Vista, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BABBITT ENGINEERING AND MACHINERY, INC., and SAN MARCOS GREENHOUSES, INC., Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-7-SD 79-CE-7-1-SD 79-CE-11-SD 79-CE-18-SD 8 ALRB No. 10

DECISION AND ORDER

On December 15, 1980, Administrative Law Officer (ALCJ James Wolpman issued the attached Decision and recommended Order in this proceeding. Thereafter, General Counsel and Respondent each timely filed exceptions and a supporting brief. General Counsel and Respondents each timely filed reply briefs.

Pursuant to the provisions of California Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1/] findings, and conclusions[2/] of the ALO

[1/] Both General Counsel and Respondents except to certain of tht ALO's credibility resolutions. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear oreocnderance of the relevant evidence demonstrates

[fns. 1 & 2 cont. On p. 2]

as modified herein, and to adopt his recommended Order, with modifications.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondents Babbitt Engineering and Machinery, Inc., and San Marcos Greenhouses, Inc., their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization, by unlawfully terminating or refusing to hire or consider for employment the former employees of Lewis Gardens, Inc., or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code section 1153 (c) of the

[fns. 1 & 2 cont.]

that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB Mo. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531. We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

[2/] Although we adopt the ALO's conclusion that San Marcos Greenhouses, Inc., succeeded to the bargaining obligations of Lewis Gardens, Inc., we reject the ALO's overly mechanistic analysis concerning the factor of work-force continuity. We find that but for a discriminatory campaign to defeat successorship, a significant proportion of the San Marcos employees would have been drawn from the predecessor work force. In light of all of the circumstances of transfer of ownership, of which work force continuity is but one factor, see San Clemente v. ALRB (1981) 29 Cal.3d 874 [176 Cal.Rptr. 768, 776-777] enforcing 5 ALRB No. 54, we conclude in conformity with the ALO that the totality of circumstances involving this transfer of ownership was "a change in ownership not affecting the essential nature of the enterprise." MLR3 v. Band-Age, Inc. (1st Cir. 1976) 534 F.2d 1 [92 LRRM 2001, 2003] citing Tom-A-Hawk Transit, Inc. v. NLRB (7th Cir. 1969) 419 F.2d 1025, 1056-7 [73 LRRM 2020].

Act.

(b) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the UFW as the certified exclusive collective bargaining representative of the agricultural employees of San Marcos Greenhouses, Inc.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of the agricultural employees of San Marcos Greenhouses, Inc., and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole all of their agricultural employees, including Dorothy Van Cinder, Patricia Daltorio, Pedro Gonzales, Socorro Vega, Reynaldo De Casas, Andreas Gonzales, Conrado Luna, Duayne Giron, Mary Hickey, Salvador De Casas, and John Martinez for all losses of pay and other economic losses sustained by them as a result of Respondents' refusal to bargain with the UFW as such losses have been defined in Adam Dairy aba Rancho Dos Ries (Apr. 26, 1978) 4 ALRB Mo. 24, as modified by Ranch No. I, Inc. (July 14, 1980) 6 ALRB No. 37, for the period from February 22, 1979, until such time as Respondents commence good-faith collective bargaining with the UFW which leads either to a

contract or a bona fide impasse.

(c) Immediately offer Mary Hickey, Salvador De Casas, and John Martinez reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other employment rights and privileges.

(d) Immediately offer employment in their former or substantially equivalent jobs to Dorothy Van Cinder, Patricia Daltorio, Pedro Gonzales, Socorro Vega, Reynaldo De Casas, Andres Gonzalez, Conrado Luna, and Duayne Giron, replacing if necessary any persons presently occupying those positions. If there are not sufficient positions available at San Marcos Greenhouses, Inc., to hire each of the aforesaid employees immediately, Respondents shall place their names on a preferential hiring list and hire them as soon as jobs become available. The order of employees' names on the preferential list shall be determined pursuant to a non-discriminatory method approved by the Regional Director.

(e) Make whole Mary Hickey, Salvador De Casas, John Martinez, Dorothy Van Cinder, Patricia Daltorio, Pedro Gonzales, Socorro Vega, Reynaldo De Casas, Andres Gonzales, Conrado Luna, and Duayne Giron for any economic losses they have suffered during the period from the date of their termination or failure to be hired by Respondents to the date on which they are offered full reinstatement, by payment to each of them of a sum of money equal to the wages they lost plus the expenses they incurred as a result of their unlawful termination or Respondents' failure to hire them, less their respective net interim earnings, together with interest en said sum at the rate of seven percent

per annum. Back pay shall be computed in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, and shall begin from date of termination for Mary Hickey, Salvador De Casas, and John Martinez, and from February 16, 1979, for Dorothy Van Ginder, Patricia Daltorio, Pedro Gonzales, Socorro Vega, Reynaldo De Casas, Andres Gonzales, Conradc Luna, and Duayne Giron.

(f) Preserve and, upon request, make avaialble to the Board or its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records relevant and necessary to a determination, by the Regional Director, of the back pay period and amount of back pay due under the terms of this Order.

(g) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Lewis Farms, Inc., and/or San Marcos Greenhouses, Inc., since January 1, 1973.

(i) Post copies of the attached Notice in all appropriate languages for 60 consecutive days in conspicuous places on its premises, the period and places of posting to be determined by the Regaional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(j) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(k) Arrange for a representative of Respondents or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all agricultural employees of San Marcos Greenhouses, Inc., on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable' rate of compensation to be paid by Respondents to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period,

(1) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with its terms. Upon request of the Regional Director, Respondents shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

IT IS FURTHER ORDERED that the certification of the UFW be, and it hereby is, amended to state that the UFW is the certified exclusive collective bargaining representative of all agricultural employees of San Marcos Greenhouses, Inc., and that

said certification be, and it hereby is, extended for a period of one year commencing on the date of issuance of this Order.

Dated: February 19, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing where all parties had an opportunity to present evidence, the Board found that we did violate the law by refusing to bargain with your elected representative and by discriminating against employees on the basis of union activity.

The Agricultural Labor Relations Board has told us to send out and post this Notice. We will do what the Board has ordered us to do and also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other agricultural workers these rights:

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

Because this is true, we promise that:

WE WILL NOT terminate or refuse to hire or consider for employment or otherwise discriminate against any employee, previous employee, or applicant for employment because he or she has exercised any of these rights.

WE WILL offer Mary Hickey, Salvador De Casas, and John Martinez their jobs back and pay them any money they lost because we terminated them.

WE WILL offer jobs to Dorothy Van Ginder, Patricia Daltoric, Pedrc Gonzales, Socorro Vega, Reynaldo De Casas, Andres Gcnzales, Conrado Luna, and Duayne Giron, replacing if necessary any present employees, and we will pay each of - hem any money they lost because we failed or refused to hire them. If we do not have enough to be available to hire all of those employees immediately, we will put their names on a list to be hired as soon as positions become available.

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by cur employees.

WE WILL reimburse all our employees, including those named above, for all pay and benefits lost because of our failure to meet and

bargain with the United Farm Workers of America, AFL-CIO, as their collective bargaining representative.

Dated: SAN MARCOS GREENHOUSES, INC.

By: By: _____
(Representative) (Title)

BABBITT ENGINEERING AND MACHINERY, INC

By: By: _____
Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1350 Front Street, Room 2056, San Diego, California 92101. The telephone number is 714/237-7107.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Babbitt Engineering and Machinery, Inc., and San Marcos Greenhouses, Inc.

8 ALRB No. 10
Case Nos. 79-CE-7-SD
79-CE-7-1-SD
79-CE-11-SD
79-CE-18-SD

ALO DECISION

In September 1978, a representation election was held among the employees of Lewis Gardens, a nursery in Vista, California. As a result of that election, the Board, in January 1979, certified the United Farm Workers of America, AFL-CIO (UFW) as the employees' exclusive collective bargaining representative. The day following certification, Lewis Gardens was sold to Babbitt Engineering and Machinery, Inc., which created a wholly-owned subsidiary, San Marcos Greenhouses, Inc., to operate the nursery. Respondents Babbitt and San Marcos subsequently refused to bargain with the UFW and fired three employees who subsequently filed charges of discrimination. The ALO found that Respondents had conducted a discriminatory campaign to terminate employees who had worked for Lewis Gardens and to refuse to rehire other predecessor employees in an effort to defeat successorship. He concluded that Respondents were successors to Lewis Gardens and should be ordered to bargain with the UFW. He further concluded that Respondents should be ordered to reinstate those persons discriminatorily fired, to offer employment to those perscns previously refused rehire, and to make all employees whole for economic losses incurred as a result of Respondents' unlawful refusal to bargain with the UFW. In the course of reaching his conclusion on the successorship issue, the ALO selected a date to assess the factor of work-force continuity, the date six weeks after certification and approximately six weeks prior to Respondents' reaching a full complement of employees.

