Hickman, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MICHAEL HAT FARMING COMPANY, A Sole Proprietorship, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 92-CE-28-VI 92-CE-29-VI 92-CE-36-VI 92-CE-37-VI 19 ALRB No. 13 (September 22, 1993)

DECISION AND ORDER

On March 2, 1993, Administrative Law Judge (ALJ) Arie Schoorl issued the attached decision in which he found that Michael Hat Farming Company (Hat) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA)[1] by engaging in surveillance of employees engaged in a demonstration outside Hat's property. The ALJ dismissed numerous other allegations, concluding that the evidence was insufficient to sustain them.

Both the United Farm Workers of America, AFL-CIO (UFW) and the General Counsel timely filed exceptions and supporting briefs taking issue with the ALJ's failure to find that Hat was a successor employer having an obligation to bargain with the UFW. They filed no exceptions with regard to his dismissal of the other allegations. Hat filed no exceptions, but did file a reply brief supporting all of the ALJ's findings and conclusions with regard to successorship. The Agricultural Labor Relations Board

[1]The ALRA is codified at Labor Code section 1140 et seg.

(Board) has considered the record and the attached decision of the ALJ in light of the exceptions and briefs filed by the parties and, except as noted below, affirms the ALJ's findings of fact and conclusions of law and adopts his recommended order.[2] Specifically, the Board adopts the ALJ's conclusion that Hat was not a successor employer and therefore had no duty to bargain with the UFW, but offers some clarification in the analysis to be applied.

DISCUSSION

Successorship

A. Joint Employer

From 1985 to June of 1992, San Joaquin Farming Co. (San Joaquin), a land management company, operated the vineyards at what is known as Grizzly Ranch. Sometime between 1987 and 1992, John Hancock Mutual Life Insurance Co. (Hancock) became the sole owner of Grizzly Ranch. Since September 1, 1985, San Joaquin had recognized the UFW as the certified bargaining representative and the two parties had a series of collective bargaining agreements. In June of 1992, Hat bought Grizzly Ranch from Hancock and began operating it himself. Hat refused the UFW's request to honor the existing contract and assume San Joaquin's bargaining obligation.

Hat argues that it cannot be a successor employer because it succeeded only to the interest of Hancock, which was not a joint employer with the entity holding the bargaining

[2]The ALJ's dismissal of the allegations to which no exceptions were filed are adopted pro forma.

obligation, San Joaquin.[3] In a situation such as this, where Hat has succeeded not only to the ownership interest in the vineyard but also has, by operating the vineyard himself, succeeded to the function of the land management company formerly holding the bargaining obligation, we find that the lack of any ownership interest passing between the two entities does not preclude finding Hat to be a successor employer.[4]

The implications of accepting Hat's theory, particularly in agriculture, could be very serious. Given the frequency with which the assets of agricultural entities are sold, transferred, or otherwise transformed through corporate changes, and the frequency with which entities hired to manage property and provide labor come and go, bargaining relationships easily could be disrupted. This would undermine a central

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[3]The ALJ properly concluded that the record was insufficient to show that Hancock and San Joaquin were joint employers.

[4] As argued by the General Counsel and the UFW, the facts in Rivcom Corp. v. ALRB (1983) 34 Cal.3d 743 [195 Cal.Rptr. 651] (Rivcom) are very similar to those in the instant case. There, Rivcom succeeded to the interest of the landowner and was found to be a successor employer even though the original certification named a former land management company as the employer. Rivcom replaced the land management company with another upon taking over the property. The Board, affirmed by the court, found Rivcom to be the agricultural employer, not the new land management company. In neither the Board nor the court's opinion is there any indication that the former landowner and land management company were joint employers. Similarly, in the seminal successorship case of NLRB v. Burns International Security Services (1972) 406 U.S. 272 [80 LRRM 2225], a security company was found to be a successor vis-a-vis a unit of security guards at Lockheed, even though the company succeeded to no assets of the previously designated employer (another security company), but instead took over via a competitive bid submitted to Lockheed.

purpose of the ALRA, the encouragement of stable and peaceful labor relations in the agricultural sector. For this reason, we believe it more consistent with established successorship principles and the policies underlying those principles to focus on who succeeds to the function of the predecessor employer, rather than on the passing of ownership interests. B. Continuity of Workforce

In the present case, the ALJ correctly found that Hat did not hire any former San Joaguin employees and that this was not the result of discrimination. Continuity of the workforce, or workforce majority, traditionally has been the most critical factor in successorship analysis. However, in Highland Ranch and San Clemente Ranch Ltd. (1979) 5 ALRB No. 54 (affd. (1981) 29 Cal.Sd 874), this Board held that, in light of the transient nature of agricultural work, the continuity of workforce criterion should not be given the same degree of emphasis under the ALRA. Nevertheless, neither the Board, nor the California Supreme Court in its decision affirming the Board, ever stated that workforce continuity could be totally absent. Indeed, in its opinion in Rivcom, supra, 34 Cal.3d at 765, which issued several years after San Clemente, the court stated that continuity of workforce was a "crucial factor."[5]

[5]In cases subsequent to San Clemente, although the Board has stated that workforce continuity is but one of many factors to consider, the new employers had hired a substantial number of the predecessor's employees and the only dispute was whether it was a majority. (John V. Borchard, et al. (1982) 8 ALRB No. 52; Babbitt Engineering and Machinery, Inc., et al. (1982) 8 ALRB No.

(continued...)

essential nature of the enterprise nor the work or working conditions of the employees. For example, the replacement of equipment so that it could be standardized to match the equipment used at Hat's other operations would itself have little effect on employees. At most, such changes would require some minimal training to acquaint the employees with the new equipment. Similarly, while the amount of tying, suckering, and irrigation system maintenance work was greatly reduced, the essential nature of the work did not change. Nor did the change in the number of customers buying the grapes have any discernable effect upon employees.

On the other hand, many of the changes cited by the ALJ were properly viewed as militating against a finding of successorship because they had an impact on working conditions and the employees' relationship to their employer. For example, working conditions were changed in that all employees were expected to do tractor driving, there was a complete change in supervisory staff, and the employees were expected to be able to do machine pruning and spraying of pesticides and herbicides, which the San Joaquin employees had not normally done.

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Thus, San Clemente is most fairly read as permitting successorship to be found even where the number of new hires who worked for the predecessor falls short of a majority, but does not dispense with the need for some substantial workforce continuity. Therefore, to resolve any ambiguity that may appear in the ALJ's decision, we hold that the lack of any workforce continuity in the present case precludes finding Hat to be a successor to San Joaguin's bargaining obligation.

C. Continuity of Operations

In finding no successorship, the ALJ relied primarily on his findings that there were substantial changes in the operation of the vineyard. In our view, some of the changes relied on by the ALJ should not be given much weight in determining successorship because their effect on employees was not significant.[6]

Some of the changes noted by the ALJ here, while they made the operation much more efficient, did not affect either the

[5](...continued)
10.) In a more recent case, the Board stated that workforce majority is a critical factor. (Gourmet Harvesting and Packing, Inc., et al. (1988) 14 ALRB No. 9.)

[6]Though the continuity of operations criteria on their face refer to the business itself, their real import is the effect upon employees and their working conditions. In NLRB v. Jeffries Lithograph Co. (9th Cir. 1985) 752 F.2d 459 [118 LRRM 2681], the scope of the operation was greatly expanded, but the court found successorship because the "day-to-day life" of the employees remained the same. Similarly, in Fall River Dyeing S Finishing Corp. (1987) 482 U.S. 27 [125 LRRM 2441], successorship was found despite changes in the production process because they bore only indirectly upon the employees' working conditions and their relation to the employer.

ORDER

'By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Michael Hat, doing business as Michael Hat Farming Co., a sole proprietorship, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of agricultural employees' union activities or any other protected concerted activity of agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by section 1152 of the Agricultural Labor Relation Act.

