STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUN WORLD INTERNATIONAL, LLC, a.k.a. SUN WORLD, Employer, and UNITED FARM WORKERS OF AMERICA, Petitioner.	)	Case No. 2010-UC-001-VIS 38 ALRB No. 3 (April 18 , 2012)

DECISION AND ORDER

On September 13, 2010, the United Farm Workers of America (UFW or Petitioner) filed a Petition for Unit Clarification and/or Amendment of the Bargaining Unit under certification numbers 75-RC-8-M, 75-RC-42-R, 75-RC-48-C, 75-RC-57-R, 75-RC-58-R and 75-RC-15-R. The UFW requests that the geographical scope of the certifications and the name of the employer be clarified and/or amended to be designated as: all agricultural employees of Sun World International, LLC (Employer or Sun World) in the State of California, to be accomplished by combining in one statewide bargaining unit the operations existing at the time of issuance of the multiple Agricultural Labor Relations Board (ALRB) certifications listed above with all agricultural operations subsequently acquired by Sun World.

On October 26, 2011, a hearing was conducted on the Petition for Unit Clarification and, on February 28, 2012, the Investigative Hearing Examiner (IHE) issued

the attached decision. The IHE recommended that the UFW's Petition for Unit Clarification be dismissed in its entirety.

The Agricultural Labor Relations Board has considered the record and the IHE's decision in light of the exceptions filed by the UFW and affirms the IHE's findings of fact and conclusions of law, and adopts his recommended decision except as modified below.

DISCUSSION

As the IHE describes, there are three categories of Sun World agricultural operations: (1) Existing unionized operations covered by two active certifications assumed by Sun World, 75-RC-57-R (originally Coachella Growers, designated as "all agricultural employees of employer in Imperial Valley"), and 75-RC-58-R (originally Cal Pac Citrus, designated as "all agricultural employees of employer in Riverside County"), with up to 60 workers combined; (2) Existing non-union operations in the Coachella Valley (1200 employees during harvest), in Kern County (up to 7000 at peak), and in Oxnard (run by a management company, 150 workers at peak); and (3) Unionized operations which are no longer active (75-RC-8-M, 75-RC-42-R, 75-RC-48-C, 75-RC-15-R). In these four certifications the bargaining unit was described as "all agricultural employees of the employer in the State of California," with the exception that in 75-RC-15-R the unit excluded "Sun World Packing Corporation in the Coachella Valley."

As the IHE observed, this case raises two primary issues:

1. The extent to which a unit clarification petition can be used to expand the reach of an ALRB certification to include operations that did not exist when the union was originally certified.

Central to the UFW's position is its contention that a previous certification as the collective bargaining representative of "all agricultural employees of an employer in the State of California" means that if an employer later employs additional agricultural employees anywhere in the State of California, regardless of where they work, the type of work they do or whether they voted in the original election, the UFW is entitled to be their representative. Moreover, the UFW asserts that this is true even as to certifications where the original operations covered by the certifications have been discontinued.

We do not agree. Such unit descriptions simply reflect that at the time of the certification the unit included all of the employer's operations in the state. It has no independent legal significance regarding the appropriateness of the inclusion of any after acquired operations. We therefore agree with the IHE that unit clarification petitions seeking to add operations to the original certification must be analyzed in the same manner as initial unit determinations.[1] In addition, we affirm the IHE's conclusion that

[1] Section 1156.2 of the Agricultural Labor Relations Act (ALRA) limits the Board's discretion to designate the appropriate bargaining units. It is only when the employer operates in two or more non-contiguous geographical areas that the Board has discretion to select the appropriate unit(s) rather than a unit that includes all of the employer's agricultural employees. The IHE stated in his analysis that the Board has interpreted section 1156.2 as supporting a policy favoring statewide bargaining units. In *Coastal Berry, LLC* (2000) 26 ALRB No. 2, the Board clarified that there was no statutory presumption or preference in favor of a statewide unit when the operations are in two or more noncontiguous areas. (*Id*. at p. 20). "Rather, the Board is free to determine in each case based on all reasonable and relevant factors, whether a statewide unit or multiple units are more appropriate." (*Id*. at p. 20.)

none of Sun World's existing non-union operations are appropriate accretions to either of the two active certifications. [2]

2. The status that should be given to Board certifications covering farming operations that have become inactive or dormant.

The IHE recommended that where the existing certifications have long been inactive or dormant, the Board use its discretion by refusing to extend those certifications to noncontiguous operations regardless of their character. As none of the present Sun World operations are on land contiguous to the inactive certifications, the IHE concluded that those certifications cannot be invoked to extend the bargaining unit. Conversely, the IHE concluded that there would be no obstacle to the accretion of contiguous operations.

We agree with the IHE that it would not be appropriate to accrete any of Sun World's present operations to the inactive certifications. However, we believe that his recommended holding is overbroad. His conclusion that contiguous accretions would be acceptable is likely based on the assumption that in those circumstances it would constitute a

[2] Because the IHE concluded that there was no community of interest between Sun World's current unionized operations and its non-union operations in Kern County, the Coachella Valley and Oxnard, the IHE found it was unnecessary to consider Sun World's arguments based on the National Labor Relations Board's (NLRB) accretion doctrine. The NLRB has defined accretion as "the addition of a relatively small group of employees to an existing unit." (*Safety Carrier, Inc*. (1992) 306 NLRB 960, 969.) The NLRB has held that "accretion is inappropriate if the employees at the additional facilities numerically overshadow the employees at the time of the election." (*Superior Protection, Inc.* (2004) 341 NLRB 267, 268.) The ALRB has not had occasion to determine if the NLRB's precedents on accretion are applicable under the ALRA and it is not necessary to do so in this case because we have found the requested accretions to be inappropriate for other reasons. However, we note that the UFW is seeking to accrete operations ranging from 150 to 7,000 employees to the approximately 60 employees covered by the Blythe certifications.

revival of the dormant operations. Conversely, he concluded that this could not be true as to noncontiguous operations. However, we cannot rule out the possibility that there could be circumstances where operations are revived in noncontiguous areas, particularly where relatively little time has passed since the discontinuance of the original operations. In the present case the original operations have been discontinued for periods ranging from 10 to 29 years and there is no evidence in the record from which to conclude that the operations sought to be accreted could be considered a revival of the discontinued operations. Therefore, we affirm the IHE's conclusion that the inactive certifications cannot be the basis for any of the accretions sought by the UFW in this case.

ORDER

The decision of the IHE is affirmed, consistent with the above discussion. The UFW's Petition for Unit Clarification is dismissed in its entirety.[3]

DATED: April 18, 2012

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

[3] The dismissal of the petition does not preclude future unit clarification petitions based upon changed circumstances or issues not litigated in the present case.

CASE SUMMARY

SUN WORLD INTERNATIONAL, LLC **38 ALRB No. 3**
(United Farm Workers of America) Case No. 2010-UC-001-VIS

Background

On September 13, 2010, the United Farm Workers of America (UFW) filed a Petition for Unit Clarification (UC Petition) under six certifications issued in the 1970's. Four of the certifications covered operations that had become inactive. The UFW requested that the geographic scope and name of employer be clarified as: "all agricultural employees of Sun World International, LLC (Employer) in the State of California." The UFW sought to combine operations existing at the time the old certifications were issued with all operations subsequently acquired by Employer into one statewide unit.

IHE Decision

The Investigative Hearing Examiner (IHE) recommended that the UC Petition be dismissed in its entirety. The IHE's decision explored two primary issues: 1) the status that should be given to certifications covering farming operations that have become inactive, and 2) the extent to which a UC Petition can be used to expand the reach of a certification to include operations that did not exist when the union was originally certified. With respect to the first issue, the IHE recommended that where the existing certifications have long been inactive, the Board use its discretion by refusing to extend those certifications to noncontiguous operations. With respect to the second issue, the IHE concluded that the propriety of accreting new operations must be analyzed in the same manner as initial unit determinations regardless of whether the original unit was designated as "statewide."