BOARD DECISION

The Board, while affirming the findings, rulings, and conclusions *of* the ALO and his recommended Order, rejected his mechanistic analysis of work-force continuity. The Board noted that at ail relevant times, a significant proportion of the predecessor's employees would have been employed by Respondents. The Beard noted that work-force continuity is only one of several factors used to assess successorship and in light of all the circumstance; here found that Respondents succeeded to the interests and obligations of the predecessor employer.

* * *

* * *

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS

In the Matter of:	
BABBITT ENGINEERING AND MACHINERY, INC., and SAN MARCOS GREENHOUSES, INC. ,	Case No. 79-CE-7-SD 79-CE-7-1-SD 79-CE-12-SD 79-CE-18-SD
Respondents,	
	DECISION
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

Barbara Dudlev and Antonio Barbosa,
for the General Counsel

John D. Collins and Christopher J. Martin,
Luce, Forward, Hamilton & Scripps
of San Diego, California for the Respondent

STATEMENT OF THE CASE

JAMES WOLPMAN, Administrative Law heard before me on July 22, 23, 24, 25, 28, and Diego, California. The Complaint, as amended, alleges that Respondent, Babbitt Engineering and Machinery, Inc., and its Co-Respondent, San Marcos Geenhouses, Inc., violated Sections 1153(e), (c) and (a) of the Agricultural Labor Relations Act(hereafter called the "Act"). The Complaint is based en charges filed by the United Farm Workers of America, AFL-CIO (hereafter called the "UFW"), copies of which were served March

19, 27, and June 7, 1979. [1/] Respondents and General Counsel appeared at the hearing and both filed briefs in support of their positions.

Upon the entire record, including my observation of the demeanor of the witnesses. and after consideration of the arguments and briefs submitted by the parties, I make the following :

FINDINGS OF FACT

I. Jurisdiction.

Babbitt Engineering and Machinery, Inc., is the sole owner of San Marcos Geenhouses,Inc., (a corporation whose former name was Lewis Gardens, Inc.) as such both Co-Respondents are corporations engaged in agriculture in California. Accordingly, I find both Co-Respondents to be agricultural employers within the meaning of Section 1140.4 (c) of the Act.

Further, it was stipulated to by the parties that the U] a labor organization representing agricultural employees thin the meaning of Section 1140.4(f) of the Act, and I so

II. The Alleged Unfair Labor Practices.

The Complaint, as amended, alleges that the Co-Respondents violated Section 1153 (e) and (a) by refusing to recognize and bargain with the UFW as the representative of agricultural workers employed at San Marcos Geenhouses,the wholly owned subsidiary of Babbitt Engineering. The obligation to recognize and bargain is alleged to have arisen out of the status of Co-Respondents as legal successors to Lewis Gardens, Inc., a corporation for which the UFW had been certified as exclusive bargaining agent on January 18, 1979, when it was owned by Hubert and Helen Lawis. As a further violation of Sections 1153(e) and (a) and, in addition, of Section 1153 (c), it is alleged that the Co-Respondents embarked on a campaign to prevent the hiring of former employees of Lewis Gardens and to terminate certain Lewis Gardens employees who had been hired by Co-Respondents, all for the purpose of avoiding the obligation to bargain. Finally, the complaint alleges that three employees -- John Martinez, Salvador de Casas, and Mary Mickey -- were

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[1/] The charge in 79-CE-7-SD was served on Lewis Gardens and forwarded to Respondents March 9, 1979.

discharged in retaliation for their support for and activities on behalf of the UFW, in violation of Section 1153 (c) and (a) of the Act. 2/

Co -Respondents deny that they occupy the position of Successor to the corporation owned by Hubert and Helen Lewis. They further deny undertaking any campaign to prevent, discourage, or terminate employees of the Lewises. And they specifically deny that any of the three named employees were terminated for union sympathies or activities.

III. The Facts.

A . The Previous Employer.

Prior to January 27, 1979, all of the common stock in Lewis Gardens, Inc., was owned by Hubert and Helen Lewis, The Lewises had been in the nursery business for many years specializing in azaleas; they had developed and patented a number of varieties. In addition, they raised a wide variety of green house-plants.

The Lewises operated out of two separate locations, one in Whittier and the other in Vista. Marketing at Vista was confined to "back door" sales to retailers; at Whittier there was full distribution to flower shops, retail plant stores and, to some extent, supermarkets.

The Lewises, perhaps because they had failed to keep abreast of changing production and consumption patterns, losing money. Their azaleas were not receiving needed at and the house-plant inventory included f for efficient, profitable operation.

The work complement at the Vista Operation had dwindled from 46 in March, 1978, to 27 in late September , to 15 in October, 1978. At the time of the sale and for the month or so proceeding there were only 6 or 7 employees. The Lewises had not kept up with going wage rates; pay was low, in some cases below minimum.

In September, 1978, the UFW had petitioned for an election; it was held September 21, 1978, and the UFW won by a vote *of* 22 to 0 . On January 18, 1979, the UFW was officially certified as bargaining representative and on January 24, 1979, Ceasar Chavez wrote to the Lewises requesting that negotiations begin.

2/ There is a technical defect in the Complaint in that de Casas' discharge is alleged but not alleged as a violation (¶ 17). Because the ommission is purely technical and the discharge was fully litigated, I disregard the error.

B. The Sale.

In December, 1978, Babbitt Engineering in the person of Virginia Babbitt, a corporate officer and stockolder, first looked over the Lewis property. Mrs. Babbitt was in the market for a business which could be "turned around". She had seen other nurseries in the area and been told that the Lewis oper-aion would be a good one to look at.

Negotiations began and an agreement to purchase was signed January 21, 1979, and supplemented January 29, 1979. Payroll records indicate that Babbitt actually began operating the business on January 27, 1979.

Under the terms of the sale Babbitt Engineering acquired all of the common stock of Lewis Gardens, Inc., for $50,000 and the assumption of approximately $2,500,000'in debt. 3/ What actually passed to Babbitt was the entire nursery business at Vista, including real property Cabout 95 acres), buildings and equipment, inventories and accounts receivable. Babbitt did not acquire the Whittier real property; it had already been sold to a developer. But it did acquire the buildings and equipment there which were owned by the corporation. Babbitt arranged to lease the Whittier property until June, 1979, to allow for the transfer of business and facilities down to Vista (the lease was later extended to September, 1979 to complete the transfer).

Since Babbitt obtained a convenant by the Lewises not to compete as well as full ownership of Lewis Gardens, Inc., it would be fair to say that the "good will" likewise passed to Babbitt.

The agreement said noting about employees. The six who were still there simply remained on the payroll.

Shortly after the initial agreement, the Lewises received the UFW demand to commence bargaining (dated January 24, 1980). It was brought to Virginina Babbitt's attention and the Lewises' son Donald insisted that the January 29th Addendum to the Purchase Agreement include a specific acceptance of "all legal and financial liability associated with Lewis Gardens, Inc., recent employee union representatives [sic]" By this Mrs. Babbitt understood, not that she was agreeing to assume the Lewises duty to bargain, but that she would merely be holding them harmless against any claims which the UFW might have against the Lewises as predecessors. I find that as of the time of sale Virginia Babbitt felt that the UFW certification was matter between the UFW and the Lewises and of no direct to her (except to the extent she had agreed to hold them harmless)

3/ Babbitt Engineering as the sole owner of Lewis Gardens, later renamed San Macros Greenhouses Inc. is the a later ago of its subsidiary and properly named as Co-Respondent. Hood Industries, Inc., 243 NLRB No.39 (1990).

Donald Lewis did, however, urge her to obtain legal advise so that the UFW letter could be answered, and she was concerned enough to do so shortly after taking over the operation.

C. The Operation of the Nursery Under Virginia Babbitt.

1. The beginning of Operations.

The key to the resolution of the issues raised in this proceeding is an understanding of the person who was the moving force in the new operation, Virginia Babbitt. Her background, the situation confronting her when she took over, the problems as she perceived them which arose after the take over, her reactions, the decisions she made or was unable to make, and the actions she took -- all of these provide a "logic" for the events which followed and supply the rationale needed to assess the claims of successor-ship and discrimination.

Mrs. Babbitt is an intelligent, strong willed and experienced businesswoman, used to making decisions and generally able to ccce with the problems of managing a business. But everone has their limits, and the situation which she inherited at Lewis Gardens sorely tested hers.

She had no previous experience in the nursery business and few places to turn for help. The Lewises were by all accounts idiosyncratic and old-fashioned and had, after all, brought the business almost to bankruptcy. She did befriend and seek guidance from competitiors, but the drawbacks to such reliance are obvious and, as time passed, the evidence indicates she came to have reservations. She inherited a skeleton crew and no experienced grower. Sales were at *a* standstill. The azaleas -- and inventory worth in the neighborhood of $1,000,000 -- had not been adequately cared for. The physical operation was spread over two locations, creating serious problems of supervision and necessitating constant travel back and forth.