2. Take the following affirmative actions, which are deemed necessary to effectuate the policies of the Act.

(a) Destroy any pictures or videotapes of agricultural employees picketing on public property that are accessible to it or within its possession.

(b) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(c) Post copies of the attached Notice at conspicuous places on its premises, the place of posting to be

determined by the Regional Director. The Notices shall remain posted for 60 consecutive days at each location. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(d) Mail copies of the attached notice in English, Spanish and any other appropriate language(s) within 30 days after the date of issuance of this Order, to all employees employed at any time by San Joaguin Farming Co. between July 1, 1991 and May 31, 1992, and to all Respondent's employees employed between June 1, 1992 and August 1, 1992.

(e) Arrange for a representative of Respondent or a Board agent to read the attached Notice in English, Spanish and any other appropriate language(s) to the assembled employees of Respondent on company time. The reading of the Notice shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(f) Notify the Regional Director in writing, within 30 days after the date of the issuance of this Order, of the steps that have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her

periodically thereafter in writing of what further steps have been taken in compliance with this Order.

DATED: September 22, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

MICHAEL HAT FARMING CO,
(UFW)

19 ALKB No. 13
Case Nos. 92-CE-28-VI
92-CE-29-VI
92-CE-36-VI
92-CE-37-VI

Background

On March 2, 1993, Administrative Law Judge (ALJ) Arie Schoorl issued a decision in which he found that Michael Hat Fanning Company (Hat) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA) by engaging in surveillance of employees engaged in a demonstration outside Hat's property. While the ALJ found that Hat had a right to photograph those who were trespassing on his property, the taking of video and still pictures of those on public property he found to be unlawful. The ALJ dismissed numerous other allegations, concluding that the evidence was insufficient to sustain them.

Both the United Farm Workers of America, AFL-CIO (UFW) and the General Counsel filed exceptions taking issue with the ALJ's failure to find that Hat was successor employer having an obligation to bargain with the UFW. They filed no exceptions with regard to his dismissal of the other allegations. Hat filed no exceptions to the finding of the surveillance violation.

Board Decision

The Agricultural Labor Relations Board (Board) affirmed the ALJ's findings of fact and conclusions of law and adopted his recommended order. However, the Board found it necessary to provide several clarifications in the analysis applied to the successorship issue. First, the Board held that it was not necessary that the previous owner of the ranch have been a joint employer with the former land management company which had held the bargaining obligation. Rather than examining whether Hat had purchased or otherwise assumed a legal interest from the predecessor employer, the Board found it more appropriate to examine who took over the function of the predecessor. In this case, Hat both purchased the ownership interest in the ranch and assumed the function of the land management company by operating the ranch himself. Thus, the Board concluded that the lack of joint employer status between the former owner and land management company did not preclude finding Hat to be a successor to the bargaining obligation. The Board nonetheless affirmed the ALJ's conclusion that under traditional successorship principles Hat did not succeed to the bargaining obligation.

The Board also held that its decision in Highland Ranch and San Clemente Ranch Ltd. (1979) 5 ALRB No. 54 (affd. (1981) 29 Cal.3d 874), which may be read to stand for the proposition that successorship may be found under the ALRA even without the hiring

of a majority of the former workforce, did not dispense with the need for some substantial workforce continuity. Thus, the Board concluded that in the instant case the lack of any workforce continuity precludes finding Hat to be a successor employer.

The Board also found that some of the changes in operations relied on by the ALJ in concluding that there was little or no continuity of operations after Hat took over the ranch should not be given much weight because their effect on employees and their working conditions was not significant.

* * *

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

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (ALRB) has found that we, Michael Hat Farming Co., have violated the Agricultural Labor Relations Act by engaging in surveillance of agricultural employees while they were engaged in protected activity, in this instance, peaceful picketing. The ALRB has ordered us not to interfere with, restrain or coerce you, our employees, in the exercise of rights guaranteed by the Agricultural Labor Relations Act.

The Board has directed us to post and publish this Notice.

The Agricultural Labor Relations Act is the law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT interfere with, restrain, or coerce agricultural employees in the exercise of their rights by engaging in surveillance of employees engaged in protected activity.

DATED: MICHAEL HAT FARMING COMPANY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite H, Visalia, California 93291. The telephone number is (209) 627-0995.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MICHAEL HAT FARMING COMPANY, A Sole Proprietorship, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 92-CE-28-VI 92-CE-29-VI 92-CE-36-VI 92-CE-37-VI

Appearances:

General Counsel:

Eduardo R. Blanco
Chief of Litigation

Freddie A. Capuyan Assistant
General Counsel

915 Capitol Mall, 3rd Floor
Sacramento, CA 95814

Respondent:

Bruce J. Sarchet
Littler, Mendelson, Fastiff, Tichy & Mathiason 509 West
Weber Avenue, Fourth Floor Stockton, CA 95203

Charging Party:

Marcos Camacho A Law
Corporation P.O. Box
31, Keene, CA 93531

Before: Arie Schoorl
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

This case was heard before me on September 14, 15, 16, 18, 21, 22, 23 and 28, 1992 in Modesto, California. The complaint issued on August 4, 1992, based on charges (92-CE-28-VI and 92-CE-29-VI) filed by the United Farm Workers of America, AFL-CIO (hereafter called the UFW) and duly served on the Michael Hat Farming Company, a Sole Proprietorship (hereafter called Respondent). Respondent filed an answer on August 18, 1992. An amendment to the complaint issued on August 5, 1992. A second amended consolidated complaint issued September 3, 1992, adding charges (92-CE-36-VI and 92-CE-37-VI) which had been duly served on the Respondent on July 21, 1992.

General Counsel, Respondent and the Charging Party were represented at the hearing. General Counsel and Respondent filed timely briefs after the close of the hearing. Upon the entire record including my observation of the witnesses, and after considering the post-hearing briefs submitted by General Counsel and Respondent, I make the following findings of fact:

I. Jurisdiction

Respondent has admitted in its answer that it is an agricultural employer within the meaning of section 1140.4(c) of the Act, and the UFW is a labor organization within the meaning of section 1140.4 (f) of the Act. I find that Conrado Castillo, Pascual Mejia, Carlos Avitia, Marcario Fuentes, Juan Nila, Jose Jaquez, Jesus Martinez, Jose Rojas and two nephews of the latter are agricultural employees within the meaning of section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practices

General Counsel alleges that the UFW is the certified bargaining representative of Respondent's employees at Respondent's Grizzly Ranch in Stanislaus County and, since June 15, 1992, Respondent has refused to recognize or to meet with it for the purposes of negotiating or discussing the terms of a collective bargaining agreement. General Counsel further alleges that since on or about June 15, 1992, Respondent has failed and refused to hire the employees of the predecessor employer to their farmer positions because said employees joined or assisted the UFW or engaged in other protected activities for the purposes of collective bargaining or other mutual aid or protection. General Counsel further alleges that Respondent by its owner Michael Hat assaulted an agricultural employee in the presence of other agricultural employees. General Counsel further alleges that Respondent by its owner Michael Hat threatened agricultural employees engaged in a peaceful demonstration outside Respondent's premises that he would kill any worker who would enter his property. General Counsel further alleges that Respondent by its owner Michael Hat and a person under his direction surveilled and videotaped agricultural employees engaged in a peaceful demonstration and then videotaped the license plates of agricultural employees engaged in the demonstration. General Counsel further alleges that Respondent, by a foreman, appropriated signs being used by agricultural employees engaged in a peaceful demonstration outside Respondent's premises.

General Counsel alleges that by committing the acts described above Respondent had violated section 1152 and sections 1153(a), (c) and (e) of the Act.

III. Background

The Michael Hat Farming Company is a sole proprietorship owned by Michael Hat and his wife. Hat Farming owns and operates vineyards in the San Joaquin Valley in Kern, Madera, Merced, San Joaquin, Tulare and Stanislaus counties, and also owns and operates wine grape ranches in the coastal valley near King City and Soledad.[1]

On June 1, 1992, Respondent purchased the Grizzly Ranch in Stanislaus County (comprised of 2,800 acres of wine grape vineyards) from the John Hancock Mutual Life Insurance Co. (hereafter called Hancock).