Board Decision

The Board adopted the IHE's decision with several clarifications. First, while the Board agreed that it would not be proper to accrete any of Employer's present operations to the inactive certifications in the instant case, the Board found the IHE's recommended holding was overbroad and that in limited circumstances it may be appropriate to accrete noncontiguous operations. Second, the Board clarified that the designation of a "statewide" bargaining unit merely reflects that at the time of certification the unit included all of an employer's operations in California, and that it has no independent legal significance regarding the inclusion of after-acquired operations. Finally, while the Board found it was not necessary to determine whether NLRB precedent on accretion of operations where the number of employees is larger than in the original bargaining unit was applicable in this case, the Board noted that accretions with similar proportions to that being sought by the UFW have been found to be inappropriate by the NLRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: SUN WORLD INTERNATIONAL, LLC, a.k.a. SUN WORLD Employer, and UNITED FARM WORKERS OF AMERICA Petitioner.	**Case No. 2010-UC-001-VI**

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DECISION OF INVESTIGATIVE HEARING EXAMINER

JAMES WOLPMAN: This Petition for Unit Clarification was heard in Visalia, California on October 26, 2011.

I. ISSUE

The Petitioner, United Farm Workers of America (UFW), requests the Board to clarify six outstanding certifications, covering operations for which it was previously certified, to establish a single statewide unit of all agricultural employees of Sun World International, LLC.

The Employer contends that such a unit is inappropriate because four of the certifications cover operations that no longer exist and the two active certifications are confined to operations in distinct geographical areas and lack any community of interest with its current operations elsewhere in the State of California.

II. FINDINGS OF FACT

A. The Six Certifications

The certifications on which the UFW relies in asserting its claim to a single statewide unit are:

1. **75-RC-42-R**, issued April 25, 1978, pursuant to the decision of the Board in 4 ALRB No. 23, in which the UFW was certified at Sun World Packing Corporation as "the exclusive bargaining representative all agricultural employees of Sun World Packing Corporation in the State of California." (Pet. Ex. 1(E)) Pursuant to this certification, the UFW entered into several collective bargaining agreements with Sun World, Inc., the most recent of which expired on January 31 2002. (Pet. Ex. 1(F).) The employer contends that the operations covered by the

agreement were discontinued and that it presently has no employees covered by the certification.

2. **75-RC-15-R**, issued April 5, 1977, the UFW was certified at Sun World Marketing/Sun World Packing/Sun World Produce/Abatti, as the exclusive bargaining representative for "All agricultural employees of the employer in the State of California, excluding Sun World Packing Corporation in the Coachella Valley." (Pet. Ex. 1(G)) The employer contends that the operations covered by the agreement were discontinued in 1994 and that there are presently no employees covered by the certification.

3. **75-RC-8-M**, issued October 5, 1975, pursuant to the decision of the Board in 1 ALRB No. 2, in which the UFW was certified at Interharvest, Inc. as "the representative of all agricultural employees of the employer in the State of California." At some point Sun Harvest, Inc. succeeded Interharvest and entered into a collective bargaining agreement with the UFW acknowledging this certification. (Pet. Ex. 1(I)(J)(K)) The agreement expired on August 31, 1982. The employer contends that thereafter the operations covered by the agreement were discontinued and that presently there are no employees covered by the certification.

4. **75-RC-48-C** issued January 27, 1976, in which the UFW was certified at Maggio Tostada, Inc. as the representative of all agricultural employees of the employer in the State of California. At some point Sun World, Inc. acquired the vegetable operations of Maggio Tostada, and entered into a series of collective

bargaining agreements with the UFW acknowledging this certification. The last agreement expired on January 31, 1986. (Pet. Ex. 1(H)) The employer contends that thereafter the operations covered by the agreement were discontinued and that presently it has no employees covered by the certification.

5. **75-RC-57-R**, issued January 22, 1976, pursuant to the decision of the Board in 2 ALRB No. 17, in which the UFW was certified at Coachella Growers Inc. as "bargaining representative for all agricultural employees of employer in Imperial Valley." (Pet. Ex. 1(A)) The parties acknowledge that at some point this certification was assumed by SWI, LLC, and that the UFW currently represents employees working under that certification. (Pet. Exs. 1(B) & Pet. Ex. 6 (Avila Declaration))

6. **75-RC-58-R**, issued January 22, 1976, pursuant to the decision of the Board in 2 ALRB No. 18, in which the UFW was certified at Cal Pac Citrus Co. as "bargaining representative for all agricultural employees of employer in Riverside County." (Pet. Ex. 1(C)) The parties acknowledge that at some point this certification was assumed by Sun Desert, Inc. and later by SWI, LLC; and that the UFW currently represents employees working under that certification. (Pet. Ex. 1(D))

B. The History of Employer's Operations

In corporate documents, the employer portrays itself as a family of business enterprises engaged in agriculture, in one form or another, since 1976. (Pet. Ex.

5(27)(29); see also Pet. Ex. 1(K)(L))[1] Its history, however, is not one of smooth and continuous evolution; rather, it is marked by several fundamental shifts in focus. First, as a packer, marketer, and sometimes harvester of the crops for other growers, then as an actual commodity producer, and finally to its current status as a grower and distributor of specialty bred and branded produce and fruit. Along the way, some Sun World entities were formally dissolved or simply fell by the wayside, while others took over.[2]

That changing, shifting history is the backdrop against which the scope and validity of the six certifications here at issue must be judged.

It begins in 1975 or 1976 when two members of the Sun World family—Sun World Marketing and Sun World Packing—started packing and marketing a wide variety of fresh fruit and vegetables for other growers in farming areas scattered throughout California. (Pet. Exs. 6 (Avila Declaration) & 5(27)) Two

[1] The voluminous exhibits introduced by the Union are a mixture of argument, opinion, fact and hearsay. Much of that hearsay was not controverted. These factual findings rely on hearsay evidence to the degree that I found it to be reliable under the standard adopted by the California Supreme Court in *Triple E Produce Corp. v. ALRB* (1983) 35 Cal.3d 42. (See my Order Formally Admitting Exhibits into Evidence, ¶ 2, dated Nov. 15, 2011.)

[2] In the course of this proceeding the names of many Sun World entities appear—Sun World Packing Corporation, Sun World Marketing/Sun World Produce, Sun World Harvesting, Inc., Sun World Citrus, Sun Desert, Sun World, Inc., Sun World International, Inc, and Sun World International, LLC. Both historically and during the course of the hearing, the parties treated them as different manifestations of one, single entity, which I have termed "Sun World" or "the Sun World family." Thus, while those different business forms may be or have been of importance in other legal contexts, they have functioned under the ALRA as a single integrated enterprise.

certifications—75-RC-42-R (*Sun World Packing*) and 77-RC-15-E (*Sun World Marketing*)—were issued covering their agricultural employees. (Pet. Ex. 1(E)(G))

At some point, early on, Sun World Packing began harvesting citrus for growers in the Coachella Valley. (Pet. Ex. 6 (Avila Declaration)) Those harvesting operations were eventually assumed by Sun World, Inc., which entered into several collective bargaining agreements with the UFW, all of which reference Certification 75-RC-42-R (*Sun World Packing*). (Pet. Ex. 1(F) The last agreement expired in January 2002. According to the Employer, by then, Sun World Packing had already ceased operation; and, since then, neither Sun World, Inc. nor any other entity owned or controlled by the Employer has performed work covered by that certification. (Tr. 97-98, 99-100)

According to Employer, Sun World Marketing ceased doing business in 1994 and, since then, no entity owned or controlled by it has performed any work covered by certification 77-RC-15-E.

