Ventura County, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OCEANVIEW PRODUCE COMPANY, A Division of Dole Fresh Vegetables Company, Inc., Employer-Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative, AND BUD ANTLE, INC./BUD OF CALIFORNIA, A Division of Dole Fresh Vegetables Company, Inc., Employer-Petitioner, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 890, AFL-CIO, Certified Bargaining Representative.	Case Nos. 95-UC-l-EC(OX) 95-UC-2-EC 22 ALRB No. 15 (December 31, 1996)

DECISION DISMISSING UNIT CLARIFICATION PETITIONS

This matter comes before the Agricultural Labor Relations Board (ALRB or Board) pursuant to separate petitions for unit clarification (UC) filed by Oceanview Produce Company (Oceanview) and Bud Antle, Inc. (Bud) on the basis of identical claims. Oceanview and Bud (hereafter collectively referred to as Employers) assert that the existing Oceanview bargaining unit

which is represented by ALRB certified United Farm Workers of America, AFL-CIO (UFW or Union) is void ab initio and that the employees must instead be considered part of the statewide unit comprised of all agricultural employees of Bud Antle, Inc. The latter unit was certified prior to the Oceanview unit and is represented by Local 890, International Brotherhood of Teamsters (Teamsters).

Following a full evidentiary hearing in which all parties participated, Investigative Hearing Examiner (IHE) Barbara Moore issued the attached decision in which she recommended that the petitions be dismissed. The Employers timely filed exceptions to the IHE's decision and the UFW filed a brief in response. The Board has considered the IHE's decision in light of the record and the positions of the parties and affirms the IHE's rulings, findings and conclusions.[1]

The Employers except to the IHE's failure to reach and decide whether, as they contend, they are now, and were at the time of the election, a single employer and therefore all agricultural employees of both Oceanview and Bud should comprise a single bargaining unit. Accordingly, they propose that the Board's more recent certification of the United Farm Workers of America, AFL-CIO, as the representative of Oceanview's Ventura County agricultural employees, be set aside and that the employees in that unit be consolidated with the more expansive

[1]Member Harvey did not participate in the consideration of this case.

and previously certified Teamster represented Bud unit. We find no merit in the exception.

The pivotal question in this case is which of two certified labor organizations will represent the employees of Oceanview Produce Company as well as who will decide that question, the employees themselves or their employer.

The Employers concede that the issue is not one which normally qualifies for resolution by means of "unit clarification" as that process was created to address questions not resolved at the time of the election or which are the result of post-certification changes; questions which concern the status of individual employees such as whether they are covered by the existing unit.[2] The underlying issue here, however, as defined by the Employers, is more fundamental; it does not concern the scope of the unit, but rather whether the 1994 election among almost 600 Oceanview employees should now be set aside.

Public policy under both the National Labor Relations Act and the Agricultural Labor Relations Act (ALRA or Act) indicates that unit clarification petitions may never be filed when a question concerning representation exists and certainly never by a rival union. Moreover, essential "to a full

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[2]For example, the scope of the unit became an issue in Bertuccio Farms (1982) 8 ALRB No. 101 only when the parties began negotiating and the employer questioned whether he was obliged to bargain with regard to employees recently supplied by a labor contractor. In Point Sal Growers and Packers (1983) 9 ALRB No. 57, the Board clarified the unit to include a clerical employee whom the employer sought to exclude from the negotiations process on the grounds that she was a confidential employee.

appreciation of the whole of the ALRA is the undisputed intent of the California Legislature that only employees determine whether or not they are to be represented for purposes of collective bargaining and by whom and, further, such matters are to be tested only by means of the Board's secret-ballot election process. Those basic statutory tenets would be violated were the Board to now endorse the position advanced by the Employers because the ultimate objective they seek would result in the decertification of the union which the Oceanview employees chose in a secret-ballot election conducted and certified by the ALRB, requiring those same employees to be represented by the "rival" Teamsters union, and all without any input whatsoever from the employees themselves. If, as the Employers appear to contend, only one unit is appropriate under the Act, they have not disclosed why it is the Teamster certified unit they choose.

In order to cast the issue differently, in their attempt to take it outside the limitations of the unit clarification process, the Employers seek to characterize their dispute as one which concerns only whether Labor Code section 1156.2[3] overrides the unit clarification process and thereby is dispositive of the question herein. On that -basis, the Employers claim that section 1156.2 empowers the Board to undertake a de novo evaluation of this issue, to now place it in the context of a pre-election petition for certification. Neither the record

[3]Unless otherwise indicated, all section references are to the California Labor Code section 1140 et seq.

nor public policy considerations evince a forceful purpose to now undertake such an inquiry.

As the Employers correctly observe, section 1156.2 requires that, as a general rule, all agricultural employees of an employer be encompassed within a single bargaining unit (i.e., a plant-wide, wall-to-wall, or statewide bargaining unit).[4] Because of this statutory preference for comprehensive bargaining units, this Board has developed numerous safeguards by which to guarantee as nearly as possible that elections are conducted in units appropriate for collective bargaining. Thus, as early as April, 1994, when the UFW served Oceanview with a Notice of Intent to Take Access (NA), Oceanview was on notice that the Union was seeking to organize its Ventura County agricultural employees. Thereafter, when the Union filed the petition for certification of the Ventura unit, Oceanview had a second, but missed, opportunity to challenge the unit designation. Later, Oceanview not only failed to assert a challenge to the unit in its official response to the petition, but in fact appeared to endorse the unit as described by the Union by stating therein that "[a]11 of the Employer's agricultural employees are employed in Ventura County." On that basis, the Regional Director

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[4]Section 1156.2 reads:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

reasonably could believe that there was no impediment to, at public expense, holding an election among the 593 Oceanview employees who cast ballots.

Although Oceanview asserted no objection to the unit when served with the NA, when served with the petition, in its official response to the petition, or during the pre-election conference, it did not waive the right to do so by means of post-election objections, the next appropriate vehicle for asserting such a challenge. Oceanview did indeed file numerous objections, but not one relating to the unit. Nor did it lack the opportunity to raise the unit question during the numerous other stages of this proceeding, including during and following the hearing on its election objections and the Board's decision dismissing objections and certifying the UFW. The ultimate remedy for an aggrieved employer, as in all representation cases, is the refusal to bargain process by which to renew the election challenge before the Board and ultimately before the courts. (Libbey-Owens-Ford v. NLRB (3d Cir. 1974) 495 F.2d 1195 [85 LRRM 2668].) Oceanview did not elect any of these well established options for testing unit appropriateness, but instead affirmatively recognized the UFW as the exclusive representative of all of its Ventura County agricultural employees and proceeded to bargain towards a comprehensive collective bargaining agreement. In so doing, Oceanview made a voluntary and conscious decision to waive any right it might otherwise have had to challenge any aspect of the underlying election, and failed to

disclose to the Board the views it now professes to advance.

Notwithstanding the statutory emphasis on single units, section 1156.2 also grants the Board considerable discretion to designate less than statewide units where it first determines that the employees of a particular employer are employed in two or more noncontiguous geographical areas.[5] The Board is not required to designate the most appropriate unit, only a unit appropriate for collective bargaining. (See, e.g., Bruce Church, Inc., supra. 2 ALRB No. 38; John Elmore Farms (1977) 3 ALRB No. 16; Prohoroff Poultry Farms (1983) 9 ALRB No. 68.)[6]

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[5]Following NLRB precedents concerning elements which establish a "community of interest" among employees, the Board examines each of the employer's operations in light of whether there is an interchange of employees and supervision, as well as other factors including whether there is a common labor relations policy which governs all employees at all locations. (See, e.g., Bruce Church. Inc. (1976) 2 ALRB No. 38.)