In 1984, Paloma-Hickman, a general partnership, had purchased the Grizzly Ranch and since 1987 it had contracted the operation of the ranch to Pacific Coast Farms.

The members of this partnership were Hickman-Greenfield, Inc. and Hancock. Sometime between 1987 and June 1992 Hancock bought out Hickman-Greenf ield and became the sole owner of the Grizzly Ranch.

Since 1985, the San Joaquin Farming Co. (hereafter called San Joaquin) a land management company, has operated the

[1]Respondent purchased and began operations on the San Joaquin county ranch (200 acres) in 1985, the Madera county ranch (2,600 acres) in 1988, the Merced county ranch (710 acres) in 1989, the Kern county ranch (640 acres) in 1990 and the Tulare county ranch (320 acres) in 1991.

vineyards. Beginning in 1987 the owner Hickman-Greenfield and later the owner Hancock contracted Pacific Farms to operate the ranch. Pacific in turn contracted the operations of the ranch to San Joaquin. San Joaquin continued to operate the Grizzly Ranch until June 1, 1992, when Respondent purchased and took possession of the property.

In 1975, the UFW was certified as the exclusive bargaining representative of the bargaining unit. The certification identified the employer as "Valley Vineyards Services" a land management company which was not the owner of the subject property. The certification identified the bargaining unit as "all the agricultural employees of the Employer employed at its Stanislaus County premises."

Since September 1, 1985, San Joaquin had recognized the UFW as the certified bargaining representative of its agricultural employees at the Grizzly Ranch, and had signed and implemented successive collective bargaining agreements with the UFW which were in effect from September 1, 1985 to July 31, 1992. When Respondent took over the operations of the ranch on June 1, 1992, the UFW requested Respondent to honor the collective bargaining agreement of its predecessor. Respondent refused to do so contending that its predecessor Hancock had no duty to bargain with the UFW because the certification was confined to the land management company, San Joaguin. Respondent alleges that it is not bound by San Joaquin's obligation to bargain with the UFW since it is not the successor to San Joaguin since it has radically changed the operation of the ranch so

there is no continuity of labor force or business operations.

IV. FACTS

A. Respondent's Refusal to Rehire Former San Joaquin Employees and to Recognize the UFW

On June 1, 1992, Respondent's general manager Steve Stewart began start up operations at the Grizzly Ranch. He was assisted by Respondent's managers Randy Mohler and Jeff Higby.[2] Stewart transferred four employees from its other ranches and assigned them to work at the Grizzly Ranch.[3]

All four had at least a year experience working at other Hat ranches performing duties of tractor drivers, irrigators etc. Stewart described the transfers as promotions since the four workers had been part-time employees for Respondent and now would be full-time.

Stewart credibly testified that he selected the four employees because they had exhibited good working skills, had knowledge of Respondent's farm operations, and were familiar with the equipment utilized at Respondent's ranches. Stewart also credibly testified that no one had told him not to hire former San Joaquin employees. In hiring employees for other newly

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[2]Steve Stewart was Respondent's general manager. In his supervisory work involving Respondent's Central Valley ranches, he was assisted by managers Randy Mohler and Randy Ramey. A fourth manager Jeff Higby was in charge of special projects. At the end of the start up period, Stewart will be the sole manager of the Grizzly Ranch.

[3]Stewart selected the four employees after consulting with the respective ranch managers. However Randy Mohler had suggested Salvador Villasenor to him. Michael Hat had no input with respect to the selection of the four employees; he merely instructed Stewart to proceed to hire employees for the Grizzly Ranch.

purchased ranches, Respondent has transferred employees from its other ranches. There was no collective bargaining obligation outstanding at the Madera, Merced or Kern ranches at the time of Respondent's purchase. There is no record evidence that such an agreement was in effect at the Tulare or San Joaquin ranches.

On June 3, 1992, approximately 100 of San Joaquin's former employees picketed Respondent's office carrying flags and signs which read "Michael Hat here are your workers" , "We are ready to negotiate", and "Michael Hat we want our jobs". The group marched around the office building from 3:30 p.m. to 4:00 p.m. chanting about jobs. Respondent's bookkeeper, Kathleen Stewart, Steve Stewart's wife, was the only one present in the office. None of the picketing workers attempted to enter the office or talk with Kathleen Stewart. At 4:00 p.m. she came out of the office, locked the door, looked at the signs and the flags, and drove off in her car.[4]

On June 4, 1992, the UFW mailed a letter addressed to the Respondent in Escalon, California. In the letter Cesar Chavez, president of the UFW, made a demand on Respondent to bargain asserting that Respondent was the successor to San Joaquin Farming Company with whom the UFW had a collective bargaining contract. The letter was returned and was resent by FAX and received.by Respondent on June 25.

On or about June 15, 1992, Respondent's attorney Bruce Sarchet had informed the UFW representative Efren Barajas that he

[4]Kathleen Stewart testified that she read one of the signs but could only remember the words "Michael Hat".

represented Respondent. On June 15, Sarchet and Barajas engaged in a telephone conversation in which Barajas made a demand that Respondent bargain with the UFW. Barajas also requested employment for the former San Joaquin employees, explaining that they formed a complete work force, had experience, were dependable, and were ready to start work at any time. The two also discussed a possible voluntary access agreement by which the UFW would have organizational access to the Grizzly Ranch.

On June 26, Barajas and Sarchet engaged in a second conversation. Barajas once again requested that Respondent bargain with the UFW. He also asked Sarchet whether Respondent was going to hire the former San Joaquin workers. Sarchet replied that all positions at the ranch had been filled. Barajas replied that he was prepared to file charges against Respondent for refusal to bargain and for discriminating against the former employees because of their union vote. A few hours later the conversation was renewed. Sarchet informed Barajas that Respondent did not feel that it was discriminating against the workers or that it had a duty to bargain and therefor Barajas should do what he had to do. Respondent has not to this date agreed to bargain with the UFW or has hired any former San Joaquin employees.[5]

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[5]Up to the end of the hearing, there was no evidence that Respondent had made any new hires.

B. Successorship

1. The Question of Whether Respondent's Predecessor Was a Joint Employer

Beginning in 1985, and up until Hat took over, San Joaquin Farming Co. exercised the overall management of the ranch. During this period of time, it had three successive collective bargaining agreements with the UFW. None of the agreements mentioned either Pacific or Hancock. San Joaquin made all the decisions as to the daily work assignments, the payment of employee wages, the times to irrigate, to spray etc.

A former San Joaquin employee, Pascual Mejia, credibly testified that he and his fellow employees received work instructions only from San Joaquin supervisors.

The owners, Paloma-Hickman and subsequently Hancock, through the intermediary Pacific, paid San Joaguin on a fee acre basis. The operating budget which included labor costs and estimates of operating costs was to be approved by the owners on a quarterly basis. San Joaquin exercised supervision of the care and cultivation of the crops and furnished all materials, supplies, and equipment (not supplied by owners). San Joaquin could only resolve labor disputes with approval of the owners.

The agreements between the owners and Pacific and between San Joaquin and Pacific were virtually identical——the owners contracting with Pacific to provide certain services at a fee per acre basis and Pacific in turn contracting with San Joaquin to provide the services that Pacific was to render the owners and also on a fee per acre basis.

2. Continuity of Work Force and Business Operations

The Grizzly Ranch has 2,800 acres of wine grape vines. The varieties are French Colombard, Chenin Blanc, Malvasia Bianca, Ruby Cabernet, Barbera Sangeovese and Chardonnay. During the years before Respondent bought the Grizzly Ranch, all of the grapes had been sold to Gallo. In 1992, Respondent sold the grapes to various wineries including Gallo, Franzia, Paul Masson, Heublein and Cananiagua.