In the early 1980s Sun World moved to the next stage—from harvesting and packing for other growers to full-fledged farming. In a joint venture with United Brands, it acquired an interest in and assumed management of Interharvest, a large lettuce grower operating in Salinas and Imperial Valleys. (Pet. Ex. 5(27); Tr. 101) The entity created to manage the new operation—Sun Harvest, Inc.—assumed responsibility for Interharvest's statewide collective bargaining obligation under certification 75-RC-8-M by entering into a collective bargaining agreement with the UFW referencing that certification. (Pet. Ex. 1(I)(J)(K))

The Interharvest venture was not a success, and, with the expiration of the collective bargaining agreement in August 1982, it was terminated. (Pet. Ex. 5(27)) Since then, according to the employer, no entity owned or controlled by it has performed any work covered by certification 75-RC-8-M. (Tr. 101-102)

During the same period, another member of Sun World family, Sun World, Inc.—likewise pursuing the company's new found strategy—acquired the Coachella Valley vegetable operations of Maggio Tostada, Inc. and assumed responsibility for its statewide collective bargaining obligation under certification 75-RC-48-C by entering into a collective bargaining agreement with the UFW referencing that certification. (Pet. Ex. 1(H))

Eventually, as Sun World's operations shifted away from commodity farming, the former Maggio Tostada unit—like that of Interharvest—was discontinued. The last collective bargaining agreement expired in January 1986 (Pet. Ex. 1(H)), and, according to the employer, no entity owned or controlled by it has performed any work covered by certification 75-RC-48-C since 1994. (Tr. 100-101)

In the late 1980s and early 1990s, Sun World moved from generic commodity production to its current status as a grower and distributor of specialty bred and branded produce and fruit—sweet peppers, seedless watermelons, tomatoes, peaches, plums, apricots, a wide variety of citrus, and, most of all, seedless table grapes. (Pet. Ex. 5(27)(28)(29)(30) & (32))

The most significant step in that transformation was its 1989 acquisition of Superior Farming Company, Inc. with its 40,000 acre Kern County operation, devoted primarily to table grapes. That operation had—back in 1977—been the subject of a union election, won by the UFW, but subsequently set aside by the Board. (*Superior Farming Company, Inc.*, 6 ALRB No. 21 (1980))

While Kern County is now the center of the Sun World enterprise, it does maintain smaller operations elsewhere in California. (Pet. Ex. 5(31)) Two of them were acquired from agricultural employers covered by UFW certifications—75-RC-57-R (Coachella Growers Inc.) and 75-RC-58-R (Cal Pac Citrus Co.). In both cases Sun World acknowledged and accepted the certifications. (Pet. Ex. 1(B)(D)) Unlike the certifications already discussed, these two are limited to specific areas of the State: the Coachella Growers' certification runs to "all agricultural employees…in the Imperial Valley," and the Cal Pac Citrus certification to "all agricultural employees…in Riverside County."

Currently, between 30 and 60 employees work for Sun World under the former Coachella Growers certification. (Tr. 89) All are utilized in harvesting lemons on a ranch in the Blythe area. (Tr. 89) Their most recent collective bargaining agreement, which expired August 1, 2011, acknowledges the certification and names Sun World International, LLC, as the current employer. (Pet. Ex. 1(B); Tr. 89-90)

Much the same is true of the former Cal Pac Citrus Co. certification (75-RC-58-R). It was assumed by another member of the Sun World family, Sun

Desert, Inc. The most recent collective bargaining agreement, running from September 1, 2008 to August 1, 2011, acknowledges that certification, and on August 25, 2009, Sun World International adopted the agreement. (Pet. Ex. 1(D)) While it provides for other classifications, according to the employer there is, at present, only one covered employee, whose job is to irrigate the lemon trees harvested by Sun World under the former Coachella Growers Certification. (Tr. 89; Pet. Ex. 6 (Avila Declaration).)

In addition to those two unionized operations and its large non-union operation in Kern County, Sun World currently has an operation in the Coachella Valley (grapes, citrus, sweet peppers, and seedless watermelons) and another in Oxnard (red and yellow sweet peppers). (Pet. Ex. 5(30)) In neither location does it acknowledge UFW jurisdiction.

* * *

The corporate identity of what has so far been described as the Sun World family has likewise undergone several substantial shifts. In 1994, it filed for bankruptcy under Chapter 11, and emerged the following year as Sun World International, Inc., a Division of Cadiz Land Company. (Pet. Ex. 5(3)(4) & 1(K) In 2003, it again sought protection under Chapter 11. (Pet. Ex. 5(5) This time it was acquired by Black Diamond Capital Management, LLP and emerged as Sun World International, LLC. (Pet. Ex. 5(33) During the course of those two bankruptcy proceedings, Sun World shed the variety of corporate titles it had

utilized over the years. Now all of its operations are conducted by Sun World International, LLC. (Pet. Exs. 5(27)(28)(33) & 1(K)(M))

* * *

C. The Size, Content and Conduct of Employer's Various Agricultural Operations

At hearing, ample evidence was introduced concerning each of Sun World's active operations, both union and non-union. Not so for the four inactive certifications. There the evidence is, at best, sketchy. That is so because both the UFW and Sun World—for different reasons—do not consider such evidence relevant: Sun World, because it takes the position that those certifications are null and void, involving operations which no longer exist; the UFW, not only because it believes that the certifications are in full force and effect, but also because it contends that the Board, under §1156.2 of the Act, can look no further and go no deeper than the wording of the certifications themselves, which guarantee its jurisdiction over "all agricultural employees of the employer in the State of California."

With that in mind, the size, the nature of the agricultural work performed, and the interrelationships among Sun World's present and past operations can be examined.

1. Existing Unionized Operations.

The operations covered by the two active certifications—75-RC-57-R (Coachella Growers) and 75-RC-58-R (Cal Pac Citrus)—are confined to a single

crop, lemons (Pet. Ex. 5(30)), and a single location—the area around Blythe in Riverside County. Blythe lies in the Palo Verde Valley, 104 miles over the San Bernardino Mountains to Employer's non-union operations in the Coachella Valley. (Resp. Exs. 1 & 3; Tr. 90)

Sun World harvests, irrigates and prunes lemons on the 300 acres it leases in Blythe. (Tr. 89; Pet. Ex. 5(27)(30)) Other aspects of citrus farming are preformed by a management company. (Tr. 89)

The size of the harvest workforce varies between 30 and 60. (Tr. 89) Using ladders and carrying gunnysacks, harvesters start picking at the top of a tree and work their way down; once they get to the bottom, they take their sacks to a bin. In the course of picking, they are often required to "color sort," leaving lemons that have not yet ripened for later harvesting. The work is strenuous and, besides ladders and sacks, requires gloves, sleeves, clippers, hard hats and safety glasses; some workers wear knee pads and some use back supports. (Tr. 91)

Harvesting is performed under the agreement that arose out of the Coachella Growers Certification (75-RC-57-R), while irrigation, pruning, and tractor driving are covered by the agreement that originated with the Cal Pac certification (75-RC-58-E). That bargaining relationship has a long history, extending back over 15 contracts. (Tr. 89)

The agreement covering harvest workers is tailored to lemons, with rates determined by the height of trees, the need for ladders, and whether or not the lemons are picked for juice. (Tr. 91) There is also a bonus program, unique to

Blythe, that rewards workers, in varying degrees, for work over 500 hours in the course of a calendar year. (Tr. 94-95, 96-97, 102; Pet. Ex. 1(B))

The current operation requires only one irrigator, but harvest workers are entitled to preference for hire in pruning and, when so assigned, are shifted from one agreement to the other. (Pet. Ex. 6 (Avila Declaration); Tr. 89-90) Both agreements adopt UFW pension and medical benefit plans that differ substantially from those at other Sun World operations. The same is true of contract provisions governing holidays and vacations. (Tr. 92, 94-95; Pet. Ex. 1(B)(D))

There is a single supervisor for the entire operation, Pedro Rangel. He has no responsibility for work outside the Blythe area. (Tr. 93-94)

Over the years the workforce has remained constant with little turnover. Employer's Human Relations Director, Rudy Avila, testified that he was unaware of any interchange of employees between the employer's Blythe and Coachella Valley operations. (Tr. 93-94)

2. Existing Non-Union Operations.

The Coachella Valley. The operation nearest to Blythe is located in the Coachella Valley. There, according to Avila, Sun World grows table grapes, along with some sweet peppers and experimental peaches. (Tr. 117, 120)[3] Grapes are grown on 5 different ranches, totaling approximately 1500 acres, near the