Her first step was to find an experienced grower to help run the operation and to advise her. On the recommendation of a competitor, she hired Raul Vega. He had just left off working as a grower for a neighboring nursery, Ruline, which also produced azaleas. Both Vega and Mrs. Babbitt realized that additional employees were needed at once. He therefore proceeded with her consent to hire four employees (including his brother) all of whom had worked with him at Ruline. Mrs. Babbitt put her driver, gardner, Philiope Bayonet, on the payroll. He had little experience but, as a former employee of hers, she trusted him to oversea things in her absence. Up to this point -- the very end of January -- I find that little or no consideration had been given to the hiring of former Lewis Garden Employees, not because of any untoward motivation, but simply because of the urgency of the

situation. 4/ I also find, however, that both Vega and Babbitt recognized that a goodly number of employees besides those from Ruline would be needed, and that they believed it would be helpful to find workers who had had prior experience under the Lewises. This is born out by the next two hirings -- Mary Kickey and John Martinez -- both of whom had previously worked at Lewis Gardens and understood its operation.

2. Subsequent Hiring Decisions.

Meanwhile, other problems had become manifest. The first was the condition of the azaleas. Around February 4th an expert was called in to examine them and concluded they were severely diseased. Mr. Babbitt was faced, therefore, not with a $1,000,000 inventory in need of additional care, but one which might well be permanently damaged. Also, if it had not been obvious before, it became apparent that there were far too many varieties of green plants. Something would have to be done to narrow the inventory and dispose of the plants which would not be continued.

But, there was still another problem -- the UFW's demand to bargain. While Mrs. Babbitt initially had not attached much importance to it, the insistence of Donald Lewis together with tne rumolings she heard from Haul Vega (granting those were not so explicit as he would have me believe) did have an impact; an impact significant enough that in the midst of other urgent concerns she flew to San Francisco between February 6th and 8th to discuss the UFW demand and other legal problems with the well-known San Francisco Law firm of Bronson, Bronson & McKinnon. She came away fortified with a response to the UFW which was sent cut over Donald Lewis' signature within a day or two. 5/

4/ Raul Vega testified that immediately upon hire he began urging Mrs. Babbitt to hire former Lewis employees. This is inconsistent with his actions in hiring former Ruline employees. His explanation—that they were eventually to be supervisory or lead — is not adequate; especially when taken together with his entire testimony which, which corroborated some respects, unduly magnified his understanding of the successorship issue and the clarity of his advice to Mrs. Babbitt about her union obligations. In these areas, therefore, I have refrained from relying on his uncorroborated testimony,

5/ The UFW, in its February 16th response, continued to assert its representation rights [GCX 4].

While one may speculate about the level of labor law sophistication she acquired in her luncheon meeting with two members of the firm, I find it impossible to believe that she left SanFrancisco feeling that the certification was of no concern, that she could put it out of her mind and devote herself entirely to other pressing problems.

She knew she had a problem and her behavior bears this cut. Immediately she reversed herself and instructed Haul Vega to stop all hiring, a decision which she claims was motivated solely by her discovery that the azaleas were diseased and the resultant necessity of reassessing her situation. This might be a decent explanation for not proceeding with Vega's recommendation to hire a full complement of 40 workers, but it hardly justifies the failure to hire some to care for an already neglected and damaged crop, especially since she continued for a time to believe that the disease could be overcome.

That concern about the union was part and parcel of the "sea of troubles" surrounding her is born out by other contemporaneous incidents. Mary Kickey who had worked for the Lewises and who was rehired in the office, testified to a conversation where Mrs. Babbitt said, a_ propos of the union, that she had "inherited a bag of worms"; that she was not against the union but that her employees did not need one because she had always treated them fairly.

Mary Hickey's testimony concerning her own termination on February 16th, a week or so after the conversation is also revealing. Mrs. Babbitt, expressed regret at terminating her but explained, "It was very bad timing for me to be there at. that time." These words, in the context of Mary Hicksy's previous employment and involvement in the election, taken together with the increasing concern of Mrs. Babbitt about the "bag of worms" she had inherited, point unmistakably toward a deliberate policy of union containment, 6/

D. J. Lewis (no relation to the former owners) likewise testified to an incident in which Mrs. Babbitt received a call about the union which upset her so much so that she commented to the caller "Things are really fucked up around here, and I'm going to get to the bottom of it." This comment absent of

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6/ Mary Hickey, despite her tendency to say too much, too fast and to confuse the order of some events, I found honest and believable. Unlike Haul Vega who had Mrs. Babbitt uttering the most blatant, self-incriminating statements, Mary testified to comments which, though definitely incrimination evidence the kind of indirection and reluctance one expect of a person in Mrs. Babbitt's position.

context and not clearly fixed in time 7/ nevertheless indicates that the question of the union was very much on her mind. 8/

The many pressures on Mrs. Babbitt began to take their toll: there were incidents of loss of temper, others where she would refuse to talk with subordinates. Instructions were given (about prices, for example), then suddenly countermanded. She became unpredictable in her decisions and indecisive in her plans for the future of the nursery. Concern about the union was only one element in this behavior -- but it was an element.

She soon came to believe that she was being "stolen blind". While I find a definite basis for her worries about theft, it is also obvious that she over-reacted to the point where it became difficult for her to trust anyone. 9/ Beyond theft, she even suspected actual sabotage, again without any real proof.

The weight of evidence indicates that she believed the Union to be somehow behind it. I find no reason to doubt Deputy Coppock of the San Diego Sheriff's office who took "a statement from her in mid-March, 1979, in which she had Vega and Martinez as union activists involved in the theft of $30,000 worth of azaleas ._10/ This fits with Vega's testimony that much earlier, in February, 1979, she telephoned him demanding an immediate armed guard at night to prevent "union sabotage".

Finally, there is the hiring pattern itself. Between February 12 and March 31, 1979, nineteen employees were hired; of these only three had worked for the Lewises two(the Gas-telums) long before the election and one (Montane) as a super-

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7/ Given the persons involved--Lemke and Lewis — it would have occurred somewhere between February 14th and February 24th [Res. Exh. 9(revised)].

8/ *I* found D. J. Lewis to be a sincere, honest witness. His testimony concerning the situation at the nursery and Mrs. Babbitt's attitude is thoughtful and sensible; I therefore fully credit his testimony.

9/ None of Respondent's other witnesses substantiated the widespread thievery which she believed was occurring at Vista. The one specific incident involving John Martinez is discussed below.

10/ Pete Preston, who 'was present when Ccppock interviewed Mrs. Babbitt, was unable to recall much of what was said. His "impression" that Coppock erred is no substitute for Coppock's careful recapitulation of his notes of the interview.

visor. Yet Raul Vega had received calls from approximately *12* former employees and Mary Hickey had heard from 8 others. 11/ Between April 1 and June 30, 1979, another 26 employees were hired, only one of whom was a former employee of Lewis Gardens [Res. Exh. F] 12/

The termination of former Lewis employees who had been kept on or rehired, furnishes additional evidence of a policy to contain or eliminate the UFW. Those terminations -- Martinez Hickey and De Casas -- were the subject of specific charges and are therefore considered individually below [Infra, pp. 12-15]

After examining the events of February, 1979, I conclude that, Mrs. Babbitt was besieged on every side with problems and worries, some real and others imagined. Her fear of unionization, while certainly not her only concern, nevertheless entered into her hiring decisions. It may well be that she did not yet understand the "continuity of the workforce" from the Lewis regime to be of critical, legal importance; she may simply have been worried about a renewed organizational drive. The evidence does not exclude either possibility, but it does point to a desire to contain and limit union influence, a desire which, in part at least, manifested itself in the hiring policy at the Nursery.

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ll/ Vega's tendency to overstatement should be taken inrc account; nevertheless I find that he did receive a number cf calls from former employees, a finding which is supported by the very specific testimony of Mary Hickey on the calls she received. She was able after examining payroll lists to *give* the names of those who called her: Dorothy Van Gander, Patrici Daltorio, Fedro Gonzales, Reynaldo de Casas, Andreas Gcnzales, Conrado Luna and Larry Montano [GCX 18]. There is, in addition the testimony of former employee Duayne Gircn that Larry Montano, a supervisor, told him it would be useless to apply (Infra, pp. 29-301.

12/ Testimony indicates that sometime in August two fornmer employees, Carmen Quintaria and Cleo Fuentes we that, at a former employee's request, her daughter was hired in February, 1979. These hirings do not rebut General Counsel's evidence. In Kawano, Inc., 4 ALR5 No. 14 (o. 12) (1973) aff'd 106 C.A. 3d 937 (1980) the Board specifically approved of “class discreminiation”.