[6]Section 1156.2 may not be as inflexible as the Employers appear to believe. Following passage of the ALRA, the Legislature adopted a "Letter of Intent" advising the Board that it need not be constrained by the literal language of section 1156.2 as originally drafted and enacted. Rather, for purposes of section 1156.2, the Board is free to find that off-the-farm packing or cooling facilities (i.e., operations which are not conducted on the farm) are geographically noncontiguous so that the Board may certify separate units of agricultural employees even though all are employed by the same empi'oyer and even though the off-the-farm operation may be only across the road from the main farming operation. (Senate Journal, Third Extraordinary Legislative Session, May 26, 1975.) On this basis, the Board has historically certified the Fresh Fruit and Vegetable Workers Union as the representative of agricultural employees in an off-the-farm unit, even where the employer's field employees are represented by a different union. (See, e.g., Harry Tutunjian & Sons. Packing (1986) 12 ALRB No. 22; Bud Antle. Inc., Case No. 76-RC-ll-D, Certified January 22, 1976.) Accordingly, the Act may not be read to require that an employer bargain only with one union with respect to all of its agricultural employees.

While no ALRB case squarely addresses the extent to which the Board must strive to reconcile section 1156.2 with other statutory provisions under the circumstances here, it is apparent that the Board's obligation under the Act is to construe its various provisions as a whole, in light of the entire legislative scheme of which they are a part, and therefore section 1156.2 cannot be construed in a vacuum. (People v. Harris (1985) 165 Cal.App.3d 1190 [212 Cal.Rptr. 216]; Santa Barbara Taxpayers Association v. County of Santa Barbara (1987) 194 Cal.App.3d 674 [239 Cal.Rptr.769].)

Following this well settled rule of statutory construction, we are compelled to acknowledge that section 1140.2 reminds us that " [i]t is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing ..." and that section 1 alerts us to the Legislative purpose of assuring "stability in labor relations" for all agricultural employees.

For the reasons discussed above, we conclude that the balance that must be struck argues against -upsetting the valid election which the Board conducted among Oceanview's Ventura County agricultural employees in 1994 and the subsequent certification of the UFW as the exclusive representative of those employees for purposes of collective bargaining under the Act. Accordingly, as the IHE recommended, the petitions for unit

clarification should be, and they hereby are, dismissed in their entirety.

DATED: December 31, 1996

MICHAEL B. STOKER, Chairman

MEMBER RAMOS RICHARDSON, Concurring:

I concur with Chairman Stoker's opinion that the unit clarification petitions filed by Oceanview Produce Company (Oceanview) and Bud Antle, Inc./Bud of California (Bud) must be dismissed. However, I wish to add the following comments explaining the basis for my concurrence.

On April 26, 1994, one week after the United Farm Workers of America, AFL-CIO (UFW) had filed a Notice of Intent to Organize Oceanview's agricultural employees in Ventura County, Field Examiner Mauricio Nuno wrote letters to Local 890 of the International Brotherhood of Teamsters (Teamsters), UFW and Oceanview, asking for information concerning -the relationship between Dole Fresh Vegetables Company, Inc. (DFV), Castle & Cooke, Bud and Oceanview. On April 27, 1994, the Teamsters replied, in detail, asserting that the Oceanview employees should be included in the Teamsters certification with Bud because of the intertwined relationship between DFV, Bud and Oceanview. On

May 10, 1994, Regional Director Kerry Donnell wrote to the Teamsters, informing them that he could not conclude, based on the information available to him at the time, that Oceanview was a joint employer with Bud or DFV. He suggested that the election objections or unit clarification procedures, which involve evidentiary hearings, would be more reliable avenues for having the issue resolved.

I believe that the Teamsters' comprehensive letter sufficiently raised the issue of Oceanview being a joint employer with Bud and/or DFV to alert the Regional Director that he should have investigated the matter further before concluding that the appropriate unit consisted only of Oceanview's agricultural employees in Ventura County. I am especially concerned that the Regional Director failed to investigate the joint or single employer issue further because there is some indication in the record that there may be other companies beside Oceanview, DFV and Bud that might also be part of a single employer entity.

Furthermore, I believe that the issues raised by the Employers regarding the applicability of section 1156.2 after the initial certification and what is appropriate to raise under a unit clarification petition should have been'-studied further by the Board for the purpose of clarifying potentially conflicting statutory provisions and case law.

Nonetheless, under our current statute and case law, I have no other choice but to agree with my colleagues that Petitioners' unit clarification petitions cannot be granted

because the effect would be to nullify the Board's certification of the UFW as the exclusive bargaining representative of Oceanview's agricultural employees. Under current case law, the certification of an existing union continues until it is officially decertified as the employees' bargaining representative pursuant to the provisions of Labor Code section 1156.3 or 1156.7 (Montebello Rose Company, Inc. (1981) 119 Cal.App.3d 1.) Only agricultural employees or labor organizations acting in their behalf may file a petition seeking an election (Labor Code section 1156.3). Although the potential conflict exists in attempting to balance section 1156.2 with other statutory provisions, it is clear that at this time the Board does not have the authority to choose one union over another to represent a group of employees.

This is not to say that once an initial determination is made under section 1156.2 of the Act as to the scope of the bargaining unit, the determination can never be changed. In Arco Seed Company, supra, 14 ALRB No. 6, for example, the Board considered the question of whether a certified unit should be abolished because fundamental changes in an employer's operations demonstrated that it was no longer an agricultural employer. Other issues this Board has found appropriate to consider in unit clarification proceedings include whether the identity of the employer has changed (Silva Harvesting (1989) 15 ALRB No. 2), and whether certain employees are within the described unit, e.g. labor contractor employees or clerical employees (Point Sal

Growers and Packers (1983) 9 ALRB No. 57). The National Labor Relations Board has considered issues of accretion in unit clarification cases (e.g., Boston Gas Co., supra), and accretion with all its ramifications may well be an issue that can be considered by this Board in unit clarification proceedings, as well. Because this Board has had very few unit clarification cases come before it, the question of what issues can or cannot be resolved in such proceedings cannot be definitively answered. In the future, the Board may wish to solicit public comments on this question.

DATED: December 31, 1996

IVONNE RAMOS RICHARDSON, Member

MEMBER FRICK, Concurring:

I concur with my colleagues that the identical unit clarification (UC) petitions filed by Oceanview Produce Company (Oceanview) and Bud Antle, Inc./Bud of California (Bud) (collectively, Oceanview/Bud or Petitioners) must be dismissed, as recommended by the Investigative Hearing Examiner (IHE).[7] I write separately for three reasons. First, I believe these petitions raise many issues on which guidance by the Board would be invaluable for future cases; consequently, while the IHE touched upon these issues, a more thorough discussion is warranted. Second, as explained below, my colleagues have failed to point out the chief flaw in Petitioners' argument regarding

[7]Petitioners claim that the IHE is biased against employers and should have disqualified herself from hearing this case. This is similar to other claims of bias which counsel for Petitioners has made in many other cases. Never has the Board found evidence of bias, and there is no evidence of it in this record. As the IHE has pointed out to this counsel many times, the allegation that the IHE always rules against employers has not been shown to be true nor, in any event, would it legally constitute bias. (See IHE decision, fn. 1.)

the application of section 1156.2 of the Agricultural Labor Relations Act (ALRA)[8] to this case, i.e., that the noncontiguous exception to the single unit mandate has already been found to apply. Third, since I believe that the remaining reasons why the petitions must fail are interrelated and cannot be viewed in isolation, I feel that my colleagues have not adequately framed or addressed the issues raised by the Petitioners.

The crux of Petitioners' claim is that Oceanview, Bud, and Dole Fresh Vegetables (DFV) constitute a single employer and, therefore, section 1156.2 of the ALRA, which mandates statewide units except where the employer's operations are two or more noncontiguous geographical areas, requires that the Oceanview and Bud employees be in the same bargaining unit, even at this late date.[9] Because the unique procedural history underlying the present dispute is critical to understanding the context in which it arises, the following history is provided.[10]

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[8]The ALRA is codified at California Labor Code section 1140, et seq.

[9]Section 1156.2 reads:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

[10]While some of this history appears either in the IHE's decision or my colleagues' opinions, it is repeated here to aid comprehension of those portions which do not appear elsewhere.