[3] While Avila was firm on this point, corporate documents list grapefruit, lemons, seedless watermelons, tangerines, and oranges as well. (Pet. Ex. 5(30)) Since no evidence was introduced concerning those crops, my finding is limited to those addressed in Avila's testimony.

communities of Thermal and Mecca. (Resp. Ex. 1; Tr. 118-119) Sun World also has a cold storage/packing facility in the City of Coachella. (Tr. 120; Pet. Ex. 5(24))

Presently, there are 22 regular employees working primarily in the grape operation as tractor drivers and irrigators; some also do chemical applications. (Tr. 117, 119, 124) The grapes are harvested by farm labor contractors. (Tr. 119-120) During the last harvest, those contractors utilized approximately 1200 workers. (Tr. 117)

Employer's Human Relations Director described the difference between its Coachella grape operation and work in lemons:

> "Table grapes are paid by the hour, with a bonus on the number of boxes picked. And table grapes are paid at $8 an hour. If they pick 30 boxes, then they are paid 30 cents a box additional. If they pick between 31 and 35, they are paid 40 cents for all boxes. If they pick 36 and above, then they are paid 50 cents bonus for all boxes. But it is an hour plus the bonus on the number of boxes picked." (Tr. 92)
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> * * *
>
> "Working in grapes and working in lemons is completely different. Number one, in grapes you don't have to worry about ladders. Nor do you have to worry about the lemon bag. Basically you're picking it and setting it into a tub. The tub goes into a wheelbarrow. You wheel the barrow out to the end of the row and they are packed at the end of the row." (Tr. 92)

After harvest, the grapes are taken to the employer's cold storage facility in the City of Coachella for storage and sale. (Tr. 120)

The differences in supervision, medical and pension benefits, holidays and vacations have already been described, as has the lack of employee interchange.

(Tr. 94-95, 102-103) Nor is there any history of bargaining with the UFW over existing operations in the Coachella Valley.

Kern County. Since its acquisition of Superior Farming's 40,000 acre grape operation in 1989, Sun World's business operations have come to be centered in the southern San Joaquin Valley, near the cities of Bakersfield and Arvin in Kern County. (Resp. Ex. 2) Its primary crop there is table grapes (Tr. 105), but it also grows sweet peppers, seedless watermelons, and stone fruits (apricots, plums, nectarines and peaches) and maintains a packing facility. (Resp. Ex. 5(30))

The Kern County operation is much larger than those at other locations. At peak it employs—on its own or through labor contractors—approximately 7000 workers. (Tr. 105)

The tasks performed by grape workers in Kern County are much the same as those performed by workers in the Coachella Valley; and, as such, they are likewise different from the tasks performed by lemon workers in Blythe. The same is true of supervision, compensation, fringe benefits, holidays, bonuses, vacations, and employee interchange. (Tr. 94, 97, 105) Until recently, there was one significant difference between Kern County and Coachella: Sun World used its own employees in the Kern County grape harvest, rather than those of farm labor contractors. That difference disappeared last season when Sun World began utilizing labor contractors there as well. (Tr. 109-110)

While Sun World has never engaged in direct bargaining with the UFW over its operations in Kern County, the UFW has had some contact with the work done there. (Tr. 106) Back in 1975, the ALRB determined that the grape operation of Superior Farming was an appropriate bargaining unit and conducted an election among its employees. (Resp. Ex. 6) Several years later the UFW certification which resulted from that election was set aside because of problems with balloting (Tr. 109; and see *Superior Farming, Inc*., 6 ALRB No 21 (1980)), and, in 1989, when Sun World acquired Superior Farming, it hired many of its former employees to do the same work they had previously done. (Pet. Ex. 11) Finally, on several occasions in recent years the UFW filed Notices to Take Access and of Intent to Organize at employer's Kern County operations. (Tr. 111-112)

Oxnard. Sun World produces red, yellow and mini sweet peppers in Ventura County at its Oxnard operation. (Tr. 103; Resp. Ex. 2; Pet. Ex. 5(30)) Work there is the responsibility of a management company retained by Sun World—Edward Chell Agricultural Services. (Tr. 103) Chell, in turn, hires farm labor contractors who, at peak, utilize three crews, totaling 150 workers, to grow and harvest the peppers. The only employees on Sun World's payroll who spend time in Oxnard are salaried—a supervisor who oversees the harvest and quality control personnel who occasionally visit to inspect the crops. (Tr. 104)

There is no interchange between labor contractor workers in Oxnard and workers at other Sun World operations, and there is no history of bargaining with the UFW over work preformed at Oxnard. (Tr. 104-105)

3. Unionized Operations that Are No Longer Active

The Interharvest Certification (75-RC-8-M). In 1979, Sun World, in a joint venture with United Brands, acquired Interharvest, Inc., a large Salinas Valley lettuce grower and packer with ancillary operations in King City, Brentwood (Contra Costa County), Firebaugh (Fresno County), Huron (Fresno County), Wheeler Ridge (Kern County), Oxnard (Ventura County), the Imperial Valley, and Arizona. While its primary crop was lettuce, it also grew cauliflower, celery, chili peppers, hay, onions and tomatoes. (Pet. Ex. 1(I); Tr. 101)

In 1975 the UFW was certified as the collective bargaining representative of all Interharvest agricultural employees in the State of California. As such, it entered into a collective bargaining agreement establishing the wages, hours and working conditions for all of those employees, at all of those locations, for all of those crops. (Pet. Ex. 1(I))

With the acquisition of Interharvest the Sun World/United Brands joint venture—incorporated as Sun Harvest, Inc.—assumed the Interharvest certification and signed a collective bargaining agreement with the UFW covering the Interharvest locations it continued to farm (Salinas, King City, the Imperial Valley and Arizona) and the crops it continued to grow (lettuce, celery,

cauliflower, tomatoes) and some others as well (strawberries, broccoli and anis). (Pet. Exs. 1(J) & 5(27))

That agreement contains provisions typical of UFW contacts at large—including those currently in force in Blythe—dealing with pensions, medical benefits, dispute resolution, and the like. Unlike Blythe, however, the Sun Harvest agreement is keyed to row crops, not citrus. (Pet. Ex. 1 (J))

The new venture was not a success, and following the expiration of that first agreement in August 1982, Sun Harvest terminated the entire operation. (Tr. 101: Pet. Ex. 6 (Avila Declaration)) Sun World no longer employs any of the workers or grows any of the crops covered by that agreement. Nor does it have any other kind of operation in the Salinas Valley. (Tr. 102)

The Maggio-Tostada Certification (75-RC-48-C). Maggio-Tostada was a large grower of generic vegetable crops (lettuce, cabbages, cucumbers, onions and radishes), with operations concentrated in the Coachella Valley. (Pet. Ex. 1(H); Tr. 100) In 1976, the UFW had been certified as the collective bargaining representative for all of its employees in the State of California. (Pet. Ex. 1(H))

At some point in the early 1980's, Sun World assumed the Maggio-Tostada certification and executed a series of collective bargaining agreements with the UFW. The agreements specifically mention the growing of carrots and corn; one supplement speaks of grapefruit and oranges as well. (Pet. Ex. 1(H)

Those agreements, like the others described above covering the former Interharvest operation and the current Blythe operations, contain many provisions

typically found in UFW agreements at large—pensions, health and welfare, dispute resolution, and so on.

The last agreement appears to have expired in 1986; however, employer's Human Relations Director Rudy Avila stated that operations did not entirely cease until 1995, when all were discontinued. Since then, according to Avila, none has been revived. (Pet. Ex. 6 (Avila Declaration); Tr. 100)

The Sun World Packing Certification (75-RC-42-R). As a member of the Sun World family, Sun World Packing engaged in harvesting citrus in the Coachella Valley for growers not owned by Sun World. (Tr. 98) In 1978, the UFW was certified to represent all of its agricultural employees in the State of California. (Pet. Ex. 1(E) There followed a series of collective bargaining agreements acknowledging the certification but executed not by Sun World Packing, but by Sun World, Inc., Sun World Citrus and, finally, by Sun World International, Inc. (Pet. Ex. 1(F)) The most recent agreement expired on January 31, 2002.