Implicit in this conclusion is my assessment of her credibility. While I found Mrs. Babbitt to be an intelligent and cooperative witness, her stake in the outcome, the concern which she as a businesswoman would naturally have had after receiving the UFW's demand, her discussion of it with lawyers, the credibility which I accord the testimony of Deputy Ccppock, D. J. Lewis and Mary Hickey (both because they were believable and because their testimony makes sense of the situation), and, finally, the actual hiring pattern, all dictate a finding that her testimony en the central issues of anti-union motivation and its manifestation be discredited.

3. Other Business Decisions Concerning the Future of the Nursery.

Aside from hiring, Mrs. Babbitt was confronted with a number of other basic decisions about the future of the Nursery, decisions which also bear on the successorship issue [Infra, p. 16].

a. What to Grow. At the time of sale there was little doubt that Mrs. Babbitt intended to continue on with the Lewises' principal item, azaleas. She acquired not only their $1,000,000 inventory but also their patents for the unique varieties they had developed. Sales were down, so marketing would have to expand and perhaps change; but the azaleas would continue to be the backbone of the Nursery. As for the green plants, Mrs. Babbitt knew, early on, that there were too many varieties and that a few would have to be selected out for continued production.

Even when early in February she discovered that the azaleas were diseased, she did not change her plans; the simply realized that even more effort would have to be expended to "turn the business around". In the following months, in the face of growing evidence that the crop was not good and that the economics of the business did not favor such a labor intensive product, she continued, despite recurrent feelings of dispair, to devote the primary energies of the nursery to the azaleas. Worker" were hired, plants were repotted and there was even some propagation. It is impossible to say exactly when the realization came that she would have to shift to another product line and that work on the azaleas would be confined to salvaging the inherited inventory. I do not credit her testimony that the decision had been made by the end of February. It does not comport with the work that was being carried on.

But what is more significant is that it was not until a new manager/grower (Andrew Brumbaugh) arrived in August with a new management approach that any decisions were made about what the nursery was to raise in place of azaleas. Mrs. Babbitt claims to have arrived at a new product line earlier, but her testimony is not born out by Brumbaugh. So, even conceding her early list plussionment, there was until August, 1979, no commitment to an alternative; and even then it was admitted that the shift from azalens

to liners, ground cover, budding plants, and vegetable starts would take 2 or 3 years.13/

The decision to abandon green plants was made early on, yet they continued to be cared for and sold until October, 1979, when the considerable inventory still on hand was sold off over a three month period at salvage prices to a large distributor.

b. Marketing. The new product lines — liners, ground cover, budding paints and vegetable starts — require entirely different marketing techniques. However, those techniques are only now coming into play. In 1979 traditional marketing of azaleas and, to some extent, green plants was still going on.

c. The Nature of the Work Performed. The evidence does not disclose any radical change in the nature of the work performer The only pronounced difference was the dwindling employment before the sale and its continuation for a time thereafter. But by March 1, 1979, the work compliment was comparable to that at the time of the election in September, 1978. When a full compliment was achieved in August, 1979, it was very close to the full compliment under the Lewises in March, 1979 [Res. Exh. D, F. F, & J]. Since the decision to move into liners die. not come until August, 1979, there was little change in the skills required and utilized.: Moreover, Brumbaugh testified that raising liners has a good deal in common with azaleas. Finally, the nursery business is not one which requires--except at the higher levels--unique skills. The only specific one mentioned was manual dexterity and. that is just as desirable in azalea cultivation as in the newer crops.

d. Management. Mrs. Babbitt sought to continue the same management structure which had existed previously, 15/ there would be a grower, sales and shipping personnel, and other leadmen and foremen as the operation expanded. Again, it was not until August, 1979, when Andrew Braumbaugh was hired, that there was a shift in management philosophy and practice.

e. Personnel Policy. There is no evidence of a pronounced change in personnel policy after Mrs. Babbitt took over. Wages were not changed materially. The same pay checks and applications were used.

13/ As late as April, 1930, azaleas were still the major doller product.

14/ Perhaps somewhat less propagation and green plant care; nothing else was mentioned.

15/ She did experience considerable difficulty in finding and keeping growers. Three were employed and none lasted more than 2 weeks.

f. Physical Plant. Mrs. Babbitt acquired not only the land and structures at Vista but also the structures at Whittier. The plan was to consolidate the two. It does not appear that this consolidation had any significant impact on the Vista operation until after Brumbaugh was hired in August [see Res. Exh. C and his testimony on the timing of the new installations indicated on it].

D. The Terminations.

Intertwined with the alleged campaign to discourage and eliminate former Lewis employees are the individual charges that three of them -- Mary Hickey, Salvador de Casas and John Martinez -- were terminated because of union sympathies and/or activities. Although their charges both influence and are influenced by the findings already made with respect to that "campaign", there are additional facts in each case which warrant separate consideration

1. Mary Hickey.

Mary had worked in the office for the Lewises from August, 1977, until November, of 1973. She kept the payroll, maintained personnel records, wrote and extended sales slips, made up deposits and took incoming phone calls. Because of her unique knowledge of the operation both Raul Vega and Mrs. Babbitt were happy to rehire her to perform most of the same tasks. She was not in charge of personnel, no labor issues were discussed in her presence, any confidential secretarial work was done elsewhere, and when confidential calls were received at the Vista office, Mary would be excused or excuse herself. 16/

At the time of the UFW organisational drive at Lewis, she had been elected secretary of the organizing committee, a fact which was known to the then foreman, Larry Montano, 17/ and communicated to the Lewises.

Mrs. Babbitt was aware of Mary's previous employment and had discussed her with Mrs. Lewis who criticized her as a "busybody" and a "troublemaker". Mrs. Babbitt did not admit awareness of. union sympathy or activity on Mary's part, but given Mrs. Lewis propensity to criticism and gossip, I find it hard to believe that the ambiguous, almost euphemistic, term "troublemaker" was not understood or actually connected with union activities.

16/ These facts do not support Respondents' claims that she was a confidential employee. He me t Who1e s a1e, 2 ALR3 No. 24 (1976)

11/ Montane later came to work at the nursery and shared some of this information with Mrs. Babbitt. This did not occur, however, until after Mary's termination.

But no matter; Mrs. Babbitt's comment at Mary's termination that, "It was bad timing for me to be there at that time," indicates Mary's sin was not so much her union activity as the dangerous continuity which her continued employment created—an equally-prohibitive reason for termination. Mrs. Babbitt's claim that Mary-removed herself from the job because she felt uncomfortable around Mary Ann Lemke and had betrayed confidences is what a supervisor who has "eased" an employee out would like to think happened. I credit Mary's account (supra, p. 7, fn. 6). 17a/

2. SaJvador De Casas. De Casas was one of six employees who stayed on through the change in ownership. Me had worked for the Lewises since 1976, doing general nursery work--sorting plants, watering, transplanting and transporting--and was considered *a* good worker by all.

Like Mary Hickey he had been active in the UFW organizing committee. Larry Montano was aware of this and I find that he made Virginia Babbitt aware of it at their interview immediately prior to De Casas' termination. 18/

Mrs. Babbitt had almost no personal contact with him. She testified to receiving "bad vibes" during her initial interview. The only other encounter occurred when he inquired of her, on behalf of himself and some others, about the wage increase which he had heard Raul Vega was arranging 19/. She did not take kindly to the inquiry; it appears to have confirmed in her mind his status as a ''complainer". Two days later—the same day she spoke with Montane about him—she terminated him saying she was dissatisfied. This was the first knowledge he had that she was unhappy with him or his work.

Both the timing of the discharge and the reason-- "complaining" -- indicate, at the very least, that he was terminated for acting as the spokesman for himself and the others who were unhappy with their wages.

l7a/ Finally, it should be mentioned that Hickey's work was incidental to and involved with nursery operations; she was an agricultural employee. Dairy Fresh Proiducts Co., 2 ALRB No. 55 (1975)

18/ Montano testified that he did not disclose this information to Mrs. Babbitt, but was impeached by his previous admission to General Counsel that he had revealed De Casas' union activities. The circumstances of the retraction are suspisious: After his conversation with General Counsel and before testifying, he spoke with Mrs. Babbitt and then came to the hearing and denied his prior statements. Furthermore, when confronted with the change he waive re and admitted labeling De Casas a "troublemaker" to Mrs. Babbitt.

19/ There is a conflict in the testimony as to whether he spck-directly or through an interpreter and as to his ability to speak English. The conflict, in so far as it tends towari impeachment, I find to be on a collateral matter. De Casas is serious, even a bit dour; but he testified carefully and accurately. I find him a credible witness.

3. John Martinez.

John Martinez began working for the Lewises as a maintenance man in July, 1976, and by the time of his layoff in October, 1978, was in charge of packing and shipping, as well as selling and driving. Because of his familiarity with the Lewis' operation both Raul Vega and Mrs. Babbitt were pleased to rehire him. He began on February 5, 1979, but his tenure was very short: he was terminated 6 working days later on February 12th.