In 1991, the San Joaquin Farming Company employed hundreds of agricultural employees to perform a variety of farm tasks.[6] Respondent has not hired any of these former workers or supervisors. It has reduced the number of year round workers to four and plans to hire four part-time employees in each crop year as needed.[7] In order to make such a reduction in the number of employees, Respondent has contracted with a custom harvester the harvesting of the grapes, has made substantial changes in its cultural practices and furthermore has made improvements in the irrigation system and equipment management. Furthermore employee wages and benefits are substantially different.

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[6]San Joaquin hired over approximately 500 employees to hand harvest in the months of August and September. It employed approximately 165 employees in January and February during the pruning and tying season. It employed about 40 employees during the suckering season from mid April to mid May. In other months the number of employees would diminish to ten.

[7]Respondent plans to hire four part-time employees to do the suckering and hose repair work.

(a) Cultural Practices

(i) Harvesting

Previous to Respondent's takeover of the Grizzly Ranch, San Joaquin harvested the grapes by hand and by machines. In 1991, it employed approximately 500 agricultural employees in the harvest. In 1992, Respondent contracted with a custom harvester Farrior, to harvest the entire crop with machines. Farrior accomplished the task with 30 employees.

In 1992, Respondent utilized leased machine harvesters and its own employees to harvest the grapes at its other ranches in the Central Valley. Hat credibly testified that he contracted with Farrior to harvest at Grizzly because it was the only source in California of harvesting machines that could safely harvest grapes on undulating terrain. Grizzly vineyards have slopes while the other ranches' vineyards are on flat ground.

Due to the widening of the roads by Hat, the loading of the trucks can now be carried out at any road at the ranch.

With machine harvesting, the amount of machinery and the number of workers has been reduced. Respondent has been able to dispense with much of the equipment that had previously been required. There is no further need for fork lifts with fork lift drivers, weighing machines with scale masters, and picking knives for tubs for hand harvesters etc.

In 1992, Respondent machine harvested at all of its other ranches, utilizing leased harvesting machines and employing its own work force.

(ii) Pruning

San Joaquin utilized hand pruning methods on the ranch, cane pruning on 400 acres of vines and spur pruning on the remaining 2,400 acres. Six crews of 25 workers were employed for this task which lasted for two months.[8]

This crop year, Respondent will machine prune the grape vines at the Grizzly Ranch. This method will take two employees approximately 3| months to complete. It will be accomplished by attaching a Kingsburg Cultivator cane cutter to the front hitch of the tractor and driving the tractor along the rows with the cane cutter operating. Each tractor will have either a disc or a mower attached to its rear. Thus two operations will be accomplished with one pass.

Steve Stewart credibly testified that he had decided to utilize machine pruning because he had determined that it would substantially increase the grape yield. He based his opinion on the two year results of experiments that he carried out at Respondent's Madera ranch and his observation of the results of such machine pruning at 1,500 acres of vineyards in the same vicinity over a three year period. Respondent plans to machine prune at the Madera and Tulare ranches for the 1993 crop year.

(iii) Tying

Each year, San Joaquin Farming employed six crews of fifteen workers to tie the branches of young vines so that they would grow out on the wires at the correct height for harvesting.

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[8]Hand pruning calls for the skillful selection of certain parts of a vine which should be pruned.

The process lasted two weeks.

This crop year Respondent will not tie the vines except those new suckers being trained onto the wires. Tying vines is uncommon practice at Hat's ranches because once a vine grows to a certain size there is no need to tie it every year. This year there will be a minimum of tying at the Grizzly Ranch and Hat's other ranches because the vines are fully matured.

(iv) Suckering

Every year San Joaquin employed six crews of 15 workers each to sucker the entire vineyard. Suckering began the middle of April and ended in the middle of May.

Respondent does not sucker the vines every year at its various ranches because the need of this operation depends on the age of the vineyard, the type of grape variety and the amount of growth that had occurred during the year. In this crop year, Respondent plans to employ only four workers to sucker at the Grizzly Ranch over a period of several months.

(v) Stake Repair

Each year San Joaguin employed two crews of ten workers each to repair broken stakes in the vineyards. This operation would last three to four weeks.

Hat Farming plans eventually to replace both wooden and metal stakes with heavy duty T125 metal stakes. These stakes will seldom be broken by a machine harvester. Initially Respondent will replace the broken ones and plans to replace the remaining ones on an as-needed basis.

Respondent plans to replace 10,752,000 feet of

trellis wire. It is not known whether Respondent or an independent contractor will perform such work. Respondent plans to have both the stake repair and trellis wire installation done during the dormancy season which is from November to March.

(vi) Spraying

The San Joaquin employees did not perform the operations of spraying herbicides and insecticides.

Respondent's tractor drivers perform the spraying operation by driving the tractor along the rows with the sprayer attached to the tractor. Respondent utilizes the same spraying method at its other ranches.

(vii) Irrigation

The old irrigation system consisted of well pumps, a reservoir, an electric control panel, water meters, nine reservoir pumps, 18 booster pumps, 18 large pressure regulator valves, and hundreds of field valves each with its own screen filter. Once the water reached the fields it would flow out onto the ground through the field valves, hoses and finally the emitters.

Overall the irrigation system was inefficient and required many man hours of work to keep it operating. The reservoir bred algae which required chlorine control with daily monitoring, quarterly changes of chlorine tanks and a yearly overhaul.

The pumps and valves had to be checked daily or weekly for oil levels and clogged screens to assure proper functioning. Only two of the nine waters meters were operable.

The electrical panel device had not been in use and therefore the individual field valves had been manually operated so as to turn the water on and off in the fields.

The drip emitters were defective in that they would easily clog and had no pressure adjusting mechanism. Therefore, some areas would receive no water while others would receive an excessive amount. Moreover, it was difficult to locate leaks.

Respondent has installed a revised irrigation system at the Grizzly Ranch. The reservoir has been eliminated so there is no need for the chlorine system.

A booster pump draws the water from the well and pressurizes it. The booster pump calls for a minimum of maintenance i.e. turn a grease cup once a year. The water then flows through a single pressure regulator valve and screen filters. An automatic mechanism flushes the screen filters. The system is of low maintenance. Master shut off valves have been installed so the water can be turned on and off in large blocks.

An independent contractor CalWest Rain replaced 18,000 old emitters with new Netafim pressure compensating emitters in June and July 1992. Respondent plans to have CalWest Rain replace the remaining old emitters with these new ones before the end of the year. The pressure compensating emitters will do away with the problems of over watering and thus reduce the incidence of abundant weed growth and mud bogs.

In the future, it will be relatively easy for Respondent's employees to check on hose leaks. Respondent has had an independent contractor install 16,000 end posts in June

and July 1992.[9]

The drip hoses are attached to the end posts with an emitter added at the end of the hose so that if there is a leak somewhere along the line, the ground underneath the end emitter will be dry.

Respondent has modified and improved the irrigation systems at its ranches in Madera, Merced, and Kern ranches in a similar manner as at the Grizzly Ranch.[10] Larry Isheim of CalWest Rain has designed and installed the new irrigation systems at the three ranches.

(b) Equipment

San Joaquin Farming used a wide variety of agricultural equipment of different makes and models. There were eight pickups, six four-wheelers, seven radios and five utility trailers. It rented five open air Kubota tractors that were not equipped with front three point hitches. Moreover, San Joaquin used some tractors that were 20 and 30 years old. During the harvest, San Joaquin rented 90 small field tractors to pull the picking gondolas. A large amount of specialized equipment was used in the hand harvest operations including 90 picking gondolas, three platform scales, more than 400 picking gondolas,

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[9] Respondent plans to have an independent contractor finish installing end posts throughout the ranch. Respondent had an independent contractor paint the 16,000 end posts white and number them. There were less than 100 end posts at the Grizzly Ranch at the time Respondent took over.