Although lemons do not appear among the types of citrus harvested, the work performed would have had similarities to Employer's current work in Blythe. And the labor agreements contain the same basic provisions found in most UFW agreements, including those in Blythe. (Pet. Ex. 1(F)) However, unlike the Blythe agreements, there was no detailed payment structure based on height, the need for ladders, or use (juice or whole) of the product. Nor was there a bonus program.

There was no interchange of employees with any of Sun World's other operations. (Tr. 100)

According to Rudy Avila, the harvesting operation was terminated in the late 1990s or early 2000s because the outside growers became dissatisfied with the cost and began utilizing their own harvest crews. (Tr. 97-98) At that point Sun World terminated the operation. (Tr. 99-100)

The Sun World Marketing/Sun World Packing/Sun World Produce/ Abatti Certification (75-RC-15-R). Even less evidence was introduced about this certification. What is known is this: On April 5, 1977, the UFW was certified as "the exclusive representative of all of the agricultural employees of the employer in the State of California, excluding, Sun World Packing Corporation in the Coachella Valley." (Pet. Ex. 1(G)) Aside from the fact that Sun World Marketing/Sun World Packing/Sun World Produce/Abatti operated in the Coachella Valley, there is nothing on the record to indicate the relationship that existed among the four entities named in the certification or the nature of the work performed by their agricultural employees. Nor is there any evidence of collective bargaining or the execution of a labor contract.

According to Rudy Avila the employer ceased operations in 1994, and no work covered by that certification has been performed since. (Pet. Ex. 6 (Avila Declaration); Tr. 99-100)

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Procedural Issues.

The Respondent raises two technical arguments:

(1) It contends that because the Board's Unit Clarification Regulation uses the singular term "existing bargaining unit" rather than the plural "existing bargaining units," the instant petition involving, as it does, multiple units, must be dismissed. (Title 8, California Code of Regulations, section 20385.) Here, the union filed one petition asserting that the Board should amalgamate six different certifications into a single bargaining unit. The filing of six different petitions all aimed and establishing the same unit would have been a redundant exercise, furthering no purpose, and would inevitably have resulted in a consolidation under §20335 of the Regulations. Under the circumstances, the Respondent's argument is rejected.

(2) The Respondent contends that the Petition for Clarification fails to include "a description of the existing certification, including job classifications of employees and location of property covered by the certification as required by the Regulation." (Regulation 20385(b)(3).) The Petition filed by the Union, together with attached and incorporated Exhibits, runs to over 1000 pages. It is more than adequate to carry out the intent and purpose of the Regulation by ensuring that the Respondent had full and complete knowledge of the factual matters at issue in this unusual case.

B. Substantive Issues

This case raises two primary issues:

(1) The extent to which a unit clarification petition can be used to expand the reach of an ALRB certification to include operations that did not exist when the union was originally certified, and

(2) The status to be accorded Board certifications covering farming operations that have become inactive.

1. The Use of Unit Clarification to Include Operations Not Included in the Original Certification

Early on the Board established the analysis to be utilized in determining the appropriate bargaining unit where a union is petitioning for an election. (*Bruce Church, Inc*. (1976) 2 ALRB No. 38; *Egger & Ghio Company, Inc.* (1975) 1 ALRB No. 17.) A concise statement of that analysis is to be found in *Foster Poultry Farms* (1987) 13 ALRB No. 5, at pp. 2-3:

> "Section 1156.2 of the Agricultural Labor Relations Act (ALRA) provides:
>
> > '[T]he 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.'
>
> If the employer's operations are situated on adjoining parcels, and therefore are contiguous in a literal sense (*Harry Tutunjian & Sons, Packing* (1986) 12 ALRB No. 22), the Board has no discretion to certify anything but a single, wall-to-wall unit of all the employer's agricultural employees. However, if the operations are situated on noncontiguous parcels, the Board will then determine whether the

> employer's agricultural operations lie within a Single Definable Agricultural Production Area (SDAPA) on the basis of their similarity with regard to such factors as water supply, labor pool, climatic and other growing conditions. (*Egger & Ghio Company, Inc.*, *supra*, 1 ALRB No. 17.) Again, a finding that the operations are located in a SDAPA dictates the conclusion that only one bargaining unit is appropriate. Only if the operations are neither literally contiguous nor within a SDAPA, will the Board then consider whether there is a substantial community of interest among the employer's agricultural employees, on the basis of factors considered by the National Labor Relations Board (NLRB) in bargaining unit cases, that would justify a single bargaining unit. Such community of interest factors include physical or geographical location; the extent to which administration is centralized, particularly with regard to labor relations; common supervision; extent of interchange among employees; similarity of jobs, skills and working conditions; and the pattern of bargaining history among employees. (*Bruce Church, Inc*., *supra*, 2 ALRB No. 38)

The question presented by this case is whether that analysis—or some other one—should be followed when, subsequent to certification, an Employer expands or alters its business to include operations that did not exist at the time of the election, and the certified union files a unit clarification petition claiming that those operations should be folded into its existing certification.

a. The UFW's Position

The UFW contends that the certification of a union "as the collective bargaining representative of <u>all agricultural employees</u> of an employer <u>in the State of California</u>" means exactly what it says: If the employer has agricultural employees anywhere in the State of California then—regardless of where they work, what they do, or whether they were part of the unit that voted in the original election—the union is entitled to be their representative. In making that argument

the UFW does not entirely abandon the traditional SDAPA/Community of Interest analysis. Rather it relegates it to secondary status, saying, "Any lack of interchange and differences between operations…is only appropriate for consideration in connection with clarification of the existing state-wide bargaining unit to constitute more than one unit in non-contiguous areas" (UFW Brief In Support of Unit Clarification, 12/14/10, p. 17),[4] and suggests, as an alternative to its prayer for a single statewide unit, that "the instant UC Petition be granted to clarify separate certifications in San Joaquin Valley, Oxnard, and Riverside County." (UFW Post Hearing Brief, p. 38.) In other words, the existing certifications require the recognition of the UFW as the collective bargaining representative of all Sun World employees in one statewide unit, but the Board has the power to divide that one big unit into smaller units—each represented by the UFW—utilizing traditional SDAPA/ Community of interest analysis. Of course, under the UFW's approach, none of the employees in any of the new, smaller units, would have a say in whether they wished to be represented by the UFW even though, by definition, they share no community of interest with the workers who participated in the original election.

In staking out its position, the UFW relies on the language of Labor Code section 1156.2 that "[T]he bargaining unit shall be all the agricultural employees of an employer." Over the years and in varying factual situations, the Board has

[4] The UFW reiterates that position, more opaquely, in the second paragraph on page 37 of its Post Hearing Brief.

cited that language as indicating the policy in favor or all-inclusive, statewide bargaining units. That policy, however, is not absolute. The second sentence of that section grants the Board considerable discretion to designate less than statewide units where it determines that the employees of a particular employer are employed in two or more noncontiguous geographical areas. Furthermore,

> "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].)" *Oceanview Produce Company* (1996) 22 ALRB No. 15, p. 8.

One potentially competing policy is to be found in section 1140.2 of the Act:

> "It 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 <u>of their own choosing</u> ..." (*Emphasis supplied*.)

Under the UFW's approach, workers in distant parts of this state having no common interest with those in a certified bargaining unit could find themselves—without ever having an opportunity to vote—represented by a union certified elsewhere; their only consolation being that they would be entitled to their own separate unit. Surely the Act calls for a better balance between the need for wall-to-wall units and the right of distant employees with distinct interests to designate representatives "of their own choosing."