Martinez was paid a salary and was to be in charge of sales and shipping. However, sales were minimal, no one worked directly under him, and he did no hiring or firing. Occasionally he would request some assistance. 20/

During the Lewis' regime he had been by far the most active worker in the union campaign. Even before the UFW was in the picture, he had sought out the Laborers Union, as a possible representative. When that did not work out, he was the one to go to the UFW. He was responsible for obtaining authorization cards and for general laison with the union; and he was elected president of the organizing committee.

All of this was known to the Lewises. Mrs. Babbitt testified that Mrs. Lewis told her that Martinez was "dishonest" and a "bad" worker", but claims his union activity was never discussed. As with Hickey, I find it difficult to believe that his role was not alluded to.

It was immediately after Mart-Inez was hired on, that Mrs. Babbitt went to San Francisco to discuss, among other things, the UFW bargaining demand. There then ensued the telephone conversation with Raul Vega in which she instructed him to cease all hiring and obtain a guard at night.

The union -- along with the diseased azaleas and. theft -- was very much on her mind. Indeed, Officer Coppock's testimony indicates that she linked the union with the thefts (and both with Martinez); a notion which is corroborated by Raul Vega's testimony that her announced purpose in having the armed guard was to forestall "union sabotage".

All of this must be taken into consideration in evaluating the two radically different versions of Martines's discharge: That of Mrs. Babbitt and her retainer Philippe Bayonet and that of John Martinez and Mary Hickey.

According to Mrs. Babbitt (and confirmed for the most part by Bayonet) she had instructed Bayonet in her absence to see to it that no shipments left the premises without invoices. On February 12th, orobablv late in the afternoon. she returned and

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20/ The facts do no support Respondsents' claim that he was a supervisor. Section 1140.4 (j); Anton Caratan and sons, 4 ALRB No. 102 (1978).

saw that. John Martinez had just finished loading up an unmarked van. Since no paperwork was apparent, she asked Bayonet who was standing beside her to check the van, but he was unable to do so before it left. John was asked about the shipment and, according to Mrs. Babbitt:

> "[He'] wouldn't open up his mouth. An I got excessively angry. And I don't know what I said, but I'm sure it had four-letter words in it. And I asked him to pick up his check." [Tr. I:131(22-25)].

A subsequent search for an invoice turned up nothing. John cane to the office and was given his termination slip.

Martinez denies that there was an incident with an unmarked van. According to him, he was called into the office the morning of the 12th, told that he was no longer needed and terminated. When he asked about the future, Mrs. Babbitt told him she did not know what to do with the nursery.

Mary Hickey who was present, confirms Martinez's account. She further testified that the only paper work about which there was a question concerned a shipment to Whittier.

On balance, I accept Hickey "s and Martinet's account. "Chile Martinez is not beyond reproach 21/, his account is corroborated by Mary Mickey whose credibility is established (Supra, p. T, en 6). Furthermore, had the firing been as acrimonious as Mrs. Babbitt testified, it would be difficult to account for Martinez's later return to the nursery to discuss Montano. Also, there is abundant evidence that other nurseries -- in return for favors -- had beer, given plants without a serious effort being made to police shipments and paperwork. Bayonet's testimony is not persuasive: he struck me as an underling who could be counted upon to do--and say--what was expected of him.

I cannot, however, entirely discount Mrs. Babbitt's claim the she believed Martinez was involved in theft. The trouble is that it was mixed up in her mind with hostility toward the union. The two fed upon each other. I conclude that her preemptory haste in discharging Martinez without confrontation or investigation would not have occurred but for his suspected union sentiments.

21/ As evidenced by his refusal to disclose his current employment and his eventual attempt to cultivate Mrs. Babbitt by informing on Montano.

DISCUSSION AND CONCLUSIONS

I. SUCCESSORSHIP.

The problem of successorship is not new. It has arisen in many contexts, and all have received considerable attention in the Federal Courts, before the NLRB and from the commentators. Presently its status under our own Act is before the California Supreme Court in San Cleiaente Ranch, Ltd, v. ALRB, hearing granted September 12, l980, #3(J-87.

In every case the problem is to facilitate the transfer of capital to enable reorganization and vitalization of business enterprises, while at the same time protecting employee rights and assuring the accomplishment of the transition in an environment of industrial peace. NLRB v. Security-Columbian Banknote Co., 541 F.2d 135, 138 (3rd Cir. 1976); Highland Ranch and San Clemente Ranch, Ltd., 5 ALRB No. 54 (p. 11) (1979); Rivcom Corporation and Riverbend Farms, Inc., 5 ALRB No. 55 (p. 8) (1979"); John Wiley S Sons v. Livingston, 376 U.S. 543, 549 (1964); Slicker, A Reconsideration of the Doctrine of Employer Successorship--A Step Towards *a* Rational Approach, 57 Minn. L. Rev. 1051, 1052 (1973).

In the years over which the doctrine has evolved, a number of factors have been recognized as guide posts in any successor situation, regardless of context:

> "These factors include, inter alia, consideration of the continuity of workforce, continuity of business operations, similarity of supervisory personnel, similarity of product or service, similarity in methods of production, sales and invent-orying, and use of the same plant (citations omitted) ." NLRB v. Security-Columbian Banknote Co., 541 F.2d at 139.

Pre-eminent among them is the "continuity of the workforce". Howard.Johnson Co. v. Hotel Employees, 417 U.S. 249, 263 (1974: Nazareth Regional High School v. NLR3, 549 F.2d 373, 379 (2nd Cir. 1977); NLRB v. John Stepp's Friendly Ford, 333 F.2d 333, 336 (9th Cir. 1964)22/.

22/ For a numerical analysis of workforce continuity as a function of decisional outcome, see Goldberg, The Labor Law/ Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735, 793-306 (1969).

It is also well recognized that:

> "These factors should be seen from the perspective of the employee (citations omitted). This 'employee viewpoint' derives from the concept that the only reason to limit a successor employer's ability to reorganize his labor relations is to offer the employees some protection from a sudden change in the employment relationship (citations omitted). Thus, the inquiry must ascertain whether the changes in the nature of the employment relationship are sufficiently substantial to vitiate the employee's original choice of bargaining representative (citations omitted)." NLRB v. Security-Columbian Banknote Co., 541 F.2d at 139.

Unfortunately, the factors, while easy enough to state, can be difficult to apply. This is so both because of the wide variety of circumstances in which the issue presents itself and because of a superabundance of judicial and administrative precedent. Impressionistic adjudication thus becomes a real dancer Cf. IAM, Dist. Lodge 94 v. NLRB, 414 F.2d 1135, 1139 (D.C.Cir" 1969); Slicker, 57 Minn. L. Rev. at 1054-55. If this is to be avoided it is important to recognize at the outset that the law of successorship has various uses. It is one thing to talk about successorship in the context of whether a new employer should remedy his predecessor's unfair labor practices (Golden State Bottling Co. v. NLRB, 414 U.S. 163 (1973); it is quite another to consider the extent to which the arbitration clause of the predecessor's contract applies (John Wiley & Sons v livings Sons, supra); or whether the entire contract: should survive (Howard Johnson Co. v. Hotel Employees, supra); or whether, as here, the duty to bargain should carry over to the new employer (NLRB v. Burns Security Services, 406 U.S. 272, 277-81 '1972:

> "There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." Howard Johnson Co. v. Hotel Employees, 41" U.S. at 262-63, fn. 9 23/.

In the duty to bargain context it would appear that the successorship test is less stringent than in others. Cf. Howard Johnson Co. v. Hotel Employees, supra; NLRB v. Burns Security Services, supra. What is "basically at stake is the survival of the certification issued pursuant to the election provisions of the law. That being so, inquiry should focus, more than in other contexts, not only on the continuity of employment from.

23/ See, Slicker, 57 Minn. L. Rev. at 1063-1104, for a carefull analysis of the differing considerations applicable in each conext.

predecessor to successor, but also on the survival of a "bargaining unit" whose scope and composition are similar to that of the predecessor. NLRB v. Burns Security Services, 406 U.S. at 280; Slicker, 57 Minn. L. Rev. at 1066-67. Such a prerequisite calls into play many of the considerations--personnel policy, management structure, and method of production—which have already been mentioned; but, in addition, includes others, such as job skills and classification structure.

Here the legal context is the duty to bargain. Putting aside for a moment the survival of an "appropriate bargaining unit", and turning to the "continuity of the workforce", there is at the outset the question of whether, in agriculture, that factor should be given the pre-eminent role it occupies in industry 24/.

The ALRB in Highland Ranch and San Clemente Ranch, Ltd., supra, held that in the context of a "fluid, mobile labor pool", there should not be "undue emphasis on the continuity of the workforce." However, in Rivcom Corporation and Riverbend Farms, Inc., 5 ALRB No. 55 at fn. 9, the Board refused to apply Highland where there was a "year-round, permanent labor force." This being so, there is no reason -- in the context of nursery employment -- to de-emphasize the continuity of the workforce as a factor. See Kyutoku Nursery, Inc., 3 ALRB No. 30 (.1977) (pp. 5-6).