Local 890 of the International Brotherhood of Teamsters was certified by the Board in 1977 as the exclusive representative of all of Bud's agricultural employees in the State of California, excluding all employees of vacuum cooler plants, employees at a Salinas plastic container manufacturing plant, and all employees who work exclusively outside the State of California. (Bud Antle. Inc. (1977) 3 ALRB No. 7.) After first finding that Bud's operations, which at that time included growing as well as harvesting and packing, were in several noncontiguous geographical areas, the Board found that a statewide unit was nevertheless appropriate due to interchange of employees, similarity in operations, and bargaining history.[11]

On April 19, 1994, the UFW filed a Notice of Intent to Organize (NO) indicating its intent to organize Oceanview's agricultural employees in Ventura County. The UFW filed its petition for certification on May 6, 1994. On April 26, 1994, Field Examiner Mauricio Nuno wrote separate, nearly identical, letters to the Teamsters, UFW, and Oceanview, asking for information concerning the relationship between Dole Fresh Vegetables, Castle & Cooke, Bud, and Oceanview. None of the letters were copied to the other parties. On April 27, 1994, the Teamsters replied, asserting that the Oceanview employees should

[11]ln 1989, another election was held based on a rival union petition filed by the Independent Union of Agricultural Workers. The Teamsters again prevailed and were certified once again on October 20, 1989. At that time, the unit was described as "agricultural employees of the employer in the State of California."

be included in the Teamsters certification with Bud because of the intertwined relationship between DFV, Bud, and Oceanview. The UFW replied on May 9, 1994, though it may have been in response to a later inquiry by the Regional Director, since it followed the filing of the petition for certification. The UFW asserted that Oceanview operated independently and should be considered a separate unit.

The record does not reflect that any response to the Nufio letter was received from Oceanview. However, in Oceanview[1]s responses to the election petition,[12] it affirmatively asserted that the appropriate unit was all of Oceanview[1] s agricultural employees in Ventura County. On May 10, 1994, Regional Director Kerry Donnell wrote to the Teamsters, informing them that he could not conclude, based on the information available to him at the time, that Oceanview was a joint employer with Bud or DFV. He suggested that the election objections or unit clarification procedures, which involve evidentiary hearings, would be more reliable avenues for having the issue resolved. The letter was not served on the other parties, and it is undisputed that Oceanview/Bud was unaware of this correspondence between the Teamsters and the regional office.

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[12]Oceanview filed two amended responses, which differed in the numbers of employees in the unit and the number employed during the pre-petition eligibility period. The last response also addressed a UFW amendment to the petition which added the names of the individuals who owned the assets which, after purchase by Dole, became Oceanview Produce.

The election was held on May 18, 1994. The Teamsters did not intervene or otherwise attempt to challenge the appropriateness of the unit. Though Oceanview filed election objections, it did not object to the appropriateness of the unit. The UFW was certified on March 1, 1995. On April 28, 1995, Oceanview signed a settlement agreement with the UFW, in which Oceanview agreed to recognize the certification as binding and bargain with the UFW, in return for the UFW withdrawing various unfair labor practice charges. The agreement included two dates for prospective bargaining sessions. The record also contains correspondence between Oceanview and the UFW pertaining to proposals and information requests.

As late as August 1, 1995, Oceanview refused to provide information concerning Oceanview's relationship to Bud and DFV, on the grounds that the subsidiary relationship of Bud and Oceanview to DFV did not create an "alter ego" relationship for labor relations purposes. Then, on August 18, 1995, Oceanview wrote to the UFW to express the view that Bud, Oceanview, and DFV are a single entity, at least with respect to Oceanview's harvest operations. This letter also referenced the UC petitions filed on the same date. In the UC petitions, Oceanview and Bud allege that, since Oceanview's inception, the three entities have constituted a single employer, and that this relationship has been strengthened since the 1994 election resulting in the UFW's certification at Oceanview.

Because I would dismiss the petitions regardless of whether Bud and Oceanview are part of a single employer, it is unnecessary to make a finding on that issue. Therefore, the discussion below assumes for the sake of argument that Bud and Oceanview are, as alleged, part of a single employer with DFV.[13]

A. Section 1156.2's Exception For Noncontiguous Geographical Areas Applies In These Circumstances

As noted above, section 1156.2 requires that the Board, when defining a bargaining unit, must create a statewide unit consisting of all of the employer's agricultural employees, unless the employees are employed in two or more noncontiguous geographical areas. One of Petitioners' primary arguments in this case is that the exception to section 1156.2's single unit mandate does not apply because Bud now harvests the crops grown on Oceanview's property and, therefore, Bud and Oceanview's operations in Ventura County are literally contiguous. Petitioners' also assert that Bud's other operations in the county are within the same "single definable agricultural

[13]According to Petitioners' view of the effect of section 1156.2, all agricultural employees of a single employer entity consisting of Bud, Oceanview, and DFV in California must be in a single bargaining unit. Under this theory, any other entities besides Oceanview that share the same relationship to DFV and Bud would also be part of the single employer and, consequently, within the single bargaining unit. The record provides some indication that some such entities may exist. There might also be other entities above DFV in a corporate hierarchy that also would have to be included in the single statewide unit if Petitioners' theory is taken to its logical conclusion. Consequently, even if the Board were to agree with Petitioners' claims, further inquiry would be necessary in order to ensure that the unit clarification sought by the petitions was not underinclusive and, thus, also violative of section 1156.2.

production area" (SDAPA) as Oceanviews operations.[14] These arguments fail to consider a critical aspect of the original certification of the Bud unit.

When the Bud unit was originally certified, the Board found that Bud's operations were in several noncontiguous geographical areas. The Board then exercised its discretion under the express exception in section 1156.2 to determine that, nonetheless, a statewide unit was appropriate. Assuming that section 1156.2 has any force other than during the initial certification process, in light of the original finding that section 1156.2 did not mandate a statewide unit, the acquisition of additional operations in one of the areas in which bargaining unit employees work does not require that those employees be added to the statewide unit. In other words, since the Board was lawfully exercising its discretion when it determined that a statewide Bud unit was appropriate, it also would have had the discretion to determine in 1994, had the issue been properly raised and addressed, whether a separate Oceanview unit was appropriate.

In short, since the single unit mandate of section 1156.2 did not operate at the time the Bud -unit was certified because Bud's operations were in noncontiguous geographical

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[14]Where operations are not literally contiguous, the Board then examines whether the operations are within the same SDAPA. (See John Elmore Farms (1977) 3 ALRB No. 16; Foster Poultry Farms (1987) 13 ALRB No. 5.) The main factors the Board has cited in defining a SDAPA are water supply, labor pool, climate, and other growing conditions.

areas, there is no basis for its operation now, where the only issue is the addition of new operations within one of the noncontiguous areas of operation.

While in many circumstances the addition of new operations in one of the areas where employees in the preexisting unit already worked would warrant the accretion, where, as here, there are competing certifications the considerations are very different.[15] It cannot be seriously argued that the discretionary application of community of interest criteria in the context of a unit clarification petition should ever nullify a certification. In any event, had the issue properly been placed before the Board, it is questionable whether the Bud and Oceanview employees share a sufficient community of interest to warrant the conclusion that a single unit is the most appropriate one.

The work performed by the two groups of employees is very different in nature and location, there is no interchange of employees, there is little uniformity in wages, benefits, and working conditions, and there is no bargaining or other history of being treated as a single group of employees. Moreover, in light of the NLRB's decision in Produce Maaic. Inc. (1993) 311 NLRB 1277, the Bud harvesting employees are probably engaged in mixed work, which would greatly reduce the workability of placement in the same unit as the Oceanview employees, who

[15]Indeed, prior to the Oceanview election, Bud or the Teamsters could have filed a proper UC petition seeking to accrete the Oceanview operation.

perform only work under the jurisdiction of this Board. Therefore, were the issue properly before the Board at this time, the Board might well find that a separate unit is appropriate. In any event, as explained below, the unit clarification process is not the proper forum for Petitioners' claims and Petitioners' have waived the right to raise the issue of the validity of the Oceanview certification.

B. Petitioners' Claims Are Not Appropriate For The Unit Clarification Process

Section 20385 of the Board's regulations[16] allows for petitions to be filed to clarify an existing bargaining unit, inter alia, "where no question concerning representation exists." A "question concerning representations" (QCR) arises where it is necessary to determine who, if anyone, represents a majority of the employees. Such issues of free choice must be resolved through the election process. The IHE, relying on Southern California Water Company (1979) 241 NLRB 771, correctly concluded that the petitions in this case are improper because they raise a QCR.[17]

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[16]The Board's regulations are codified at California Code of Regulations, Title 8, section 20100, et seq.