The incongruity inherent in the UFW position is best seen by contrasting two hypothetical situations. In the first, assume the UFW petitions for an election seeking to represent employees in noncontiguous geographical areas, assume further that the employees in one area (Unit 1) lack a community of interest with those in the other area (Unit 2) and that sufficient authorization cards for a showing of interest were obtained only in first area. Applying the traditional SDAPA/Community of Interest analysis, an election would be directed in the Unit 1, but not in Unit 2, and if a majority of Unit 1 employees voted for the union, it would be certified as the collective bargaining representative for that unit.

Now suppose a different situation: the only workers the employer has when the UFW petitions for and prevails in an election perform work identical to that of the employees in Unit 1, above. Since the employer has no other employees, the Board, following normal practice, would certify the union as "the collective bargaining representative for all of employer's agricultural employees in the State of California." Several months later, the employer expands its operation to include a group of employees who perform work identical to those in Unit 2, above; i.e., they work in a noncontiguous area and lack a community of interest with the certified unit.

Under the theory espoused by the UFW, it would—without a vote—be entitled to assume jurisdiction over the Unit 2 employees in the second hypothetical, even though there is no discernable policy reason for treating them

differently than the Unit 2 employees whose right of self-determination was recognized in the first hypothetical.

b. ALRB Precedent

The Board has yet to determine the balance to be struck between the policy favoring all-inclusive bargaining units and the right of farm workers to have representatives of their own choosing in cases—like the one at hand—where a union seeks to extend the reach of its certification to operations not included in its original certification. There are, however, two cases where the issue was raised and a solution suggested: *Silva Harvesting, Inc*. (1989) 15 ALRB No. 2 and *Oceanview Produce Company, supra*, 22 ALRB No. 15.

In *Silva Harvesting* the union sought to clarify its existing certification to include three additional business entities as a single employer. The IHE found that one of them was closely enough aligned with the certified employer to constitute a single employer. That being so, the question then became: Are the employees of that of that new entity to be included in the existing certification? In finding that they were, the IHE adopted the traditional analysis, described above, for determining the appropriate unit for an election, and concluded that a sufficient community of interest existed between the employees covered by the original certification and those of the new entity to warrant their inclusion in the existing bargaining unit. (*Id.* IHE Dec. pp. 26-29.)

While instructive, the IHE decision is not precedential because, on review, the Board vacated the petition and remanded the case to the Regional Director to correct a procedural error.

Oceanview Produce Company involved a complex and unusual situation. In 1989 a Teamster local had been certified to represent employees of Bud Antle statewide. In 1995 the UFW was certified as the bargaining representative for the employees of Oceanview Produce. Though no objection to the proposed unit was filed at the time of the election, a few months later both Bud Antle and Oceanview filed Petitions for Clarification, arguing that they constituted a single employer whose employees shared a sufficient community of interest to warrant their inclusion in single bargaining unit—the earlier certified Teamster unit.

The case raised a number of issues, but the fundamental one, according to the lead opinion, was "whether the 1994 election among almost 600 Oceanview employees should now be set aside." (*Supra,* 22 ALRB No. 15 at p. 3.) Noting, (1) that Oceanview had failed to raise the issue as an objection to the election and (2) that other sections of the Act mitigated, to some extent, the preference found in §1156.2 for wall-to-wall units, the Board determined that the "stability of labor relations" would best be served by dismissing the Petition. (*Id*. at pp 8-9.)

The present case does not involve competing certifications, and therefore the decision in *Oceanview* is not dispositive. However, the recognition in the lead opinion that §1156.2 is not absolute (*id.* at p. 8) and the reasoning in Member Frick's concurring opinion offering "guidance…invaluable for future cases" (*id.* at

p.14) are relevant. In that concurrence, she indicates that—had a unit clarification petition been filed *prior* to the Oceanview election (i.e. when, like here, there was only one certification in the picture)—the community of interest analysis traditionally utilized by the Board in election proceedings would have been applied; and, had that happened, "…it is questionable whether the Bud and Oceanview employees share a sufficient community of interest to warrant [their] inclusion in a single unit…" (*Id.* at p. 21 and fn.15.)

c. The Analysis To Be Applied in Unit Clarification Proceedings

All things considered, the analysis to be utilized when a party seeks to expand a bargaining unit to operations not included in its original certification should be the same analysis the Board uses in determining the proper unit for an election in the first place: (1) If the new operation is contiguous with the old, the Board is without discretion and must direct its inclusion. (2) If the new operation is non-contiguous, but within the same Single Definable Agricultural Production Area, the Board will exercise its discretion to direct its inclusion. (3) If the new operation is neither contiguous nor within the same SDAPA, the Board will "consider whether there is a substantial community of interest…on the basis of the factors considered by the National Labor Relations Board" (*Foster Poultry Farms, supra,* 13 ALRB No 5, pp. 2-3; *Bruce Church, supra,* 2 ALRB No. 38.)[5]

[5] The union incorrectly cites four Board decisions to support its contention that the Employer's opposition to a statewide bargaining unit is specious and contrary to the requirements of the ALRA. First, it asserts that *Harry Tutunjian & Sons* (1986) 12 ALRB No. 22, p. 5, holds that "all agricultural employees of the

Note that this does not render the language "all agricultural employees of the employer in the State of California" meaningless. Rather, it recognizes that, upon a proper showing, the Board will extend an existing certification to all

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employer are included in the bargaining unit without regard to the types of work involved or the kinds of crops." (UFW Post Hearing Brief, p. 27.) What the Board actually said was: "…all of an employer's agricultural workers *employed in a single geographical area* be included in one unit without regard to the types of work involved or the kind of crops grown." (*Id*. p. 5, *emphasis supplied*.) Next, it asserts that *Baker Brothers* (1985) 11 ALRB No. 23, holds that "once the parameters of the employing entity are defined, the only statutorily appropriate unit consists of all of the entity's agricultural employees irrespective of the nature of their agricultural work." (UFW Post Hearing Brief, p. 27.) The union does not mention that the Board's holding was directed to crop operations in *contiguous areas*. (*Id*. p. 18.) A similar failing infects the Union's reliance on *R.C. Walter & Sons*, (1976) 2 ALRB No. 14, which involved a *contiguous* packing shed. Finally, it claims that *Dole Fresh Fruit Co*. (1996) 22 ALRB No. 4, holds that changes in crops, acreage, and employee turnover cannot effect a successor employer's obligation to bargain with the certified bargaining representative of predecessor's employees. Putting aside for later consideration the applicability of successorship cases, like *Dole*, to the case at hand (see *infra*, p. 35, fn. 10), what the Board actually said was: "Neither the *minimal* change in acreage devoted to grape production nor employee turnover may serve to defeat the bargaining obligation under the circumstances herein." (*Id*. p. 6, *emphasis supplied*.)

Two other cases cited by the UFW—*J.J. Crosetti Co., Inc.* (1976) 2 ALRB No. 1 and *Joe A. Freitas & Sons v. Food Packers* (1985) 164 Ca.App.3d 1210—are inapposite. Both involved attempts by another union to carve out, or *subtract*, employees—Truck drivers in *Crosetti* and Drivers/Loaders in *Freitas*—who worked in job classifications entitled to vote in the original elections conducted in wall-to-wall bargaining units deemed appropriate by the Board. Here, on the other hand, the UFW is seeking to *add* employees working in new operations that did not exist when the original unit was defined and the vote conducted. While the addition, or extension, of a pre-existing bargaining unit to new operations is permissible, it can only be accomplished if the criteria spelled out above are met; i.e., the same criteria the Board would have applied in *Crosetti* and *Freitas* if the "new operations" had been in existence at the time of the original unit determinations. (*Foster Poultry Farms, supra*; *Bruce Church, supra*.)

agricultural employees in the State of California who it would have included in the original certification had their operations existed at the time.

Before attempting to apply the analysis described above to the facts of this case, there is another major issue to be considered.

2. The Status to Be Accorded Certifications Where the Operation Certified Has Become Inactive

Four of the six certifications relied upon by the UFW as the basis for extending coverage have been inactive for long periods of time. Ten years have passed since Sun World employees worked at the site of the operation where the election took place in Certification 75-RC-42-R (*supra,* p. 2); 18 years in Certification 75-RC-15-R (*supra,* p. 3); 26 years in Certification 75-RC-48-C (*supra,* pp 3-4); and 29 ½ years in Certification 75-RC-8-M (*supra,* p. 3).