24/ Reliance on "workforc severely continuity" has, however, been severely Critized by some:

> "Whether or not an employer has the status o cessor cannot turn in any part to populate its work force with more than half of the predecessor's employees. Otherwise an incoming employer can control too readily its own status under our Act. It can so severely undertake the existing employment terms that, should one less that a majority of the predecessor's employees wish employment with it, by that act alone the employer can guarantee denial of the protection which if: is the objective of the successorship doctrine to confer." Members Fanning and Pennelo dissenting in The Boeing Company, 214 NLRB 541 (1974).

Justice Douglas, dissenting in Howard Johnson and Co. v. Hotel Employees, 417 U.S. at 269 likewise emphasized the ease with an employer could “arrange” for the distraction of workforce community.

Having accepted its important role the next step is to apply it. The Supreme Court in Burns offered an important, albeit somewhat confusing guide:

> "[T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit required by §9 (a) of the Act."[1] Id. at 294-95.

When Mrs. Babbitt took over Lewis Gardens, it was anything but "perfectly clear" that she intended to re-employ enough former employees to constitute an appropriate majority. The business was in shambles. The six Lewis employees who stayed on were no more than a skeleton crew and did not constitute a representative unit. The date of transfer is therefore not an appropriate time to measure Babbitt's duty to bargain. Of. NLRB v. Houston Dist. Services, Inc., 573 F.2d 260, 256 (5th Cir. 1978); Gallis Equipment Co., 194 NLRB 799 (1972). The fact, however, that production had dropped off and the workforce had shrunk is not in itself sufficient to defeat successorship. As the Board noted in Rivcom Corporation and Riverbend Farms, Inc., 5 ALRB No. 55 at p . 20:

> ". . .a reduction in the size of the bargaining unit does not necessarily render the unit inappropriate. NLRB v. Middleboro Fire Apparatus, Inc., 590. F.2d 4 (1st Cir. 1978); NLRB v. Band-Age, Inc., 534 F.2d 1 (1st Cir.) cert, denied, 429 U.S. 921 (1976). We must look to the totality of the circumstances to determine whether the change in ownership has affected the essential nature of the business. NLRB v. Boston Needharn Indus. Cleaning Co., 526 F.2d 74 (1st Cir. 1975); Tom-A-Kawk Transit, Inc. v. NLRB, 419 F.2d 1C 25 (7th cir. 1969)

Under the NLRA the duty to bargain has survived extended an: complete shutdowns. NLRB v. Daneker Clock Company, 515 F.2d 315, 316 (4th Cir. 1975) [8 months]; United Maintenance and Manufacturing Co . , 214 NLRB 529, 532 (19 74) [4 1/2 months".; C.G. Conn, Ltd. , 197 NLRB 442, 445 (1972) [4 1/2 months]. It has even survived a short period of intervening operation by a third party. First Food Ventures., Inc., 229 NLRB 1229, 2230 (1977).

Having discarded the date of transfer as the appropriate time to measure work force continuity, another time must be found. One possibility is the date of the Union's demand. But that would be equally artificial. The UFW knew nothing of the manner and method of transition; so utilizing its demand would have little relationship to workforce continuity.

Another possibility is suggested by the dictum in Burns that, "it may not be clear until the successor employer has hired a full complement of employees that he has a duty to bargain." Id. at 295 (emphasis supplied). A number of courts, following the lead of the 9th Circuit in Pacific Hide and Fur Depot v. NLRB, 553 F.2d 609(1977), have read the language as requiring in every situation where it is not "perfectly clear" at the time of transfer that a majority of former employees will be hired, that the determination await the hiring of a full work complement. NLRB v. Pre-Engineered Building Products , 603 F.2d 134 (10th Cir. 1979); NLRB v. Houston Dist. Services, Inc., supra.

But a too literal reading of the Burns' dictum would be at odds not only with the Supreme Court's tentative use of the word "may", but also with other significant factors--the most important being the impact on employees of postponing the determination until a full complement is obtained:

> "[C)hange in employer identity often occurs without prior warning to the employees and leaves them little, if any, opportunity to plan in its wake. Such a change may be peculiarly harsh for the individual employee, since it often is accompanied by a reduction in pay or the loss of accumulated rights and benefits or even a loss of employment. Further the employees' union choice and the continued vitality of any contract negotiated in their behalf with the employer are jeopardized by the employer change. Even where the employee learns of an impending change, he is largely without effective power, even through his union representative, to bring his overwhelming interests to bear on the employer's plans." Slicker, 57 Minn. L. Rev. at 1052.

Even from the employer's standpoint, the instability inherent in delay is hardly conducive to industrial peace and healthy personnel relations. The process of determination is therefore not one which should be drawn out longer than absolutely necessary.

That is why I believe work force continuity should be measured at the time the new employer first obtains a representative complement of employees; that is, a workforce which

both in size and structure is indicative of that ultimately to be hired. This may occur on the day of transfer or sometime later. In the last analysis its occurrence can only be determined by an examination of the facts of a particular case, althouqh legal precedents can be helpful. The NLRB, for example, has a rule aimed at protecting employee free choice by discouraging the premature recognition *of* a rival union. Under the General Extrusion rule, as it is known, the composition of the unit at the time of contract execution is compared with the time of hearing; if at least 30% of the employees and 50% of the job classifications existed at execution, a rival union petition will be barred. 121 NLRB 1165, 1167 (1958). The NLRB has utilized almost the same criterion in determining whether premature recognition is an unfair labor practice. Klein's Golden Manor, 214 NLRB 307 (1974); British Industries Co., 218 NLRB 1127 (1975). In *a* recent successorship case, the NLRB specifically approved reliance by an Administrative Law Judge on General Extrusion and British Industries. Hudson River Aggregates, Inc., 246 NLRB No. 32, pp. 2 & 11 (1979). Our own Act reflects a similar policy by requiring employment to be at 50% of peak for the filing of an election petition. Section 1155.3 (a) (l) .

The question then becomes: When did Mrs. Babbitt have a representative complement of employees. The answer calls for more than a simple tally; it involves not only size cut also the character of the unit. Is its composition indicative of the unit expected to emerge? 25/

Based upon the evidence, I conclude that there was a representative complement at the nursery by the beginning of March 1079. During February the complement had increased gradually from 12 to 22 on March 1st; it then stabilized and remained constant until the very end of March [Res. Ex. F(revised Stabilization is a good indicator that a representative complement has been achieved. Nor was there any testimony that the composition of the workforce at that time was a typical; Mrs. Babbitt may well have been uneasy about the nursery and its future, but the fixed work complement in March indicates that the azaleas and green plants were receiving at least the minimal attention they required. It is also noteworthy that a

25/ Expectation must, of course, be tied to the realities existing at the time of takeover; not to some distant set of hopes or unformulated plans. Gallis Equipment Co., 194 NLRB at 799. Otherwise the door would be left open to the very thing which the reprsentcitivs complement test seeks to avoid -- protracted delay.

complement of 22 is close to the complement at the time of the UFW election in September, 1978.

Of the 22, only four had voted in the election, one (Montano) was a supervisor and two others (the Gastelums) had worked for the Lewises long before the UFW organizational drive and election. So at best only 7 of the 22 were former employees. But such a calculation does not dispose of the continuity of the workforce factor. General Counsel has alleged that Mrs. Babbitt engaged in a deliberate campaign to prevent the hiring of former employees and to terminate those who had been hired.

An employer who is proven to have engaged in such a campaign obviously violates §1153 (c) and (a). Rivcom Corporation and Riverbend Farms, Inc., supra; K. B . & J. Young super Markets, v. NLRB, 377 F.2d 463 (9th Cir. 1967)cert. denied 389 U.S. 841 (1967); _NLRB v._New England Tank Industries, Inc., 302 F.2d 273 (1st Cir. 1962); NLRB v. Burns Security Services, 406 U.S. at 280-81, fn. 5. Moreover, once such a campaign is established, General Counsel may obtain individual relief simply by showing each to be a member of the group against whom the campaign was directed, without the necessity of proving individual union affiliation or support. Kawano, Inc., 4 ALRB No. 104, pp. 7-8 (1978), aff'd 106 C.A.3d 937 (1980). Furthermore, once *a* discriminatory campaign is established, there is a presumption that a majority of the predecessor's employees would have been hired. Rivcoia Corporation and Riverbend Farms, Inc., 5 ALRB Mo. 55 at 19. Therefore, so long as the other requirements for successorship are satisfied, a bargaining order will issue. NLRB v. Foodway of *El* Paso, 495 F.2d 117, 121 (5th Cir. 1974); K.B.& J. Young's Super Markets_, Inc. v. NLRB, supra.

Before considering the campaign, the other factors should be addressed; for they too might defeat a finding of successor-ship even though there be merit to the allegations of deliberate tampering with the work complement. Of_. NLRB v. Security-Columbian_Banknote Co., 542 F.2 at l4o.