[17]Petitioners argue that the single unit mandate of section 1156.2 is nevertheless overriding. However, as noted above, assuming the mandate operates outside the initial certification process, the mandate does not operate in the present case because the Bud unit is made up of noncontiguous geographical areas. Moreover, as explained below, Petitioners have waived the right to now argue that section 1156.2 prevents the valid existence of a separate Oceanview unit.

There is another fundamental reason why Petitioners' claims are not appropriately raised in a unit clarification petition. The language of regulation 20385 itself speaks only of questions of unit composition. The issues raised by the petitions here pose questions as to the appropriateness of the Oceanview unit. Section 1156.3(c) of the ALRA expressly states that parties may raise by election objection a claim that the Board improperly determined the geographical scope of the bargaining unit. Similarly, Regulation 20365(a) expressly lists geographical scope of the unit as one of the issues that may be raised by election objections. Thus, the statute and regulations assume that questions of unit appropriateness are to be raised and dealt with either prior to the election (during the processing of the election petition by the Regional Director) or via election objections.

Indeed, this makes perfect sense, as a challenge to the appropriateness of the unit is in effect a challenge to the election itself. There is no dispute that Petitioners here seek to have the Oceanview election declared invalid. The election objections procedure is the proper forum in which to challenge the validity of an election. To allow further challenges at any time thereafter via the unit clarification process would undermine the statutory policy of promoting stability in labor relations. The unit clarification process is designed only to handle less fundamental questions concerning the definition of

the bargaining unit, such as which individuals or job classifications are properly included in the unit.[18]

Petitioners cite several prior Board decisions for the proposition that the single employer issue may be properly raised by way of unit clarification petitions. The single employer issue may be relevant to determining whether certain individuals or job classifications are in the defined geographical scope of the unit, i.e., to determine unit composition. However, in none of the cases cited, few of which even involve unit clarification petitions, was there a question as to the appropriateness of the certified unit.

Petitioners' reliance on Point Sal Growers and Packers (1983) 9 ALRB No. 57 and Hamet Wholesale (1976) 2 ALRB No. 24 is misplaced, since those cases involved only the question of whether specific employees were agricultural employees and, thus, properly within the certified unit. Petitioners' reliance on Arco Seed Company (1988) 14 ALRB No. 6 is misplaced because the issue there was whether, due to changes after the certification, the unit still included any agricultural employees.

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[18]In light of the above discussion, it must be concluded that the Regional Director erred in suggesting that the unit clarification process was an appropriate forum for resolving whether the petitioned for unit was appropriate. Instead, questions of unit appropriateness must be raised by election objection or they are waived. Since Petitioners were unaware of the letter to the Teamsters suggesting that a unit clarification petition was a future option, Petitioners cannot argue that the Board is now estopped from restricting the use of the unit clarification process.

In Silva Harvesting. Inc. (1989) 15 ALRB No. 2, the union sought to clarify the unit to include the employees of three additional entities on the theory that all four constituted a single employer. The IHE found one of the additional entities to be a single employer with the employer named in the certification, and opined that the statute thus required that the employees of both entities must be in the same unit. However, the Board vacated the IHE's decision on procedural grounds, so it is of no precedential value. Nevertheless, it should be noted that the additional entity which the IHE found to be part of a single employer was not in existence at the time of the certification and the petition did not raise a QCR.[19]

In TMY Farms (1976) 2 ALRB No. 58, the Board treated an election objection involving the unit status of labor contractor employees as a request for clarification of the unit. The Board rejected the employer's claim that the employees of a labor contractor should not be included in the unit because the contractor was engaged not by the named employer but by a different partner in a general partnership. The Board then rejected the employer's claim that a separate unit was appropriate due to a lack of community of interest, finding that section 1156.2 mandated that all the employees be in a single unit.

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[19]When originally filed, a QCR did exist due to a pending decertification petition and, consequently, the unit clarification petition was held in abeyance.

While the employer's claim in TMY Farms was couched in terms of unit appropriateness, the Board's treatment of the claim did not actually implicate the appropriateness of the unit as described in the notice of election or the eventual certification. Rather, the issue was in fact one of unit composition, i.e., whether the labor contractor employees were employees of the named employer and, thus, included in the described unit. It is also noteworthy that the employer in TMY Farms raised the unit issues in its election objections so that they could be addressed prior to any certification.

C. Petitioners Have Waived The Right To Challenge The Validity Of The Oceanview Certification

Petitioners argue that the single unit mandate of section 1156.2 is not subject to waiver and, by implication, may be raised at any time. In other words, Petitioners claim that the issue must be addressed irrespective of any regulatory limitations on the use of UC petitions. Petitioners rely chiefly on Joe A. Freitas & Sons v. Food Packers. Processors & Warehousemen (1985) 164 Cal.App.3d 1210.[20]

In Freitas, the court granted the employers' request to vacate an arbitration award because the arbitration was based on a contract with an uncertified union. The union had represented

[20]Petitioners also claim that Point Sal Growers and Packers (1983) 9 ALRB No. 57 and Tani Farms (1984) 10 ALRB No. 5 are conclusive on this issue, but those cases simply involved previously unresolved issues as to whether various individuals, such as drivers and clerical employees, were engaged in "agriculture" and, thus, part of the unit of "all agricultural employees." These cases are therefore inapposite.

the employers' drivers/loaders since before the passage of the ALRA. In 1979, another union was certified by the Board as the representative of the employer's agricultural employees. The uncertified union nevertheless continued to represent the drivers/loaders and the employer continued to recognize the union. Several years later, after losing an arbitration, the employer sought to vacate the award on the grounds that the contract was void by operation of the ALRA. The court agreed, finding that the ALRA operated to void any contract not reached pursuant to a valid Board certification. In what can only be described as dicta, the court when on to state that the de facto splitting of the bargaining unit violated section 1156.2. It is this finding on which Petitioners make their claim that the single unit mandate cannot be waived.

The court reached the section 1156.2 issue only as an alternative analysis, in order to find that, even if the contract was valid but voidable prior to the 1979 certification, the certification made the contract void. The court reasoned that, due to section 1156.2, the certification by operation of law included the drivers/loaders, making their representation by another union clearly unlawful. This reasoning does not carry the implication that the single unit mandate cannot be waived where a party to the election fails to raise it in election objections. Instead, it reflects the more limited finding that the certification of "all agricultural employees of the employer" necessarily included the drivers/loaders. Neither the

appropriateness of a Board-certified bargaining unit nor the validity of an election was at issue.

Petitioners also rely on the following passage from Exeter Packers, Inc. (1983) 9 ALRB No. 76:

> [C]onsidering the time constraints on preelection unit investigations by Regional Directors, we may find it necessary to rely on evidence introduced at hearings on post-election objections or in post-certification party-initiated clarification proceeding's to determine the full scope of a bargaining unit.

(Emphasis added.) The Board stated the above in the context of rejecting the union's argument that the Regional Director's description of the unit should be presumptively appropriate. The Board was thus stating that it would not apply any such presumption when it addressed unit issues. However, the passage does not mean that all issues involving the bargaining unit may be raised in either election objections or unit clarification petitions. Rather, it is most reasonably read to mean simply that the Board will provide full review of any issues concerning the bargaining unit that are raised in the appropriate forum.[21]

In sum, Petitioners have failed to advance any convincing case precedent that establishes that the single unit mandate of section 1156.2 cannot be waived if not raised as an election objection. Nor can such an interpretation be squared

[21]The Board was, of course, fully aware of the requirements of regulation 20385 and gave no indication that those requirements would not limit any future unit clarification proceedings.

with the statutory scheme for reviewing the validity of elections.