Sun World asserts that those long inactive certifications cannot, under any circumstances, be used by the UFW as a springboard to gain jurisdiction over its current operations.

The ALRB has—both in regulatory proceedings and in case law—considered the viability of so-called "dormant certifications;" i.e., situations where "the certified representative does not appear to be actively representing employees for an extended period of time," and has concluded that, unlike the NLRB, it lacks the statutory power to "recognize the concept of 'abandonment' beyond that already present in Board case law; i.e. where certified labor organizations become inactive by becoming defunct or by disclaiming interest in continuing to represent employees in the bargaining unit." (*Dole Fresh Fruit Company*, *supra*, 22 ALRB No. 4, pp. 14-16 & fn. 6.)

Here, of course, it is not that the union abandoned the bargaining unit; rather, it is the employer who abandoned the operation for which the union was certified. The difference is of some significance. If there are no employees

working in the unit, there is nothing to bargain about; and thus the Board's concern in *Dole* that union abandonment placed employers in a difficult position when they wished to make changes in wages, hours or working conditions is irrelevant. On the other hand,

> "The statutory scheme under the ALRA vests only employees themselves with the right to decide whether to select, oust, or change representatives and only by means of a Board conducted election and certification of the results of the election. As a result, representatives once certified remain certified until decertified by the Board." (*Id*. p. 15, fn. 7)

Adherence to that strict interpretation of the statute requires that the instant certifications be accepted as having some continuing status.

The question is how much status. The statutory analysis adopted above for determining the reach of *active* certifications, *requires* the Board to extend an existing certification to new operations that are contiguous with the old, but gives it *discretion* in every other situation. (*Supra*, pp. 28-29.) Where, as here, the existing certifications have long been *inactive*, I recommend that the Board exercise the discretion it has by refusing to extend those certifications to noncontiguous operations, regardless of their character.[6] Any other outcome would elevate the choices made many years ago by employees, long gone and with no present counterparts, over the right of working agricultural employees to designate representatives of their own choosing.[7]

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[6] Under this approach the Board would likewise be *required* to extend and revive the dormant certification for any operation, regardless of its character, which was undertaken at the site of or on land contiguous to that covered by the original certification. Here, no such operations are involved.

[7] Unlike the ALRB, the NLRB has allowed certifications to be called into question in a variety of circumstances: a good faith belief by the employer that the union no longer represents a majority of employees; racial discrimination by a union in representing employees in the bargaining unit; a pattern of union coercion or violence; or a determination that members of the unit are no longer employees, as defined in the Act. (1 Higgins, The Developing Labor Law (5th ed. 2006) p. 634.) This latter circumstance suggests a possible alternative approach to the issue

C. Conclusions of Law.

1. The Inactive Certifications.

Four certifications of the six certifications which are the subject of this proceeding—The Interharvest Certification (75-RC-8-M), The Maggio-Tostada Certification (75-RC-48-C), The Sun World Packing Certification (75-RC-42-R), and The Sun World Marketing/Sun World Packing/Sun World Produce/Abatti Certification (75-RC-15-R)—been inactive for many years. Under those circumstances and in accordance with the preceding analysis (*supra*, Section B.2., pp. 30-31), those certifications cannot be used to cover present day operations which are not contiguous to the location originally certified.[8]

Since none of the present Sun World operations are conducted on land contiguous to the inactive certifications, those certifications cannot be invoked to extend the reach of the UFW's jurisdiction.

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presented; to wit, since §1156.2 defines a bargaining unit as consisting of "agricultural employees" as defined §1140.4(b), a certification can be extinguished when, for an extended period, there are no agricultural employees within the unit. (Cf. *College of Osteopathic Medicine and Surgery*, (1982) 265 NLRB 295, 298, where the NLRB, following the Supreme Court decision in *Yeshiva University*, granted employer's motion to clarify by revoking the certification of unit comprised entirely of faculty because they were no longer to be considered employees under the §2(3) of the NLRA; see also, *LeMoyne-Owen College* (2005) 345 NLRB 1123, 1133.) Here, in the absence of any ALRA statutory or case authority, I do not recommend that approach because it would preclude the revival of a certification were the employer to resume a discontinued operation.

[8] Just how long it takes for a certification to become "inactive" could, in some circumstances, be a matter of debate. Here, the periods involved—ranging from 10 to 29 ½ years—are, by any measure, sufficient to render the certifications truly inactive.

2. The Active Certifications.

That leaves the two certifications covering current Sun World operations where the UFW is actively engaged in representing employees—75-RC-57-R (Coachella Growers) and 75-RC-58-R (Cal Pac Citrus). Together, they cover various aspects of Sun World's lemon operation at Blythe in Riverside County.

Under the applicable analysis (*supra*, Section B.1.c., pp. 28-29), any extension of those certifications to other Sun World operations must be resolved under the traditional analysis used by the Board in determining the appropriate unit for bargaining upon the filing of a Petition for Election: (1) If the new operation is contiguous with the old, the Board is without discretion and must direct its inclusion. (2) If the new operation is non-contiguous, but within the same Single Definable Agricultural Production Area, the Board will exercise its discretion to direct its inclusion. (3) If the new operation is neither contiguous nor within the same SDAPA, the Board will "consider whether there is a substantial community of interest…on the basis of the factors considered by the National Labor Relations Board" (*Foster Poultry Farms, supra,* 13 ALRB No 5, p. 2; *Bruce Church, supra,* 2 ALRB No. 38.)

Since none of the UFW's candidates for inclusion is contiguous to the Blythe operation, each must be examined to determine whether it is within the same SDAPA as Blythe; and, if not, whether it shares a sufficient community of interest with the Blythe operation to warrant its inclusion in that bargaining unit.

a. Kern County and Oxnard

Sun World's operations in Kern County or Oxnard are clearly outside the Blythe SDAPA. Therefore, to extend the Blythe certifications to those operations, there must be a shared community of interest.[9]

In *Bruce Church, Inc., supra*, 2 ALRB No. 38, the Board adopted the seven factors which the NLRB has traditionally utilized in assessing community of interest. Applying those factors to the relationship between Respondent's Blythe and Kern County operations yields the following results:

(1) The physical or geographical location of the operations in relation to each other. The Kern County operations of Sun World are hundreds of miles from Blythe, in different valleys, separated by several mountain ranges, with an entirely different water source.

(2) The extent to which administration is centralized, particularly with regard to labor relations. Overall employee relations is centralized at Sun World's headquarters in Bakersfield. Day-to-day employee relations are handled

[9] Neither of the active certifications—unlike the inactive ones—are statewide. In 75-RC-58-R, the UFW was certified "as the bargaining representative for all agricultural employees of employer in Riverside County," and in 75-RC-57-R as "bargaining representative for all agricultural employees of employer in the Imperial Valley." Under the UFW's primary contention—that the reach of the unit is to be determined solely by reference to the scope of the certification—that would exclude from consideration the Sun World operations in Kern County and Oxnard. However, under the NLRB standard adopted by our Board in situations where neither the contiguous or SDAPA test is met, the focus is not on the wording of the certification but on the facts that support or negate the existence of a community of interest. Therefore, the possibility of a community of interest between Sun World's operations in Blythe and those in Kern County and Oxnard is here evaluated.

locally.

(3) The extent to which employees at different locations share common supervision. Blythe and Kern County operations are separately supervised. At the corporate level those supervisors have common executive supervision.

(4) The extent of interchange among employees from location to location. There is no evidence of interchange between employees working in Blythe and those working in Kern County.

(5) The nature of the work performed at the various locations and the similarity or dissimilarity of the skills involved. As explained by Employer's Human Relations Director, the tasks performed by the grape workers in Kern County and elsewhere are quite different from those performed by the lemon works in Blythe. (Tr. 92, quoted *supra* at page 13.)