[10] Respondent has not yet installed a new irrigation system at its Tulare Ranch, although Larry Isheim has already designed one.

800 picking knives and eight bin dumpers. Thousands of spare parts were needed due to the wide variety of equipment.

As Respondent had done at its other Central Valley vineyards, it replaced virtually all equipment when it took over operations of the Grizzly Ranch. The numerous pieces of equipment left by San Joaquin were, with a few minor exceptions, junked or sold.

Respondent uses virtually the same equipment at all its ranches. A typical example are the tractors. Respondent rents them from the same company on a two year lease. The same make and model is used at all six Central Valley ranches. Each tractor is equipped with the same accessories.

Each of Respondent' s ranches uses the same make and model of equipment: four wheelers, fork lifts, sprayers, sulfur dusters, welders, portable air compressors, steam cleaners, service trailers, highway trailers, scrapers, discs, etc.

Because of the standardization of equipment, Respondent deals with only about 100 spare parts and thus is able to carry a complete supply at minimum cost; whereas, San Joaquin with its wide variety of equipment frequently had to send out for spare parts.

(c) Changing Configuration of the Land

As with its other vineyards, Respondent changed the configuration of the land to make it suitable for machine harvesting. All of the roads were widened by removing vines to permit machine harvesting, and thousands of vines were removed at

other locations to facilitate the use of the machine harvester.[11]

The Respondent also graded and terraced the rows between the vines so the machine harvesters can operate safely on hilly terrain.

(d) Wages and Benefits

San Joaquin had a collective bargaining agreement with the UFW which covered the wages and benefits. There were 10 job categories each one with its own wage rate. Moreover, the contract provided for piece rates for harvesting, pruning and tying. Certain San Joaquin employees were eligible for health, dental, and life insurance benefits. The contract also provided for vacation pay, jury duty, and bereavement leave.

Respondent pays approximately the same wages and provides the same benefits at all its ranches, including the Grizzly Ranch. Respondent's employees at the latter ranch receive two weeks vacation pay per year but no other fringe benefits.

(e) Supervisors

San Joaquin employed one general manager and two supervisors year around. They imparted the daily instructions to the San Joaquin employees. None of these supervisors were hired by the Respondent.

With more work done by machines, fewer employees are needed; and with fewer employees, the need for supervisors has

[11] ln mid June 1992 Respondent contracted an independent contractor to remove the vines.

likewise diminished.

Respondent's ranch manager, Steve Stewart, assisted by three other managers, manages the Grizzly Ranch along with five other Hat Farming ranches in the Central Valley. When a manager is not present, one of the four permanent employees takes his place and operates as a working foreman.

C. Other Alleged Unfair Labor Practices

1. Alleged Surveillance, Threat and Assault

One morning in July 1992, seven former San Joaquin employees[12] gathered at a road entrance to Respondent's Grizzly Ranch carrying signs reading: "We are ready for negotiations", "Michael Hat here are your workers", and "Michael Hat we want our jobs".

Previously, Respondent had painted a red line along the edge of its property, approximately 25 feet from the fence which ran parallel to the public roadway (Lake Road).[13]

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[12]Conrado Castillo credibly testified that there were seven employees picketing and identified them as Juan Nila, Jose Jaquez, Jesus Martinez, Jose Rojas, two nephews of the latter and himself.

[13]In early June, there had been a number of demonstrations in the vicinity of the gate at Respondent' s Lake Road entrance, during which some of the demonstrators encroached on Respondent' s property. Respondent contacted the Stanislaus Public Works Department to find out exactly where the ranch property limits were in relation to the public road. The Stanislaus Public Works Department advised Higby that the line ran approximately 50 feet from the fence and ten feet from the road. So there was a large space between the ranch's fence and the public road. Respondent proceeded to paint a red line to indicate where Respondent's property ended. At Higby's request, three deputy sheriffs came to the ranch and met Higby and the workers at the ranch gate. A Spanish speaking deputy explained in Spanish to the 16 workers present what the line signified. Former San Joaquin workers, Mejia, Fuentes, Avitia and Nila were among those present.

Michael Hat and Steve Stewart arrived at the picketing site in Hat's Bronco and parked inside the entrance gate. They got out of the vehicle with Hat carrying a video camera and Stewart a Polaroid camera. They approached the workers. Two of them (one was Juan Nila) were on private property and Nila's red pickup truck was straddling the red line.[14] The other five were on public property. Hat asked the two workers to get behind the red line and to move the red pickup.[15] Neither of the 2 responded. Hat repeated his request 5 or 6 times in a conversational tone without any reaction from the workers. He then video recorded the license plates of the parked cars, the signs, and the faces of the seven workers. In doing so, he came within 3 feet of the workers. Stewart photographed the red pickup.[16]

Conrad Castillo suggested to Juan Nila that he put his sign in front of the video camera and he did, coming within six inches of Hat's face. Hat pushed the sign away with his left hand, and Nila jerked the sign back. The sign broke and fell to

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[14] The workers had parked their other motor vehicles, which were 3 or 4 in number, on public property.

[15] Castillo credibly testified that there was gravel and sand on the red line and so it was not easy to detect and that Hat kicked the gravel and sand aside and it appeared that the red pickup was two feet over the line.

[16] Respondent contends that the pickup was blocking the gate entrance. Since Nila's pickup was between two and eight feet inside the red line and it was 50 feet from the red line to the entrance it is difficult to believe that the red pickup was blocking the entrance.

the ground.[17] Nila got into the red pickup, started it, raced the motor, spun the tires and moved it 8 feet across the red line onto public property.

Stewart joined Castillo[18] outside the gate and told him that there was a right way and a wrong way to do things and that "we" want to do things the right way. Castillo replied, "Yes I know". A few minutes later, Hat joined the conversation and said to Castillo that he, Castillo, knew what the rules were. Hat went on to explain the necessity for such rules as he pointed out that someone coming on the ranch could be poisoned by pesticide spray, a car could go into a ditch, or a tractor might come off a hill and kill someone.

Castillo replied that he had worked for twenty years on the ranch and no such accidents had occurred. Hat answered that after only 3 to 4 weeks on the ranch he had a dent in his Bronco and that he could fix that but he could not fix it if someone got killed.

Castillo began to ask questions about changes in the ranch operations especially the irrigation system. In response Hat and Stewart took Castillo on a 45 minute tour of the ranch. Castillo asked for employment but was told that there were no

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[17] The signs consisted of a stick of wood (a piece of lath) 46 inches long, 1J inch wide and % inch thick. The words were printed on thin cardboard which was attached to the stick with staples.

[18] Incidentally Castillo had been president of the UFW ranch committee for a few years.

openings at that time but when there was he could apply.[19] 2. The Flags and Sign Incident

In the middle of July 1992, Marcario Fuentes, a former employee of San Joaquin Farming Co., picketed with two other former San Joaquin employees at the entrance to Respondent' s property adjoining Lake Road. The three were carrying the signs described above. They placed two UFW flags and one sign in a hole on the entrance gate posts. Sometime later, an individual who Fuentes believed to be named "Randy", came along and removed the three items. Fuentes said to him, "Hey, sir give me my signs. This is mine." Randy replied, "No, get out of here, Mexican."

Randy returned ten minutes later. Andres, a UFW representative, arrived and Fuentes and his two fellow picketers told him what had happened. Andres talked to Randy and he returned the sign and flags to Fuentes and his two companions. Fuentes testified that he knew that the red line defined the limits of Respondent's private property and public property and that the gate posts, in question, were on private property.

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[19]Castillo testified that Hat said to him that "I can kill a person that comes on my property." Although Castillo was a credible witness I discredit his testimony on this point and the reason I do so is that I believe that Castillo's understanding of the English language is limited. Hat could have easily said "Anyone who comes on my property can be killed" and Castillo could have understood hearing what he had testified to. Moreover Castillo admitted that his English is very poor and that he did not remember exactly the words of the alleged death threat.