Section 1156.3(c) provides the exclusive mechanism for challenging before the Board the validity of an election, i.e., by filing election objections.[22] Section 1158 provides the exclusive mechanism for court review of the validity of an election. That mechanism requires that the challenge be in the form of a technical refusal to bargain, which results in a final Board decision subject to direct review in the courts of appeal. Once this review process is completed or the time for review has passed, the certification becomes final and its validity can no longer be challenged.[23] To allow via a unit clarification petition a challenge based on a claim that could have been raised as an election objection, as Petitioners urge in the present case, would undermine all principles of finality and stability that underlie the statutory scheme.

Here, Petitioners had many opportunities to raise the issue of the propriety of a separate Oceanview unit. First, Petitioners had the opportunity to raise the issue in response to the election petition. Not only did they fail to do so, but

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[22]As noted above, section 1156.3(c) expressly provides for a challenge based on the geographical scope of the bargaining unit.

[23]Of course, a change in the employer's operations that removes the operations from the statutory definition of "agriculture" would divest the Board of jurisdiction altogether. This is because an unlitigated claim regarding subject matter jurisdiction may be raised at any time. In essence, Petitioners claim that the force of section 1156.2 is akin to subject matter jurisdiction, but they have provided no authority for such a dramatic proposition.

Oceanview's response affirmatively supported the propriety of such a bargaining unit. Next, the issue could have been raised as an election objection, but was not. Lastly, assuming that Petitioners would be allowed to raise an issue not included in election objections, the opportunity to engage in a technical refusal to bargain also passed.[24] Therefore, it must be concluded that Petitioners have waived the right to challenge the validity of the Oceanview certification based on section 1156.2.

In sum, even if DFV, Bud, and Oceanview constitute a single employer, the single unit mandate of section 1156.2 did not operate at the time the Bud unit was certified and, therefore, does not operate at this time to require that the Bud and Oceanview units be combined. In addition, Petitioners' claims are not appropriate for the unit clarification process because they raise a QCR and do not involve issues of unit composition which were left unresolved at the time of the certification or were raised by changed circumstances. Lastly, Petitioners have waived the right to challenge the validity of the Oceanview certification by failing to raise the issue by way of election objections and failing to follow the statutory process for review of decisions certifying elections. For these

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[24]In Grow-Art (1983) 9 ALRB No. 67, the Board held that an employer who agrees to recognize the certified union and commences full bargaining has implicitly abandoned any objections it may have raised with regard to the validity of the election. Here, the record shows that Oceanview did agree to recognize the validity of the certification and began bargaining with the UFW.

reasons, I concur that the unit clarification petitions in Case Nos. 95-UC-l-EC(OX) and 95-UC-2-EC must be dismissed.[25]

DATED: December 31, 1996

LINDA A. FRICK, Member

[25]I would deny the UFW's request that the Board award costs and attorneys' fees on the grounds that the petitions are frivolous. The California Supreme Court, in 5am Andrews' Sons v. ALRB (1988) 47 Cal.3d 157, 171-173, has held that the Board does not have authority to award attorneys' fees and costs.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: OCEANVIEW PRODUCE COMPANY, a Division of Dole Fresh Vegetables Company, Inc., Employer-Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative, AND In the Matter of: BUD ANTLE, INC./BUD OF CALIFORNIA, a Division of Dole Fresh Vegetables Company, Inc., Employer-Petitioner, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 890, Certified Bargaining Representative.	)	Case Nos. 95-UC-l-EC (OX) 95-UC-2-EC

Appearances:

Theodore R. Scott
for Petitioners

Carlos Perez
for United Farm Workers

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

Barbara D. Moore, Investigative Hearing Examiner: This case was heard by me on May 20 and 21, 1996, in Oxnard, California.[1] It arises from two Petitions Seeking Clarification of Bargaining Unit/Amendment of Certification filed with the Agricultural Labor Relations Board ("ALRB" or "Board") by Oceanview Produce Company, a division of Dole Fresh Vegetables Company, Inc. ("Oceanview") on August 17, 1995, and by Bud Antle Inc./Bud of California (Bud), a division of Dole Fresh Vegetables Company, Inc. ("Dole"), on August 18, 1995. The petitions were consolidated on October 26, 1995, by the Regional Director of the Board's El Centro Regional Office.[2]

Petitioners and the United Farm Workers of America, AFL-CIO ("UFW"), the certified bargaining representative of Oceanview's agricultural employees, were represented by counsel at the hearing. Both parties were given full opportunity to participate in the hearing, and their requests to file briefs were granted. Based on the

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[1]At the hearing, Petitioners filed a written request for me to disqualify myself. The request asserts that in various cases I have made legal and factual findings adverse to employers which in Petitioners' opinion were insupportable and demonstrate a bias against employers. Assuming arauendo that the decisions contain more legal and factual findings against one party than another, the law is clear that even "...numerous and continuous rulings against a litigant [which are] erroneous, form no ground for a charge of bias or prejudice." (Andrews v. Agricultural Labor Relations Board (1981) 28 Cal. 3d 781.) The appropriate recourse is to seek review of any such findings or rulings. (Id., p. 795) Petitioners' request is denied.

[2]I will use "Petitioners" when referring to Bud and Oceanview jointly.

entire record[3] including my observation of the demeanor of the witnesses, and after careful consideration of the parties' briefs, I make the following findings of fact and conclusions of law.

On October 20, 1989, in case number 89-RC-l-VI, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 890 ("Teamsters") was certified by this Board as the exclusive bargaining representative of all the agricultural employees of Bud in the state of California.[4] On April 19, 1994, the UFW filed an Notice of Intent to Organize ("NO") indicating its intent to organize all the agricultural employees of Oceanview located in Ventura County.

On April 26, 1994, Field Examiner Mauricio Nufio of the El Centro Regional Office wrote to Teamsters seeking information concerning the relationship between Bud and Oceanview and inquiring whether or not

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[3]Citations to the hearing transcript are identified by (page number). Petitioners' and UFW's exhibits are denominated PX number and UFWX number, respectively. I left the record open for Petitioners to obtain declarations authenticating handwritten notes they sought to introduce as part of PX 46 and 46 (a) which Petitioners' counsel represented were provided to him by the El Centro Regional Office pursuant to a Public Records request by Petitioners. I hereby admit as PX 46 (b) the declaration of the Regional Director, copies of two pages of PX 46 (a) part of which had been cut off in photocopying, and the cover letter from Petitioners' counsel dated June 11, 1996.

[4]Although it filed a Statement of Opposition to Bud's petition, Teamsters did not intervene or appear at the hearing. It did, however, file a brief which I have considered since Teamsters' interests could be significally impacted. The brief adds no new arguments but does reflect its opposition to granting the petitions.

Teamsters contended the employees of Oceanview were included in the Bud bargaining unit and covered by the collective bargaining agreement between Bud and Teamsters. (PX 45, pp.44-45.)[5] On that same day, Nuno also wrote Oceanview's counsel requesting information about the relationship among Oceanview, Bud, Dole and Castle & Cooke. (UFWX3) Neither letter was served on, nor copied to, anyone else.[6]

On April 27, 1994, Mike Johnston, Business Agent for Teamsters, replied to the questions posed by Nuno. (PX 45, pp. 5-13.) Among other things, Johnston asserted that both Oceanview and Bud harvested under the Dole label; that he believed the man who made the final decisions regarding the business operations of Bud made similar decisions for Oceanview; that he believed the supervisor of Bud's celery harvest operation reported directly to Oceanview's General Manager; that he believed the same man made the final decisions regarding labor relations and personnel matters for both Bud and Oceanview; that the supervisor of Bud's celery harvest operations sent supervisors who worked for him to "train, direct and evaluate" Oceanview's harvest

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[5]PX 45 consists of numerous documents provided to Petitioners by the Regional Director pursuant to Petitioners' Public Records Act request. There are handwritten page numbers on the bottom of each page to assist in locating specific documents.

[6]Indeed, Petitioners acknowledge they were not aware of the communications between Nuno and Johnston or between the Regional Director and Johnston discussed below. (See Petitioner's Response to UFW[1]s Interim Appeal of Order Denying Motion for Summary Adjudication, p.27.) Thus, Petitioners were not misled into believing they could raise the issue later.

supervisors and had even done such training himself.