Of the remaining factors, the most important is the continued appropriateness of the bargaining unit (supra on. 17-18). It has already been pointed out that the nature of the work performed and the manner of its performance has not changed (supra pp. 10 & 11). In fact, as Andrew Brunbaugh testified, even with the new product lines, no basic chance is to be expected. There has been little, if any, alteration in personnel policy (supra, p. 11) , or in. management structure (supra p. 11) , and the unit had returned to its size at election. I therefore conclude that the Lewise' bargaining unit, "remained intact under the successor and continued to be an appropriate unit." Id. at 139.

While there was an eventual change in product, that did not even begin until August, 1979, and is still incomplete. Moreover, it will not substantially alter the work from "the perspective of the employee." Id. at 139. The same is true of the physical plant (supra p. 12). Marketing did change more rapidly, but its effect on employee work was not that significant (supra p. 11). The legal trappings of the takeover are not especially important, but in any event the method of sale—purchase of all common stock in the predecessor and its continued corporate existence with an eventual name change—is a format with little discontinuity.

Finally, there is a factor which any number of courts have cited, but whose importance remains uncertain: The freshness of certification, especially when the changeover occurs during the certification year. NLRB v. Burns Security Services , 406 U.S. at 279 & fn. 3; NLRB v. Albert Armato and Wire & Sheet Metal Specialty Co., 199 F.2d 800, 803 (7th Cir. 1952) ; Firchau Logging Co., Inc., 126 NLRB 1215 (1960) ; Brooks v. NLRB, 348 U.S. 96 (1954); Section 1156.6 of the Act and Kaplan's Fruit & Produce Co., 3 ALRB No. 28 (1977) . Here the election was held 4 months before the transfer of ownership and the certification issued only 2 weeks before.

I conclude therefore that the other relevant factors are not so pronounced as to defeat successorship if there be *a* basis for finding that *a* majority of former employees would have been working in March but for the discriminatory campaign. The facts surrounding the allegation of an anti-union campaign have been considered (supra pp. 6-9) . They poin- unmistakably to a hiring and termination policy governed in part by a desire to contain and limit union influence. Mrs. Babbitt acted out of a combination of motives, and one of them was to defeat unionization at the Nursery.

The Board has considered the issue of mixed motive en a number of occasions, the most recent being Harry Carian Sales, 6 ALRB No. 55 (1980), where it said:

> "Our ultimate inquiry [is] whether respondent would have discharged the crew members but for their union activities. 'Where a discharge is motivated by an employer's anti-union purposes it violates Labor Code Section 1153(c) and (a) even though additional reasons, of a legitimate nature may exist for the discharge.' Abatti Farms, Inc. May 9, 1979)5 ALRB No. 34 , p. 27 , enf'd in part Abaitt

Farms v. ALRB (1980) 107 Cal. App. 3d 317." 26/

I conclude that the hiring and termination policy would, not have existed as it did and been enforced as it was but for a desire to contain and limit union influence. That being so, the continuity of the workforce is , under Riycom, to be presumed. This means that the burden shifts to the Respondents who must come forward with proof that even if there had been no illegal campaign there still would not have been a majority of former employees at the time a representative complement was achieved. 27/

26/ This "but for" test is consistent with the test developed by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). Very recently, in Wright Line 25l NLRB No. 150 (1980) , the Board rejected the "dominant" or "primary" motive test, abandoned its former "in part" test, and adopted the Mt. Healthy analysis, Under the new test the initial burden is on the General Counsel to make a prima facie showing that projected conduct was a "motivating factor" in the employer's decision. Once that is established, the burden shifts to the employer to demonstrate that the action would have taken place in the absence of protected activity. While the Mt. Healthy test does not conflict with the "but for" analysis, it does have the advantage of clearly allocating the burden of proof. Here, under either test, ray conclusion would be the same.

27/ A number of courts have suggested the possibility that a mathematical majority may not be required. Boeing Co. v. IAM, 504 F.2d 307, 318 (fn. 15) (5th Cir." 1974); Dynamic Machine Co. v. NLRB, 552 F.2d 1195, 1203 (7th Cir. 1977). However, this has been in the context of an analysis based on a full, rather than a representative complement. Given the choice of the smaller, representative criterion, a majority should be established, recognizing, however, that there will be instances in which a majority will exist even though circumstances preclude an exact count. There has also been some question as to whether the majority is to be computed as a percentage of the new employer's workforce or as a percentage of the predecessor's total complement. Boeing Co. v. IAM, 504 F.2d at 319. The view supported by the weight of authority is that the computation is to be based on the new employer's workforce at the time chosen. United Maintenance & Manufacturing Co. , 214 NLRB at 533-34.

Respondents have not met this burden. At a minimum there were four former employees working at the time a representative complement was employed. Three others were terminated illegally (infra pp. 27-28) . Hickey named eight 28/ employees who asked for work; and, according to Vega, there were still more. Even discounting the size of Vega's estimate and allowing for some overlap with Hickey's list, there is insufficient evidence to overcome the presumption that at least 12 of the 22 employed in March, 1979, would, have been former employees.

II. THE INDIVIDUAL DISCHARGES

This case -- more than almost any ether -- points up the inadequacy of the Great Dane Trailer test in analyzing allegations of pretextural discipline. Under that test:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight' an anti-union motivation must be proved to sustain the charge 'if the employer has come forward with evidence of legitimate and substantial business justification for the conduct.'" NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967).

Here, there is no way in which the terminations of the three persons primarily responsible for bringing the union to the nursery can be characterized as anything but "inherently destructive of important employee rights," especially since their firing was part of an overall anti-union campaign and, what is more, their elimination might well have destroyed the "continuity of the workforce" and with it the entire duty to bargain

But notice where the characterization leads: Once the discharges are labeled "inherently destructive", motive becomes irrelevant; "the Beard can find an unfair labor practice ever. if the employer introduces evidence that the conduct was motivated by business considerations." Thus, even accepting Respondents' contention that the only motive for discharging Martinez

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28/ Including Montane and four employees who, while working" at the time of the election, were all employed in 1973 -- much more recently than the Gastelums.

was theft, for De Casas, poor attitude, and for Hickey, betrayal of confidential information, the Board can nevertheless find the terminations to be unfair labor practices.

I cannot believe Chief Justice Warren meant that in Great Dane Trailers; nor do I believe that he would consider the terminations "comparatively slight". His test simply is not equipped to handle the situation. Great Dane, after all, concerned the granting of special benefits to non-striking employees — conduct which can be seen as having aspects of business justification while, at the same time, having a substantial adverse impact on employee rights. The test is useful in that situation and in others like it; e.g. superseniority for non-strikers [NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)]; lockouts (Truck Drivers Local 449 v. NLRB (Buffalo Linen Supply Co.) , 353 U.S. 87 (1957) ; American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) ; NLRB v. Brown, 380 U.S. 278 (1965)]; and the right to go out of business to avoid unionization [Textile Workers v. Darlington Mfg. Co. , 380 U.S. 263 (1965)] . But it does not work in the context of pretexture discipline.

An analysis has been suggested which is more helpful in such cases, but which also takes into account the other situations in which discrimination questions arise and will continue to arise. In addition, it rationalizes the many precedents which do exist in this area of the law. 29/

Under this analysis the first question to be asked is: What business interest does the employer appeal to in seeking to justify conduct which adversely affects or tends to affect the right of employees to join, sympathize with or engage in activities in support of a union? The next inquiry is: Is that interest the real reason for the conduct or is it a pre-text? And the final question is: If the reason offered is the actual reason, does the societal interest in allowing employers to further their business interests by such conduct outweigh the harm which of workers to hat conduct inflicts on the ability of workers to pursue the legismate and important forming and maintaining unions.

This third inquiry can be very important in some contexts --the use of the lockout, super-seniority for non-strikers and so on--but it is not especially important in situations like

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29/ See: Christensen & Svanoe, Motive and Intent in the commission of Unfair Labor Practices; The Supreme Court and the Fictive Formality, 77 Yale L. J. 1269 (1968)

those at issue here; for, *in* such cases the employer general!" is appealing to an interest which all would acknowledge he is entitled to pursue. Here, for instance, no one would clain that Respondent had to continue Martinez as an employee if, as Mrs. Babbitt claimed, he was a thief.

The inquiry that is important in this case and in cases like it is the second: Is the reason advanced by the employer the real reason, or is his conduct the result of wanting to punish or deter workers for engaging in activities in support of unionization? Notice that such an inquiry involves, almost inevitably, the issue of motivation, something which is not at all germane to the balancing test which terminates the analysis. 30/

But does this analysis speak to the important question of how the burdens of producing and going forward with the evidence are to be allocated?