ANALYSIS AND CONCLUSION A.

Successorship

General Counsel argues that Respondent is a. successor because its predecessor Hancock was a joint employer along with San Joaquin and because the changes that it wrought at the Grizzly Ranch did not alter the essential nature of the business which was and still is the cultivation and harvesting of wine grapes.

In the alternative General Counsel argues that, according to current ALRB decisions, it is not necessary to prove that Hancock was a joint employer with San Joaquin. Successorship can be found solely by proving that the changes made by the new owner did not alter the basic relationship between the workers and the employer. General Counsel bases this latter argument by citing the Board's decision in Rivcom Corporation.[20]

Respondent denies that Hancock was a joint employer and therefore if its predecessor Hancock was not bound by the UFW certification Respondent is not bound by it either. Furthermore, Respondent contends that General Counsel is wrong in arguing that the Board's holding in Rivcom eliminates the requirement of joint employership to sustain a Successorship.

Respondent further argues that even assuming General Counsel is correct and Rivcom does away with the necessity of joint employership, Respondent does not succeed to the bargaining

[20]Rivcom Corporation (1979) 5 ALRB No. 55 aff'd Rivcom Corporation v. ALRB (1983) 34 Cal 3d 743.

obligation since the continuity and similarity of the working and business conditions have radically changed.

1. The Question of Joint Employership

The first question to be answered is whether Respondent's predecessor Hancock was a joint employer with San Joaquin.[21] A joint employer relationship exists where two otherwise separate businesses maintain a common labor policy. In Andrews Distribution Company Inc, (1988) 14 ALRB No. 19 the Board stated "The focus of a joint employer claim is whether two or more separate business entities 'co-determine' the essential terms and conditions of employment of the employees in question."

General Counsel bases its argument that Hancock was a joint employer by pointing out San Joaquin's limitations such as: no specialized equipment provided, no ownership in the land, no role in marketing the crop, no profit for the crop, no outlays of money above that which had been pre-approved without approval by Hancock, no resolution of labor disputes without approval by Hancock, no signing of collective bargaining agreements without prior approval, etc.

However, farm management contracts between San Joaquin and Pacific and between Pacific and Hancock demonstrate that the parties intended that San Joaquin would be an independent land manager with absolute authority in directing the day to day labor relations.

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[21]The focus of a joint employer claim is whether two or more separate business entities "co-determine" the essential terms and conditions of employment of the employees in question. See, Andrews Distribution Company Inc. (1988) 14 ALRB No. 19

General Counsel's assertions are not true concerning San Joaquin's management of labor relations. According to the agreements the limitations on San Joaquin's authority in labor relations are the following: "Manager (San Joaquin) shall immediately inform Company (Pacific) of any facts which reasonably cause Manager to anticipate a labor dispute. Manager shall keep Company currently informed of the progress of any such labor dispute." "Manager shall have no right to make any agreement on behalf of the Company or binding on Company unless he has obtained the prior written consent of Company." "Manager shall furnish all labor and supervision and, to the extent not provided for by the Company, furnish all materials, supplies, and equipment necessary to perform the services under this agreement." "Manager shall do and perform all acts and services reasonably necessary to farm the property in accordance with good agricultural practices. . .including without limitation, the planting, replanting, irrigation, tilling, disking, pest management, week control, harvesting, and transportation of crops and crop products." See Joint Exhibit 10.

Taken as a whole, this language indicates that San , Joaquin would be in charge of negotiations with the employees or a union over wages, hours and working conditions and the owner's role would be limited to approving or disapproving of any agreement so reached.

Moreover, a former San Joaquin foreman, Pascual Mejia credibly testified that the only persons who gave him orders were San Joaquin supervisors.

Under the management agreements, the role of Hancock was to review San Joaquin’s operating budget, reimburse expenses and approve large scale projects that had little to do with labor relations. General Counsel's assertions that San Joaquin did not own the land, or profit from the sale of the crop, or market the crop are all beside the point. Incidentally, according to the agreement, San Joaquin's services included assisting and counseling the owner on the sale of the crop.

In view of the foregoing, I find that San Joaquin was solely in charge of daily labor relations.

In Limoneira Company (1981) 7 ALRB No. 23 the Board had before it the question of whether two agricultural employers each had a bargaining obligation with the UFW. Limoneira was a land management company which harvested and packed lemons, oranges, grapefruit and avocados for two growers. The union had been certified as the exclusive bargaining agent of the Limoneira's agricultural employees. When the two growers terminated their individual contracts with Limoneira the union sought to impose the bargaining obligation on each of them.

The Board refused to do so. Neither grower directly participated in contract negotiations with the Union. Neither recruited, employed, housed, fed, supervised, or paid the harvesting workers. There was no common labor relations policy. Based on these facts, the growers had no bargaining obligation with the UFW.

In view of the foregoing, I find that Hancock, the owner of the land and Hat's predecessor, was not a joint employer

with San Joaquin. That being so, Hat did not inherit an obligation to recognize or bargain the UFW.

2. Continuity of Work Force and/or Business Operations

General Counsel and the UFW argue that according to the Board decision in Rivcom, the Board should nevertheless find Respondent to be a successor to San Joaquin's bargaining obligation because the facts of the Rivcom case are similar to those in the instant case. There the prior property owner, PIC Realty Company, contracted a land management company, National Property Management systems, Inc. (NMPS) to assume responsibility to farm the agricultural property. NMPS had a bargaining obligation with the UFW. PIC sold the property to Paraships Builders, who immediately sold the property to Newport Properties, Inc. Newport leased the land to Rivcom which, in turn, contracted with a land management company ("Triple M") to operate the ranch. Even though there was no finding that PIC and NMPS were joint employers the Board found that Rivcom was a successor to NMPS's bargaining obligation due to the continuity of the work force and other factors. The General Counsel and the UFW therefor contend that the Rivcom decision stands for the proposition that there is no need for a predecessor owner and a land management company to be joint employers for a successor owner to inherit the bargaining obligation of the land management company. All that is necessary is a finding that the normal successorship tests of "continuity of the work force and business operations" be satisfied.

Respondent disagrees and points out that the issue was

never really considered in Rivcom. Respondent asserts that there are numerous California cases holding that if a court opinion did not discuss, analyze or address a particular legal issue, the court opinion cannot be given stare decisis effect as to that issue.[22] I have reviewed the Rivcom ALRB and Supreme Court decision and find that there is no mention of the question of whether PIC and MPNS were joint employers.

Because this matter can be disposed of on the basis of traditional successorship principles, without the necessity of reaching the joint employer issue there is no need to address those arguments.

According to NLRB precedent, the factors to be considered in determining successorship are the following: continuity of work force, continuity of business operations, similarity of plant and equipment, similarity of products, and similarity of working conditions. The most important factor for the NLRB is the continuity of the work force i.e. whether a majority of the new employer's employees were formerly employed by the previous employer. See William J. Burns Int'l Detective Agency v. NLRB, 441 F2d 911, 77 LRRM 2081 (CA 2, 1971) aff'd sub nom. Burns Int'l Sec.Servs. v. NLRB, 406 US 272, 80 LRRM 2225 (1972).

However in San Clemente Ranch Ltd.(1979) 5 ALRB No. 54 the Board concluded that given the unusual characteristics of

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[22]Lubetsky v. Friedman (1991) 228 Cal. App. 3d 35, Department of Justice v. Workmen's Compensation Appeals Board (1989) 213 Cal,App.3d 194, People v. Lonergan (1990) 219 Cal.App.3d 82.

agricultural ownership patterns and the agricultural labor force[23] an approach to successorship which examines factors in addition to the continuity of the work force is most appropriate. The Board went on to say that undue emphasis on the continuity of the work force factor at the expense of other relevant factors would render the important protection provided agricultural employees by the successorship principle almost entirely ineffective. The Supreme Court in San Clemente Ranch Ltd, v. ALRB (1981) 29 Cal 3d. 874, affirmed the Board's decision in respect to the over emphasis of the work force factor. With this ruling in mind, I shall proceed to evaluate the various factors.