Johnston asserted his belief that the "operations of Bud, Dole Fresh Vegetables and Oceanview [were] inextricably intertwined" and that, as a result, Dole, Bud and Oceanview legally constituted a joint employer. Consequently, he contended the ALRB should consider the Teamsters' certification in 89-RC-l-VI as including the Oceanview employees.

On May 6, 1994, the UFW filed a Petition for Certification (PC) in a unit of all the agricultural employees of Oceanview in Ventura County (UFWX4) which it estimated included approximately 600 workers. The following day, Oceanview filed its response "...as'required by Section 20310 of the Board's Regulations." (UFWX5, p.l).

Oceanview[1]s response addressed each paragraph of section 20310. Subparagraph (a)(2) thereof states:

> If the employer contends that the unit sought by the petition is inappropriate, the employer shall additionally, within the time limits set forth in subsection (d) , provide a complete and accurate list of the names and addresses of the employees in the unit the employer contends to be appropriate, together with a written description of that unit.[7]

Oceanview made no claim the unit was not appropriate. To the contrary, it affirmatively asserted the appropriate unit consisted of approximately 647 workers which included all of Oceanview's

[7]The time limit is within 48 hours, extended to the next business day if the due date is a Sunday or legal holiday.

agricultural employees employed in Ventura County.[8] It repeated this position in paragraph 7 where it referred to the UFW's statement in paragraph 7 of the PC that the unit did not include all of Oceanview's employees in California by replying it was unsure which employees were not included because all of them were employed in Ventura County. (Id.)

Further, in responding to paragraphs 3(c) and (d) of the PC, which asserted that no labor organization was currently certified as the exclusive representative of the unit sought and that the PC was not barred by an existing collective bargaining agreement, Oceanview responded only that it objected if the UFW were contending the unit should include workers in Oceanview's packing shed because they were "covered by a certification issued by the NLRB and a current collective bargaining agreement with Teamsters Local 189...." (UFWX5, p.2.) It never mentioned the unit of Bud workers represented by Teamsters Local 890.

On May 10, 1994, several days after Oceanview had already filed its response to the PC, the Regional Director wrote to Teamsters

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[8]On May 9, 1994, Oceanview wrote a corrected response changing the number of workers in the unit to approximately 860. (UFWX6) Thereafter, on May 12, 1994, Oceanview filed still another response pursuant to an amended PC filed by the UFW primarily responding to the naming of certain individuals and contending Oceanview employed approximately 749 workers in the payroll period relevant to the PC. (UFWX8) In each of these three responses, Oceanview took the position that the appropriate unit was all agricultural employees of Oceanview in Ventura County.

indicating that he could not conclude on the basis of Johnston's showing that Bud and Oceanview or Oceanview and Dole were joint employers and that he would not dismiss the PC. (UFWX7) He further stated that: "Situations involving a petition for a unit clarification or post election objections provide a procedure whereby subpoenas can be issued, a hearing conducted and a more reliable evidentiary record can be developed." As with the earlier letter to Johnston, the UFW, Oceanview, Bud and Dole were not made aware of the Regional Director's determination.

Teamsters did not pursue the matter and did not intervene in the subsequent election which was held on May 18, 1994. Although Oceanview filed objections to the election, it did not object to the appropriateness of the unit. Ultimately, on March 1, 1995, the UFW was certified as the exclusive bargaining representative of all the agricultural employees of Oceanview. (UFWX25.)

On April 28, 1995, Oceanview signed a private party settlement with the UFW wherein, in return for the UFW dropping certain unfair labor practice charges, it agreed to recognize the UFW's certification as binding and agreed to meet and bargain in good faith with the UFW. (UFWX12(a) and (b)).[9]

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[9]Although the settlement refers to settling outstanding issues concerning the validity of the UFW's certification and related issues, there is no mention of the appropriateness of the unit, and several months later, on August 1, 1995, Oceanview refused to provide the UFW with certain information on the grounds the subsidiary relationship of Bud and Oceanview to Dole did not create an "alter ego" relationship for labor relations purposes

Then, on August 18, 1995, Oceanview wrote the UFW asserting that Oceanview, Dole and Bud "...are a single entity, at least with respect to Oceanview's harvest operations."[10] [Emphasis added.] The letter further informed the UFW of the filing of the Petitions. (UFWX19.)

The Petitions aver that:

> since the date of the [Oceanview] election there have been changes in the manner in which [its] operations are carried out and controlled, particularly with respect to control over labor relations

and that as a result of these changes, "the single employer/joint employer relationship which has existed at all times material hereto has been strengthened." [Emphasis added.] Consequently, Petitioners now contend, pursuant to section 1156.2 of the Agricultural Labor Relations Act ("ALRA" or "Act"),[11] the agricultural employees of Oceanview must be included in the unit covered by the Teamsters' certification.[12]

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and took the position that the unit represented by the UFW consisted only of Oceanview's agricultural employees which unit was separate from the agricultural employees of Dole's other subsidiaries. (UFWX17, pp.7-8.)

[10]Oceanview also has year round farm or ranch employees.

[11]All section references hereafter are to the California Labor Code unless otherwise noted.

[12]Section 1156.2 provides:

> The bargaining unit shall be all of the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine

Bud subsequently amended its petition on December 20, 1995, to assert that the changes in its relationship with Oceanview and Dole date not just from the May 18, 1994, UFW election as previously contended, but actually date from the October 1989 Teamsters election. It does contend there were further changes in Oceanview's operations after the latter election. Additionally, it amended its original contention that the Regional Director found no merit to the claim in Teamsters' April 27, 1994, letter that it should represent Oceanview's employees and now contends the Regional Director merely advised the Teamsters that he would not dismiss the UFW petition based on Teamsters' claim.[13]

On October 27, 1995, the Board's Executive Secretary issued a notice of hearing. Thereafter, on November 16, 1995, the UFW filed a Motion for Summary Adjudication to Strike Petitions for Unit Clarification and a Memorandum In Support Of the Motion To Strike ("Motion") contending the unit clarification procedure is

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> the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

[13]On January 2 and 3, 1996, the UFW wrote to the Executive Secretary and the Regional Director, respectively, seeking dismissal of the amended petition and contending Bud should not be allowed to alter its prior admission that the Regional Director found no merit in Teamsters' claim. The amendment was made well in advance of the hearing. I find no prejudice to the UFW in permitting the amendment since it has had ample time to prepare its response. Further, I find no merit to the UFW's argument that the Regional Director decided the merits of the Teamster's claim.

inappropriate in this case.

On November 22, 1995, the Acting Executive Secretary issued an Order to Show Cause ("OSC") why the UFW's Motion should not be granted. On November 28, 1995, the Executive Secretary appointed Chief Administrative Law Judge Thomas Sobel as Investigative Hearing Examiner ("IHE") and transferred the OSC to him for ruling. Petitioners filed two responses to the OSC, one entitled an Initial Response, which primarily addressed procedural arguments, but which also included arguments on the merits, and a later response which more fully addressed the merits of the UFW's motion.

On December 8, 1995, IHE Sobel denied the UFW's Motion opining that although the case of Southern California Water Company (1979) 241 NLRB 771 "powerfully argue [d] for dismissal of the petitions,..." he preferred to consider Petitioners' arguments in the context of a more complete record.[14] On December 12, 1995, the UFW filed a Special Request For Interim Appeal of Order Denying Motion For Summary Adjudication which the Board denied without prejudice in Admin. Order No. 96-2 on February 5, 1996.

On April 18, 1996, Teamsters filed a Statement of Opposition to Bud's petition objecting to the unit clarification procedure being used to defeat the wishes of the Oceanview employees expressed in a secret ballot election. It asserted the procedure was especially

[14]He did not consider any of the declared "facts" in the Motion because the OSC did not alert Petitioners they should controvert the UFW's factual assertions.

inappropriate since neither it, Bud nor Oceanview opposed the UFW's petition on the grounds it conflicted with Teamsters' certification of Bud employees.

After various continuances, the matter ultimately went to hearing as described above. The threshold issue is whether the petitions should be dismissed because they raise a question concerning representation (QCR) and thus are not permitted by section 20385 of the Board's regulations.

