shed workers and therefore non-agricultural workers:

RAUL CERVANTES	ERNESTINA PSREZ JIMENEZ
MANUEL PEREZ ALFARO	HILDA ALFARO PEREZ
GERARDO GARCIA SATO	RODOLFO PEREZ ALEJO

The two issues involved in resolving the question of eligibility of these voters are:

1. Whether a sufficient portion of the business activity of the Employer is commercial rather than agricultural and therefore under the jurisdiction of the National Labor Relations Board and;

2. If such commercial activity does occur at Bunden Nursery, do the above named workers engage in such activity to an

extent so as to deprive them of their agricultural status.

In the Employer's Response to the Election Petition the Employer states that a portion of it's business activity was in fact commercial activity as "it has purchased numerous flowers and horticulture material from other growers which Bunden then packs, sells and ships to wholesalers and retailers throughout the United States and also into Canada and Japan." The Employer then listed fourteen growers from whom it purportedly made such purchases during the last year. The Employer declined to submit specific evidence of purchase orders, sales receipts or any other documentation to support its claim of a commercial flower packing operation. In the absence of such documentation prior to the election of March 17, 1988, the Regional Director rejected the Employer's request to dismiss the election petition and to impound the ballots.

ANALYSIS AND RECOMMENDATION

The Employer has subsequently declined to submit any further evidence or documents pursuant to the challenge ballot investigation which would specifically support its claim of operating a commercial packing facility.[3/]

An agent of the undersigned investigated the nature and

[3]The Employer has raised the issue of its commercial activity and its anticipated expansion in that area in connection with the peak argument it makes in its Objections to the election submitted to the Executive Secretary of the ALRB. It argues that upon construction of an expanded facility it anticipated purchasing 25% to 50% of its products from others.

extent, if any, of the claimed flower and related purchases by Bunden from other growers. The investigation disclosed that several of the listed growers claimed to do no business at all with Bunden. Only two of the growers contacted acknowledged some sales to Bunden and these were minor purchases made by Bunden over several years time.

Evidence from employees indicates that, on occasion, the nursery may purchase a box of ferns or other material which is then used as an adornment with the packed Bunden flowers.

The Employer requests that the Region consider the decision in H-M Flowers,Inc. 227 NLRB 1183 and other decisions as a basis for finding that its commercial activity places it under the jurisdiction of the NLRB. It also asserted it would file a petition (RM) with the NLRB. There is no evidence that such a petition has been filed. In H-M Flowers, Inc. the facts indicated that "at least half of the flowers processed by the employer were grown by or purchased from unrelated growers." In other cases cited by the Employer there was specific evidence adduced as to the extent of "commercial" activity engaged in by the respective employers. No such evidence has been presented with regard to Bunden Nursery, Inc. Nor is there evidence from other sources showing specific percentages of purchases from them. At most, the Employer has mada general assertions regarding purchases and has argued in its "peak issue" objections that such purchases would increase. There is also evidence that all the workers are similarly classified and perform work in both areas.

Accordingly, in the absence of any specific evidence of purchases from others which would constitute commercial activity which the Employer presumably would have in its possession, it cannot be concluded that the Employer has raised any material issue with respect to its contention that the packing shed is a "commercial" operation, and the employees therein are nonagricultural. Accordingly, it is recommended that the challenges to the ballots of RAUL CERVANTES, ERNESTINA PEREZ JIMENEZ, MANUEL PEREZ ALFARO, GERARDO GARCIA SOTO, HILDA ALFARO, and RODOLFO PEREZ ALEJO be overruled and that their ballots be opened and counted.

The Union challenged JOSE LUIS PEREZ as a supervisor. The Employer in its Response to the Petition indicated that JOSE LUIS PEREZ is a commercial employee but it did not challenge him as such at the election. Statements from employees show that Perez is the "foreman" and directs employees and can recommend discipline. The Employer asserts that Perez lacks supervisory indicia. As there is conflicting evidence as to the duties and responsibilities of JOSE LUIS PEREZ, a final determination of his status, if necessary, shall be held in abeyance pending the outcome of the election, based upon the sustained and overruled challenged ballots discussed above.

Pursuant to the provisions of Section 1142(b) of the Act and Section 20393(a) of the California Code of Regulations you may file a request for review of this Challenged Ballot Report with the Board within five (5) days of service upon you. The

request for review shall set forth with particularity the basis of the request and shall be accompanied by evidence and legal arguments which you contend support the request. It shall be accompanied by evidence that the aforementioned material has been served upon all other parties.

Dated: August 3, 1988

DONALD J. SALJNS
Regional Director
Agricultural Labor Relations Board
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