In the instant case there has been no continuity of work force since Respondent did not hire any of the predecessors' supervisors nor any of its employees.

General Counsel alleges that the continuity of the work force, must be presumed since Respondent refused to hire any former San Joaquin employee because of their union affiliation. It is well established that if a successor employer refuses to hire employees because of their union activities or affiliation, continuity of work force shall be presumed. See Babbitt Engineering & Machinery v ALRB (1984) 152 Cal.App.3d 310, Rivcom, supra.

In support of this allegation, General Counsel contends

[23]In Highland Ranches, 5 ALRB No. 54 (1979) aff'd Highland Ranch v. ALRB (1981) 29 Cal 3d 848, the Board pointed out that there is a fluid mobile labor pool in California agriculture and consequently there is a high turnover in most of the work forces of agricultural employers in California.

that Respondent refused to consider San Joaquin's former employees for hire in the past and in the future. However, General Counsel has failed to offer any substantial proof to support such allegation, while Respondent has presented convincing evidence that Respondent's hiring practice was determined for genuine business reasons. In the last 5 years, every time Respondent has taken over the operation of a newly purchased ranch it has followed the same practice. It has transferred employees from its old ranches to the new one. There is a sound business reason for doing so. Since all the cultural practices, equipment, and work assignments are standardized a newly transferred employee can immediately begin to carry out his duties without any additional training. Moreover, Respondent has reliable knowledge that the transferred employee is an efficient and dedicated worker. In the instant case, the employees transferred to the Grizzly Ranch had between one and two years experience working at Respondent's ranches. Furthermore, Respondent's general manager Steve Stewart credibly testified that he transferred the four employees to the Grizzly Ranch because they had exhibited good working skills, were knowledgeable of Respondent's method of operations, and were very familiar with the use of all the equipment.

Incidentally, there is uncontradicted evidence that there were no collective bargaining obligations outstanding at the Madera, Merced or Kern ranches when Respondent took over. There is no evidence whether such an obligation existed at the Tulare and San Joaquin ranches. Respondent carried out virtually

the same changes at the Grizzly Ranch as it did at Madera, Merced and Kern ranches, where there was no outstanding bargaining obligation. Therefore it can be safely inferred that the changes so wrought at Grizzly responded to legitimate business reasons and not to union animus.

General Counsel contends, that from the very moment that Hat learned that the UFW had a collective bargaining agreement with San Joaquin, he knew that he could not and would not hire any of its employees because to do so would have placed him in the situation he faced in Michael Hat (1991) 17 ALRB No. 2 Michael Hat v. ALRB (1992) 4 Cal.App.4th 1037.[24] According to General Counsel, Hat made any and all attempts to make application for hire futile.[25] General Counsel maintains that

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[24] In that case, Michael Hat was found to have failed and refused to bargain in good faith with the UFW and to honor the terms and conditions of a contract. The Board based its decision on its finding that Hat was a successor. General Counsel argues that due to his experience in this case, Hat became aware that in purchasing a ranch with an outstanding bargaining obligation, he might fall heir to a duty to bargain with a union if certain conditions occurred.

[25]General Counsel in its post-hearing brief does not elaborate about how Hat made it futile for former San Joaquin employees to apply for work. Respondent had hired its full complement of employees i.e. the four transfers 2 to 3 weeks before it took over the Grizzly Ranch or before the 100 employees demonstrated for their jobs on June 3. The UFW representative Efren Barajas requested work for the former San Joaquin employees in the middle of June but Respondent did not have any job openings at that time. Respondent will have job openings for 4 seasonal employees in the future. General Counsel states in its brief that "there should be no dispute that the request for employment has been made and that is has been denied." It is true that Respondent refused the UFW request for employment. Sarchet informed Barajas the reason not to hire was that Respondent had already hired sufficient workers and consequently there were no openings. Respondent's position has been that if a former San Joaquin worker applies for work on an individual basis he or she

such a motive should be inferred from that fact that Respondent had previously been found to have committed an unfair labor practice in 17 ALRB No. 2 and was ordered to bargain with the UFW; and therefore Hat, in order to avoid such an unpleasant experience, was motivated to "nip" the oncoming union problems "in the bud". However, there is scant record evidence[26] to support such an inference and there is abundant record evidence to dispel it.

In NLRB cases dealing with discrimination due to union activities there are two approaches. One was developed by the NLRB in Wright Line, Inc (1980) 251 NLRB 1082, whereby the General Counsel establishes a prima facie case that union activity was the motivation in the employer's decision, the burden shifts to the employer to show that the decision would have been the same even if there were an absence of protected activity. The second approach as set forth in Great Dane Trailers (1967) 388 U.S. 26. The question is whether the particular conduct is inherently destructive of employees'

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will be considered on their individual merits the same way as any other job applicant would be considered. When former San Joaquin employee Conrad Castillo requested employment, Hat told him to apply when there was an opening.

[26]General Counsel argues that the fact that Hat feigned lack of knowledge of the UFW's presence "leads to the conclusion that he has engaged in something other than a routine implementation of a standardized system which has as its primary result the reduction of the work force to a minimal number." No such inference can be drawn from such "feigning" since Hat carried out the same steps at the take over of his other ranches and there is no evidence whatsoever that there was a union presence at any of them.

rights. To avoid an adverse finding the employer must demonstrate that a "legitimate and substantial" business related justification for the conduct will be sufficient to negate any inference or finding of a discriminatory motive.

In the instant case, it is evident that no matter which of the two tests is applied the business justification for Hat's hiring decisions are overwhelmingly convincing. First, under Wright Line, supra, there is ample proof that the decision to transfer existing employees would have been made even if San Joaquin had no bargaining obligation. Secondly under the "inherently destructive" analysis, there are compelling, legitimate and substantial business reasons for making such hiring decisions.

In view of the foregoing, I find that there was no continuity of the work force nor can one be presumed. Although the NLRB places prime importance on this factor of work force continuity, the ALRB does not because of the peculiar nature of the agricultural industry in California where there is a plethora of migrant workers and a ongoing change of personnel. Therefore it would be possible to establish a successorship based on the remaining criteria.

In San Clemente Ranch Ltd, supra the Supreme Court adopted the language of the ALRB decision "the agricultural operation remained almost identical" and added "San Clemente farmed the same land, used the same equipment, and processed the crops in essentially the same manner as Highland had." The Court went on to state that the change in ownership brought no

alteration in either the nature or the size of the bargaining unit and finally, that the employees in the bargaining unit performed the same tasks for San Clemente that they had previously performed for Highland.

It is true that Respondent farmed the same land and raised the same crops but, by and large, those were the only factors that remained constant.

Respondent did not use the same equipment. It replaced virtually all of San Joaquin's equipment. Moreover, its handling of its equipment was a complete departure from San Joaquin's method as it standardized the equipment and, in so doing, substantially reduced the inventory of spare parts.

There was a radical change in the size of the bargaining unit. San Joaquin employed only ten employees in some months but hundreds during the harvest. Respondent employed 4 year round employees and plans to employ 4 seasonal employees in the future. During the harvest, its custom harvester, Farrior employed thirty employees.

Respondent machined harvested its other ranches utilizing leased harvesting machines and its own employees. Hat credibly testified that the reason he contracted with Farrior because the latter was the only company that had harvesting machines that were self-leveling and could safely negotiate the Grizzly ranch's sloping terrain.

By and large, Respondent's employees do not perform the same tasks as San Joaquin employees. San Joaquin employees harvested the grape crop by hand, while Respondent contracts out

the harvest to a custom harvester who harvests the grapes with machines.[27] San Joaquin employees hand pruned the grapevines. Respondent's employees will machine prune by the use of a tractor with a cane-cutter attached. San Joaquin workers tied the vines during a two week period each year. Respondent does not tie the vines because in its criteria, no tying is necessary for mature vines.[28] Suckering of the vines had been done yearly by San Joaquin. San Joaquin employed 90 workers during a one month period to perform this work. Respondent does not sucker its vineyards on a yearly basis. Its criteria in doing so is based on the age of the vineyard, the variety grown and the amount of growth that takes place during a given year. Respondent plans to employ four part-time workers to perform the suckering this year over a several month period.