Oceanview came into existence 1989 when Dole Food Company, through Dole Fresh Vegetables Company, Inc., and Bud, purchased Naumann Brothers.[15] Oceanview was established to grow, pack and ship celery, broccoli, strawberries and leaf lettuce which were the same commodities handled by Naumann Brothers. Initially, as discussed below, Oceanview harvested much of the winter crops it grew, but it has since discontinued harvesting most, if not all, of them.

Danny Urbano was in charge of labor relations for Bud at the time Oceanview was established and has been responsible for labor relations at Oceanview since its inception. Neither Bud nor Teamsters sought to lay claim to Oceanview's employees until well after the UFW filed its PC in 1994, some five years after Dole bought Oceanview.

Although the collective bargaining agreement between Bud and

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[15]Prior to Dole acquiring all the stock of Bud, said shares were owned by Castle & Cooke Fresh Vegetables, Inc. and before that by Castle & Cooke, Inc. (PX 1 and PX 3.) Thus, Dole owns both Oceanview and Bud.

Teamsters which took effect in 1992 covered all the employees of Bud statewide, its terms did not govern Oceanview's workers. (UFWX26) They were not paid the same wages, except that the wages of Oceanview's celery harvesters were raised to match that of Bud's harvesters to encourage rasing the quality of the Oceanview pack. (32-31,55,89.) Some Bud foremen were also brought in after being laid off for the season from Bud to help the Oceanview foremen conform the quality of the Oceanview pack to the Bud pack. Bud supervisors also participated in this effort. (32-34; 79-80.)

Oceanview workers did not have the same benefits as Bud employees. (88-89; 219.) For example, Oceanview workers had no pension as provided for in the agreement for some of Bud's workers and may not have the same holidays as Bud employees. Although he was in charge of labor relations for both companies, Danny Urbano was not sure on this point. (220.) Bud and Oceanview have different disciplinary policies although they may have the same policies on terminations. (54,84.) It is difficult to tell since there was contradictory testimony as to who could terminate some Oceanview workers.

Oceanview employees were not required to join the Teamsters even though the agreement required membership. Teamsters did not represent Oceanview employees' grievances. In short, neither Bud nor Teamsters ever acted as if they believed the Oceanview workers belonged in the unit represented by Teamsters.

Additionally, Bud and Oceanview operate in different spheres. Bud is a harvest company only. It follows the sun, harvesting for various growers in Salinas, Santa Maria, Ventura County, Blythe, the Imperial Valley and Arizona as the seasons progress. (225-231.) Oceanview, in contrast, has operations only in Ventura County where it primarily grows and harvests its own crops although it grows summer crops for harvest by others. Bud sometimes also harvests crops grown by Oceanview. As noted above, Oceanview has discontinued most if not all harvesting with its direct employees. Also, Oceanview has a contingent of year-round farm or ranch workers (ranging from an initial high of 100 workers to a reduced contingent of about 80) consisting of irrigators, land-preparation workers, tractor drivers and shop maintenance workers whereas Bud has almost exclusively harvest workers.[16]

Section 20385 of the Board's regulations provides for clarification of an existing bargaining unit to resolve questions of unit composition left unresolved at the time of the certification or raised by changed circumstances since that time—so long as no question concerning representation ("QCR") exists. It is modeled on the rules of the National Labor Relations Board ("NLRB" or "national board"") which also prohibit petitions for clarification or amendment

[16]I have set forth only the facts necessary to resolve the initial issues. There are additional facts in the record regarding the single employer issue which are unnecessary to set forth here in view of my conclusions below.

of certification where there is a QCR. (NLRB Rules and Regulations and Statements of Procedure (1992), Section 102.60 (b)) .

Principally relying on Southern California Water Company (SCWC) (1979) 241 NLRB 771, the UFW contends that the consolidated petitions raise a question concerning representation and therefore should be dismissed. Petitioners counter that every unit clarification by its nature affects representation. But Petitioners' stance begs the question since its construction of the regulations nullifies the limitation in section 20385 which violates the fundamental precept of statutory construction which is to afford meaning to each word. It also ignores NLRB precedent which similarly distinguishes between those cases where there is a QCR and others where there is not

At least as far back as 1942, the NLRB held the question of which of two unions represents a group of employees raises a QCR. (Pennsylvania Shipyards, Inc. (Shipyards) (1942) 40 NLRB 1300.) Shipyards, however, did not involve a petition for unit clarification. SCWC does, and addresses the issue in circumstances quite similar to the instant case.

In SCWC, the NLRB certified the United Steelworkers as the representative of the service and maintenance employees of California Cities Water Company at various locations in southern California. Some eight years later, in 1977, it certified the International Brotherhood of Electrical Workers as the representative of water distribution employees, including servicemen and maintenance

employees, of the Eastern Division of the Southern California Water Company.

Between 1976 and August 11, 1978, California Cities Water Company was a wholly owned subsidiary of the Southern California Water Company. On the latter date, the two companies merged, and Cities Water Company was dissolved. Thereafter, Southern California Water Company filed a petition to clarify the IBEW certification to include the service and maintenance employees of the former Cities Water Company.

The NLRB began its examination of the appropriateness of the unit clarification petition by observing that it would have the effect of consolidating two existing certified units—each represented by a different union. It noted that although California Cities Water Company had been dissolved, that fact did not abrogate the existing Steelworkers' certification because "...[a] certification cannot be revoked unless a majority of employees in the appropriate unit manifest their intent in that regard." (at p. 772.)

Thus, although the case presented changed circumstances relating to the Employer's organization, the NLRB found other factors paramount. In its words:

> Inclusion of the [Cities Water Company employees into the IBEW certification] would therefore have the effect of the Board imposing the IBEW on the [Cities Water Company] employees, in spite of their having chosen - in a Board election - to be represented by the Steelworkers. The Board would thus be administratively nullifying a

> certification which, was conferred as the result of a representation proceeding. We are therefore in agreement that the Employer has Invoked, the inappropriate procedure here; for it requests that we engage in a unit determination process which, given the existence of the Steelworkers certification, would have representational consequences. [Emphasis added.]

Similarly, in the case at bar, the effect of the clarification sought by Petitioners would be to nullify this Board's certification of the UFW as the exclusive collective bargaining representative of Oceanview's agricultural employees. Thus, the instant petitions have the same representational consequences as those which caused the NLRB to dismiss the petition in SCWC.

Petitioners argue that precedent developed under the National Labor Relations Act ("NLRA") is inapplicable because the NLRB has substantial latitude to establish appropriate units whereas this Board is constrained by section 1156.2. Thus, they assert, if, as they contend, Bud, Oceanview and Dole constitute a single employer, then all the agricultural employees of each entity must be included in one unit and that unit is the Bud unit since it was established before the Oceanview unit and includes all agricultural employees of Bud in the state of California.[17]

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[17]While it is beyond the scope of this case, Petitioners' raise the specter that there may be other entities which have the same alleged single employer relationship with Dole so that the agricultural employees of all such entities should be clarified into a single unit. (See, PX1 and PX 2, each containing a letter

Petitioners assert that since the single employer relationship pre-dated the UFW election, the unit of Oceanview employees was unlawful, the Oceanview election was a "rogue" election, and the Board unlawfully certified the UFW. Therefore, they contend, the certification was void ab initio which distinguishes this case from SCWC and other cases cited by the UFW because in those cases the competing certifications were valid.[18] (Petitioners' Response On The Merits To UFW's Motion For Summary Adjudication To Strike Petitions For Unit Clarification, pp. 9-10.

While agreeing that under section 1156.2 this Board is not bound to establish a single unit where the agricultural employees of the employer are employed in two or more noncontiguous

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dated November 6, 1991, from a corporate officer addressed to Bud, Dole, Oceanview and 6 other entities.) David Grau initally testified that all the divisions of Dole are set up the same way as Bud and Oceanview regarding handling funds, but later indicated he could really only speak for Oceanview.