(6) The similarity or dissimilarity in wages, working hours, and other terms and conditions of employment. There are significant differences in compensation, fringe benefits, holidays, bonuses and vacations between the unionized workers in Blythe and non-union workers elsewhere, including those in Kern County. (*Supra*, p. 14; Tr. 94, 97, 105.)

(7) The pattern of bargaining history among employees. There is no common bargaining history between the Blythe and Kern County operations. (*Supra*, pp. 14-15; Tr. 106.)

Taken together, the differences between the Blythe and Kern County operations are far greater that the similarities. I therefore conclude that the two

lack the community of interest necessary for the Blythe certification to be extended to Sun World's Kern County operations.[10]

As for Respondent's Oxnard operation, the community of interest is even more attenuated: Oxnard is on the California Coast, even further from Blythe than the San Joaquin Valley, with a different water source and climate than Blythe. The entire operation is conducted and supervised by a separate management company, with minimum direction from Sun World. There is no indication that farming the red, yellow and mini sweet peppers grown in Oxnard is comparable to lemon production in Blythe. Nor has the Petitioner produced any evidence that the wages, hours and other terms and conditions of employment are similar to those in Blythe. There is no interchange of workers with other Sun World operations. And there is no history of bargaining with the UFW.

That being so, I likewise conclude that there is no basis for extending the UFW's Blythe certification to Sun World's operation in Oxnard.

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[10] In arguing for the inclusion the Sun World's San Joaquin Valley operations in the its certifications elsewhere, the UFW cites two successorship cases: *Dole Fresh Fruit Co., supra*, 22 ALRB No. 4; and *Gourmet Harvesting and Packing*, Inc. (1988) 14 ALRB No. 9. Successorship issues arise when an employer with a bargaining obligation (the predecessor) is taken over by another employer (the successor). The question then becomes whether the predecessor's bargaining obligation carries over to the successor. That is not the situation here. The employees of Superior Farms which Sun World acquired in 1989 were unrepresented, so there was no bargaining obligation to be acquired. Thereafter there was only one employer in the picture—Sun World. Without two distinct employers—a successor and a predecessor—there can be no successorship.

b. The Coachella Valley.

That leaves for consideration Sun World's non-union operation in the Coachella Valley, where it grows table grapes, along with some sweet peppers and experimental peaches, on 5 different ranches near the communities of Thermal and Mecca, and utilizes a cold storage facility in the City of Coachella.

Since those operations are not conducted on property contiguous to the Blythe lemon operation, the first issue to be resolved is whether Sun World's Blythe operation, located in the Palo Verde Valley, and its Coachella Valley operations are within a Single Definable Agricultural Production Area. In making that determination the Board looks to the similarity of the two sites with respect such factors as water supply, climate, labor pool and other growing conditions such as harvest and planting times, the kind of crops grown and growing conditions. (*John Elmore Farms* (1977); 3 ALRB No. 16, pp. 4-5; see also, *Egger & Ghio Company, Inc.* (1975) 1 ALRB No. 17; *Foster Poultry Farms, supra,* 13 ALRB No. 5.) In *Elmore* the Board found that employer's operations in two coastal valleys (Guadalupe and Lompoc, 30 to 35 miles apart) constituted a single definable agricultural production area because of similar seasons, climate, harvest and planting times, need for labor, crops grown, and growing conditions. (3 ALRB No. 16, at p. 5.) However, in *J.R. Norton* (1977) 3 ALRB No. 66, the Board accepted its Investigative Hearing Officer's determination that employer's lettuce operations in the Palo Verde Valley (where Blythe is located) and the Imperial

Valley (90 miles away) were not in the same SDAPA, even though they shared a common water supply, similar climate and common labor pool, because of the distance involved and different harvest seasons. (Id. 3 ALRB No. 66, IHE Dec. p. 5 & fn. 1) Here, the differences are even more pronounced: While Sun World's Palo Verde Valley and the Coachella Valley operations have a common water supply (the Colorado River) and climate, they are further apart (104 miles), grow entirely different crops (lemons versus grapes), with different growing seasons (lemons are harvested from mid-September to January or February, grapes from late May to early June; lemons are pruned around April; while grapes are pruned from the end of November through mid-January (Tr. 122-123) and, unlike *Norton* where the employer used the same workers in both valleys, Sun World has a distinct labor pool for each. Thus, the case for finding Blythe and Coachella Valley to be located in separate agricultural production areas is stronger than *Norton* and much stronger than *Elmore*.

That being so, the two operations can only be amalgamated if they meet the NLRB's community of interest standards, as delineated in *Bruce Church, supra*, 2 ALRB No. 38:

(1) The physical or geographical location of the operations in relation to each other. The Coachella operations of Sun World 104 miles from Blythe, in different valleys, separated by the San Bernardino Mountains.

(2) The extent to which administration is centralized, particularly with regard to labor relations. Overall employee relations is centralized at Sun

World's headquarters in Bakersfield. Day-to-day employee relations in the Coachella Valley and Blythe are separate and distinct. (Tr. 93-94.)

(3) The extent to which employees at different locations share common supervision. Blythe and Coachella Valley operations are separately supervised. At the corporate level those supervisors have common executive supervision. (Tr. 93-94.)

(4) The extent of interchange among employees from location to location. There is no interchange of employees working in Blythe and those working in Coachella. (Tr. 93.)

(5) The nature of the work performed at the various locations and the similarity or dissimilarity of the skills involved. As explained by Employer's Human Relations Director, the tasks performed by the grape workers in the Coachella Valley are quite different from those performed by the lemon workers in Blythe. (Tr. 92, quoted *supra* at page 13.)

(6) The similarity or dissimilarity in wages, working hours, and other terms and conditions of employment. There are significant differences in compensation, fringe benefits, holidays, bonuses, vacations, and equipment used between the unionized workers in Blythe and non-union workers in the Coachella Valley. (*Supra*, pp. 12-13; Tr. 92, 94-97, 102-103.)

(7) The pattern of bargaining history among employees. There is no indication of a common bargaining history between the Blythe and Coachella Valley operations. (*Supra*, p. 13.)

I therefore conclude that there is no basis for extending the Blythe certifications to the Employer's operations in the Coachella Valley.[11]

IV. RECOMMENDED DISPOSITION

In view of my conclusion that the existing UFW certifications do not extend to Sun World's non-union operations in the Coachella Valley, the San Joaquin Valley, and Oxnard, I further conclude that the Union's claim to represent Sun World's agricultural employees at those operations raises a Question Concerning Representation which cannot be resolved by a unit clarification

[11] The conclusion that no community of interest exist between Sun World's current unionized operations and its non union operations in Kern County, Oxnard and the Coachella Valley makes it unnecessary to consider the three additional arguments, drawn from NLRB precedents, which the Respondent makes: (1) Even if there is a community of interest, the expansion of an existing certification to include a much larger unit will not be countenanced; (2) an accretion will not be permitted where the accreted group has been historically excluded and existed prior to the parties' most recent collective bargaining agreement; and (3) accretion is inappropriate where the group sought would itself constitute a separate bargaining unit. (Respondent's Post-Hearing Brief, pp. 8-10.) While the first argument received favorable consideration by the ALJ in *Silva Harvesting, Inc.* (15 ALRB No. 2, ALJD, pp. 24-28), the Board has yet to pass on it. The other two arguments have not yet been considered by the ALRB and turn on the extent to which the statutory and policy considerations that differentiate representation proceedings under the ALRA from those of the NLRA necessitate the rejection or modification of NLRB precedent. (Cf. *San Clemente Ranch, Ltd. V ALRB (1981) 29 Cal.3d 874; Cadiz v. ALRB* (1979) 92 Cal.App. 3d 365; *Comite 83, Sindicato de Trabajadores Libres (Hiji Brothers, Inc.)* (1987) 13 ALRB No. 16, p. 13; *Coastal Berry Company* (2000) 26 ALRB No. 2, p. 17-18.)

proceeding. I therefore recommend the Petition for Clarification be dismissed in its entirety.

Dated: February 28, 2012

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JAMES WOLPMAN
Investigative Hearing Examiner