The operation of the irrigation system has been greatly simplified. The time for checking the valves and hoses has been radically reduced. In the San Joaquin operation, a worker would frequently have to walk or drive a vehicle along a row to locate leaks. At times, he would have to rummage through abundant foliage to accomplish this task. In Hat Farming's operation a worker can discover leaks merely by driving along the avenues and checking beneath the end hose emitters for dry spots.

San Joaquin employees did not spray herbicides or

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[27]San Joaquin contracted with Farrior to harvest some of the grapes by machine but the large amount of harvest employees indicates that the vast majority of the grapes were hand harvested.

[28]The Grizzly Ranch vines are twenty years old.

pesticides. Respondent's tractor drivers will be performing this task.

In keeping with its past practice in the purchase and start up of operations at its new ranches, Respondent introduced its standard cultural practices, its standard employee and supervisory methods, its standard equipment purchases and rentals, its spare parts inventory and upkeep in a substantial change from the business operations as carried on by San Joaquin.

Moreover, the number of job classifications have been drastically reduced. Under San Joaquin's collective bargaining agreement with the UFW, there were 10 job titles. Respondent has only three: tractor driver, irrigator and working supervisor.

Respondent's wages and benefits are substantially different from San Joaquin's.

Gallo was the sole purchaser while San Joaquin operated the Grizzly Ranch, whereas Respondent sold its Grizzly Ranch grapes to various vintners including Gallo, Franzia, Vintners International (Paul Masson), Heublein, and Canandaigua.

In summary, there is no continuity of the work force, including the supervisors. Radical and numerous changes have been made in the cultural practices. The bargaining unit has been severely reduced. Wages and benefits are not similar. The working conditions have been altered substantially.

While it is true that the product, wine grapes, and the plant, the Grizzly vineyard, have remained the same, the other changes have been on such a grand scale that it there no longer exists any continuity of work force or business operations.

In view of the foregoing I find that Respondent was not a successor to San Joaquin's bargaining obligation to the UFW. Since it had no duty to recognize or bargain with the UFW I find that it was not guilty of violating section 1153 (e) of the Act and recommend the dismissal of the charge that alleges such violation.

B. The Other Alleged Unfair Labor Practices

1. Respondent' s Refusal to Hire San Joaquin Employees.

I have already found that Respondent had a legitimate business reason for not hiring any of the San Joaquin workers. See discussion in Analysis and Conclusion at page 30 through page 34 above. I hereby recommend the dismissal of the charge that Respondent failed and refused to hire San Joaquin employees because they joined or assisted a Union or engaged in other protected concerted activities for the purpose of collective bargaining and other mutual aid and protection.

2. Alleged Assault and Threat of Workers by Michael Hat

There is uncontradicted evidence that Michael Hat did not assault a agricultural worker. Michael Hat, Steve Stewart and General Counsel's own witness Conrado Castillo testified that Hat merely pushed the sign without touching, Nila, the worker holding the sign and that it broke either when Nila jerked the sign back or when it fell on the ground.

Michael Hat did not threaten that he would kill any worker who would enter his property. Conrado Castillo was the only witness to testify that he did so. However Castillo's command of the English language is limited. He himself admitted

as much. Moreover Hat and Stewart credibly testified that Hat did say the word "kill" but in the context of certain dangers on the ranch would might result in a trespasser being killed in an accident. So it is very likely that Castillo did not fully understand the meaning of Hat's comment and mistakenly assumed it to be a death threat.

I find that Respondent Michael Hat did not assault or threaten to kill any agricultural employee and therefor recommend the dismissal of such charges.

3. The Alleged Surveillance of Agricultural Employees

Michael Hat did engage in unlawful surveillance of five agricultural workers moments before the broken sign incident occurred. Morris, in "The Developing Labor Law" Vol. 1, p. 129 cites abundant authority to the effect that an employer who photographs or videotapes employees engaged in concerted activities may engage in prohibited surveillance, or may unlawfully create the impression of surveillance or both. In general, the NLRB has analyzed this problem by presuming that the photographing of peaceful protected activity violates section 8(a)(l), but it allows the employer to rebut the presumption by proof of specific justifying circumstances.[29]

On this occasion, 7 workers were picketing near Respondent's Lake Road gate. Juan Nila and another worker had crossed on to Respondent's property but the remaining five had not trespassed and had stayed on the public side of the red line.

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[29]See United States Steel Corp. v. NLRB 682 F.2d 98 (1982)

According to NLRB precedent, Hat was justified in videotaping Juan Nila, his pickup truck and the second worker, because they had crossed onto private property. In effect Hat was obtaining proof that they had trespassed. However, Hat had no right to videotape the five remaining employees because they had not done so.

Steve Stewart had the right to photograph Nila's pickup truck since it was partially on private property.

The employer's conduct in this instant reasonably tended to interfere with, restrain, or coerce these five employees in the exercise of their protected rights. In view of the foregoing I find that Respondent illegally surveilled agricultural employees who were engaged in a peaceful demonstration and therefore violated Section 1153(a) of the Act.

4. The Borrowed Flags and Signs Incident

There is uncontradicted evidence that the workers placed the two flags and the sign on the gate post which was on Respondent's private property. Since the signs were on private property, Respondent had the right to remove the signs. Moreover, Respondent, when reguested, returned the flags and signs to the workers. I find that Respondent did not appropriate either flags or signs that were being used by agricultural employees engaged in peaceful picketing and therefore recommend dismissal of the charge that so alleges.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act hereby orders that Respondent

Michael Hat, doing business as Michael Hat Farming Co., a sole proprietorship, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Exercising of surveillance of agricultural employees' union activities or any other protected concerted activity of agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Agricultural Labor Relations Act.

2. Take the following affirmative actions, which are deemed necessary to effectuate the policies of the Act.

(a) Destroy any pictures or videotapes of picketing agricultural employees that are accessible to you or within your possession.

(b) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(c) Post copies of the attached Notice at conspicuous places on its premises, the place of posting to be determined by the Regional Director. The Notices shall remain posted for 60 consecutive days at each location. Respondent shall exercise due care to replace any Notice which had been altered, defaced, covered, or removed.

(d) Mail copies of the attached notice in English, Spanish and any other appropriate language! s) within 30 days after the date of issuance of this Order, to all employees employed at any time by San Joaguin Farm Co. between July 1, 1991 and May 31, 1992 and to all Respondent's employees employed between June 1, 1992 and August 1, 1992.

(e) Arrange for a representative of Respondent or a Board agent to read the attached Notice in English, Spanish and any other appropriate language(s) to the assembled employees of Respondent on company time. The reading of the readings shall be at such times and places as are specified by the Regional Director, following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice of their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the guestion-and-answer period.

(f) Notify the Regional Director in writing, within 30 days after the date of the issuance of this Order, what steps have be taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: March 2, 1993

Arie Schoorl

ARIE SCHOORL
Administrative Law Judge

NOTICE TO EMPLOYEES

After a trial in which each side had an opportunity to present its facts, the Agricultural Labor Relations Board has found that we violated the law by surveiling agricultural employees while they were engaged in concerted protected activities in this instance peacefully picketing.

We will do what the Board has ordered, also tell you that the Agricultural Labor Relations Act is a law of the State of California which gives farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To choose, by secret ballot election, a union to represent them in bargaining with their employer.

4. To act together with other workers to try to get a contract or to help and protect one another.

5. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT closely watch any of your union activities.

Dated:

MICHAEL HAT d/b/a MICHAEL HAT FARMING COMPANY

By: _____

(Representative) (Title)