[18]See for example, Ronald A. popp. Inc. (Popp) (1978) 237 NLRB 1293, and Westinghouse Electric Corporation (1963) 144 NLRB 455 where the NLRB refused to clarify units which would result in employees who had elected one union being placed in a unit represented by another union. The number of workers to be added or the number of workers in the existing units was not an issue. See also James A. McBradv (1980) 247 NLRB 42 where the NLRB dismissed a unit clarification petition filed by a union to add roofers to a unit of sheet metal workers covered by a contract which did not include the roofers. The NLRB found there was a QCR and ordered an election. Contrary to Petitioners' assertion, the fact that there were 25 roofers and 7 sheet metal workers, although noted, was not discussed as being a significant factor in the NLRB's decision.

geographical areas, Petitioners assert that exception is irrelevant here because the Teamsters' certification is statewide. (Petitioners' post-hearing brief, p. 7.) I disagree with Petitioners' assertion and find the exception is applicable because Oceanview's employees work only in Ventura county which clearly is not contiguous to many of the areas where Bud's employees work, e.g. Salinas, Blythe, the Imperial Valley, Santa Maria and Arizona.[19]

Consequently, I disagree with Petitioners' contention that the Board is prohibited from relying on NLRA precedent because of the ALRA restrictions on appropriate units. Thus, the normal rule that, as required by section 1148 of the ALRA, this Board is bound by such precedent unless it is inapplicable governs this case. The considerations underlying the NLRB cases are especially applicable here because the ALRA places even more emphasis on employee choice than does the NLRA.

Under the ALRA, the only way a labor organization may be certified is through a secret ballot election, and the labor organization must initiate the process whereas under the NLRA, an employer may voluntarily recognize a union as the exclusive representative or petition for an election. (Arco Seed Company ("Arco") (1988) 14 ALRB No. 6.) Under the ALRA, an employer may

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[19]Nor are these operations located in a single definable agricultural production area. Foster Poultry Farms (1987) 13 ALRB No. 5; Cream of the Crop (1984) 10 ALRB No. 43.

not refuse to bargain with a union simply because it doubts the union still has majority support whereas under the NLRA it could. (Ventura County Fruit Growers (1984) 10 ALRB No. 45.) These deliberate deviations from the NLRA underscore the critical importance of employee self-determination in the ALRA.

In addition to the above arguments, Petitioners cite various decisions under this Act to support their contentions that the unit clarification procedure is appropriate in this case. I have carefully considered them but do not find any of them controlling nor, indeed, even applicable since none involve competing certifications as this case does.[20]

Petitioners rely heavily on Arco to counter the UFW's argument that it would be improper for the Board to abolish an

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[20]See Joe A. Freitas & Sons v. Food Packers, Processors and Warehousemen Local 865, International Brotherhood of Teamsters. Chauffeurs, Warehousemen and Helpers of America (Freitas) (1985) 164 C.A. 3d 1210 [211 Cal. Rptr.157] (non-certified union could not represent employees who had elected another union as their representative); TMY Farms (1976) 2 ALRB No. 58 and Hemet Wholesale (Hemet) (1976) 2 ALRB No. 24, (election objections filed, and non-outcome determinative challenged ballots construed as unit clarification petitions to determine if workers were agricultural and should be included in unit. See also Pappas and Company (1984) 10 ALRB No. 27, (Regional Director determined as part of challenged ballot report that single employer relationship existed, and workers were eligible to vote); and Silva Harvesting, Inc. (Silva) (1989) 15 ALRB No. 2, (whether changed circumstance as to single employer relationship since the election warrant unit clarification). Silva affirms the rule that the pendency of a QCR prohibits use of the unit clarification procedure. Petitioners cite portions of the IHE decision in Silva. but the Board vacated the IHE decision so it is improper to cite the decision's analysis or findings.

existing certified unit because to do so would nullify the worker's choice of their exclusive bargaining representation and such self-determination is the hallmark of the ALRA. Petitioners argue that Arco stands for the proposition that the unit clarification procedure is appropriate to resolve whether an employer's changed circumstances require abolishing a unit. The situation in Arco, however, was quite different from that in the case at bar, and thus I find Arco is distinguishable.

In Arco, long after the unit was certified, the company radically changed the nature of its entire business, and the question was whether the few remaining employees were agricultural. The issue was whether the unit had to be abolished because the workers were no longer agricultural employees. That is a fundamentally different question than the one posed here which is whether the UFW's certification will be replaced by the Teamsters' certification. The latter question raises a QCR; the former is a question of whether the ALRB continued to have jurisdiction.

Further, in Arco the Board addressed changed circumstances in the company's operations arising long after the election. In this case, Petitioners' position is that Bud, Dole and Oceanview were a single employer long before the UFW election, but changes since the election have strengethed the relationship. Their argument brings to mind the adage that one cannot be a little bit

pregnant. Similarly, entities either are or are not a single employer. If they were already a single employer as they contend, then this case is clearly different than Arco, where the issue of appropriateness of the unit arose only because of changes after the election which fundamentally altered the circumstances which existed at the time of the election. There, the employer obviously had no prior opportunity to raise its contention. In contrast, here, according to Petitioners, the essential circumstance has remained the same—Bud, Dole and Oceanview were a single employer at the time of the election and still are today.

The time for Petitioners to have raised the issue of the appropriateness of the unit was when the UFW filed its PC or at the time Oceanview filed its election objections.[21] The entire

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[21] The Board has held previously that matters which could have been raised as election objections and were not cannot be raised later. In Leminor, Inc. (1993) 19 ALRB No. 8, the Board dismissed the employer's petition to amend the certification which petition alleged that certain entities should be deleted as employer. The Board refused to entertain the petition since the RD determined the identity at the time the PC was filed, and no evidence contrary to his finding of single employer status was presented.

Leminor argued it did not raise the ownership issue by way of election objection because it was not challenging the unit composition but only the identity of the employers. The Board opined that the RD resolved both the scope of the unit and the identity of the employer prior to the election, and Leminor did not allege changed circumstances since the election. Thus, it was inappropriate for Leminor to seek amendment of the certification under section 20385. Leminor is distinguishable from this case because there the RD had resolved the issue at the time of the election. Nevertheless, the principle articulated by the Board that issues should be raised through the appropriate procedures as

thrust of the ALRA is to resolve representation issues quickly in the interest of stabilizing labor relations. Thus, elections are to be held within 7 days, and election objections must be filed within 5 days after the election.

Oceanview had full opportunity to challenge the appropriateness of the unit or to assert the existence of a preexisting certified representative at the time of the election. It did neither, and it again failed to raise the issue in its election objections. Instead, it waited until some 15 months after the election and nearly 6 months after the Board ultimately certified the UFW, during which time it agreed with the UFW to "recognize" the Board's certification as valid.

Not only do the Board's rules preclude consideration of the unit clarification petitions because they raise a QCR, but it would also be manifestly unfair to consider them now in light of Petitioners' lengthy delay in raising the issue. To do so would undermine both the Board's representation procedures and would run contrary to the ALRA's stricture to enhance stability in labor relations. Petitioners sat on their rights, and the time to raise the issue presented in their petitions is past.[22]

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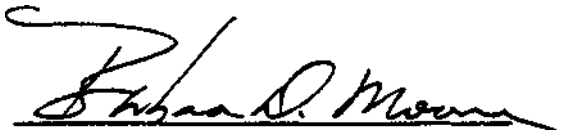
they arise is applicable to the instant case.

[22]The Regional Director's letter to Teamsters regarding the existence of the unit clarification and election objection procedures to adduce evidence to resolve questions of single employers status does not prohibit the Board from determining that these petitions should be dismissed. The Board is not estopped

Based on the foregoing, I recommend the petitions be DISMISSED.

Dated: August 1, 1996



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from reaching such a conclusion on the basis that Petitioners detrimentally relied on the Regional Director's remarks because Petitioners were not aware of the letter at the time of filing its response or its election objections. Further, the Board has always reserved the right to make the final decision in representation matters even if its conclusion differs from that of the Regional Director. Lastly, to the extent the letter can be construed as a decision by the Regional Director that the unit clarification and election objection procedures were equally available, clearly the Board's regulations prohibiting consideration of unit clarification petitions when there is a QCR prevail. Moreover, even if the petitions were proper, Petitioners have still delayed unreasonably since they contend Bud, Dole and Oceanview were always a single employer.