It does, and to see how it does, it is necessary to return to the first inquiry: What business justification does the employer appeal to in seeking to justify conduct which adversely affects or tends to affect the right of employees to join, sympathize with, or engage in activities in support of a union. Obviously, the starting point is "conduct which adversely affects union membership, sympathy or activity." And that is the initial burden on the General Counsel: to produce substantial evidence of conduct which interferes with union membership sympathy or activity. In most cases this entails proof that: the discriminates (.s) was engaged in protected activity, than the employer was aware of it, and that adverse action was taker, against the worker(s). Once this has been established, the employer must come forward with some justification for his action; namely, that he was pursuing a legitimate business interest. NLRB v. Great Dane Trailers,_Inc ., 388 U.S. at 34. it which point the General Counsel must rebut this either (a) by offering substantial evidence that the asserted interest was a pretext and the employer was actually motivated by hostility toward unionization and/or (b) by accepting the justification offered and establishing that, even if it was not pretextural, the societal interest in allowing the employer to further his business interest by such conduct does not outweigh the harm which that conduct inflicts on the ability of workers to pursue the legitimate and important goal of forming and maintaining a union.

31/ The chief virtue of this test is that it consigns motivation to a specific place, rather than allowing it to color --and very often confuse — very element of the alleged violation

Applying this analysis to the facts already found to exist here, I conclude that all three employees were active in the UFW campaign and Mrs. Babbitt knew it (supra pp. 12-14). Since adverse action--termination--occurred, the burden was on Respondents to come forward with legitimate justifications. This they did by asserting Martinez to be a thief, De Casas to be a complainer with a chip on his shoulder and Hickey to be a busybody who betrayed confidential information. General Counsel sought to rebut this explanation by establishing that it was pretextural — that Mrs. Babbitt was actually motivated by hostility toward unionization. Evidence was offered which contradicted the Respondents' justifications and which went on to show an overall campaign to contain or eliminate UFW influence.

I have found in both Hickey's 32/ and De Casas cases, General Counsel clearly established the pretextural basis (supra pp. 12 &. 13'. I therefore conclude each was terminated in violation of Section 1153 (c) and derivatively- Section 1153 (a).

With respect to John Martinez, I have found Mrs. Babbitt's motives to be a mixture of anti-union bias and her belief that he was a thief (supra p. 15). Under Harry Carian Sales_, supra, the legal question is whether his discharge would have occurred but for her anti-union bias (supra, p. 23). I conclude that preemptory haste in terminating him- -without first confronting him and fully investigating the situation—would, not have happened but for his union sentiments. I cannot gainsay at this late date whether he was actually involved in thefts or not; he may have been. What I can say is that, because of his union sympathies, he was deprived of the opportunity to vindicate himself and that is a sufficient basis upon which the premises a violation. I therefore 1153(c) and derivatively section 1153 (a) by derivatively, John Martinez.

32/ With Hickey, the Respondents claimed no adverse action occurred; she voluntarily quit. I have found that this was not so; she was terminated (supra p.13); and so with her as with Martinez and De Casas, the issue sidered.

REMEDY

1. Having concluded that Respondents violated their duty as successors to bargain with the UFW and having found this refusal to be tinged with anti-union animus, make-whole relief is clearly appropriate. Rivcom Corporation and Riverbend Farms , Inc._, 5 ALRB No. 54 at p. 22. I therefore recommend an order that Respondents: (1) meet with the UFW upon request and bargain in good faith and (2) make whole their agricultural employees for all losses of pay and other economic benefits sustained by them as a result of the refusal to bargain, such losses to be ascertained and computed in accordance with Adam Dairy, 4 ALRB No. 24 (1978), as modified by Ranch No. I, Inc., 6 ALRB No. 37 (1980), from February 22, 1979--the date the UFW demand was received—until such time as Respondents commence to bargain with the UFW and thereafter to contract or impasse.

2. The three named discriminatees are entitled to immediate reinstatement to the same or similar jobs with full back pay to be computed in accordance with J & L Farms , 6 ALRB Me. 43 (1980). In calculating the amount, the Regional Director should take into account any additional amounts arising out of the make-whole relief provided for in paragraph 1 above.

3. As for seven of the former employees who contacted Mary Hickey seeking employment 33/, I have concluded that the failure to consider them would not have occurred but for the discriminatory campaign. Their situation is thus identical to the predecessor employees in Rivcom Corporation and Riverbend Farms, Inc. They are therefore entitled to an offer of immediate employment in their former or substantially equivalent positions, replacing any one presently occupying those positions. Should there be insufficient positions, they are entitled to preferential rehire rights. In addition, they are entitled to be made whole for all pay and benefits which they would have received based on a hiring date of February 16, 1930, the last day upon which Mary Hickey could have been contracted at work. While none of the seven appear to have submitted submitted a formal job application, there does not appear to have been a consistent practice of requiring written applications; I therefore find their contact with Hickey to have beer, sufficient. In view of the testimony as to the non-seasonal nature of nursery employment, the seven should be considered as having steady employment from February 16, 1979, except that should it appear that one whose seniority dated from that rime would have suffered layoff (and perhaps eventual recall;, may be taken into account. To the seven I would also add Duayne Giron who testified that Larrv Montano told him that he

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33/ Mary Hickey named eight (G.C. Ex. 13); however, one was the former Lewis supervisor, Larry Montane, who was eventually rehired as a supervisor and later let go.

could not be hired because he was a former employee. Montano denied this, but he was not a trustworthy witness (supra p. 13); whereas I find Giron was. All are likewise entitled to the make-whole relief provided for in paragraph 1 above.

4. Because Respondents are responsible for the delay in bargaining, I have recommended that the certification of the UFW, as exclusive bargaining agent, be extended for a period of one year from the date on which good faith bargaining commences. Kyutoku Nursery, Inc., 4 ALPJB No. 44 (1978); Robert H. Hick air., 4 ALRB No. 73 (1973) .

5. The other items of remedial relief I recommend as necessary in view of the nature of the violations, Respondents' business, and the conditions among farmworkers and in the agricultural industry at large, as set forth in Tex-Cal Land Management Inc. , 3 ALRB No. 14 (1977) .

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code Section 1160.3, Respondents Babbitt Engineering and Machinery, Inc., and San Marcos Greenhouses, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by unlawfully terminating, or refusing to hire or consider for employment the former employees of Lewis Gardens, Inc., or in any like or related manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153(c) of the Act.

(b) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondents' agricultural employees at San Marcos Greenhouses, Inc. in violation of Labor Code Section 1153 (e) and (a).

(c) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code Section 1152.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of their agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole their agricultural employees, including Dorthy Van Ginder, Patricia Daltorio, Petro Gonzaies, Sccorrc Vega, Roynaldo de Casas, Andreas Gonzaies, Conrajo Luna, Duayne Giron, Mary Hickey, Salvador De Casas and John Martinez for all losses of pay and other economic losses sustained by them *as* the result of Respondents' refusal to bargain as such losses have been defined in Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1973) , as modified by Ranch No. I, Inc. , 6 ALRB No. 39 (1980) for the period from February 22, 1979, until such time as Respondents commence to bargain in good faith with the UFW and thereafter bargain to contract or impasse.

(c) Immediately offer Marv Hickey, Salvador De Casas and John Martinez reinstatement to their farmer or substantially

equivalent jobs without prejudice to their seniority or other rights and privileges.

(d) Immediately offer employment in their former or substantially equivalent jobs to Dorthy Van Cinder, Patricia Daltorio, Petro Gonzales, Scorro Vega, Renaldo de Casas, Andreas Conzales , Conrado Luna and Duayne Giron, replacing if necessary anyone presently occupying those positions. If there are not sufficient positions available at San Marcos Greenhouses, Inc. to hire each of the aforesaid employees immediately, Respondents shall place their names on a preferential hiring list and hire them as soon as jobs become available. The order of employees' names on the preferential list shall be determined pursuant to a non-discriminatory method approved by the Regional Director.

(e) Make whole each of the employees referred to in paragraphs 2(c) and 2(d) above, for any losses he or she suffered to the date on which they are offered full reinstatement, as the result of his or her termination or failure to be hired, by payment to each of them of a sum of money equal to the wages they lost plus the expenses they incurred as a result of Respondents' unlawful termination or failure to hire, less their respective net earnings, together with interest thereon at the rate of seven percent per annum. Back pay shall be computed in accordance with the formula established by the Board In J & L Farms, 6 ALRB No. 43 (1980), and shall begin from date of termination for the employees named in paragraph 2(c) above and from February 16, 1979, for the employees named in paragraph 2 (d) above.

(f) Preserve and upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(g) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondents shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(h) Post copies of the attached Notice for 90 Consecutive days at times and places to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(i) Provide a copy of the attached. Notice to each employee hired during the 12-month period following of issuance of this order.

(j) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order to all employees employed by Lewis Farms, Inc. or San Marcos Greenhouses Inc. since January 1, 1978.

(k) Arrange for a representative of Respondents or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of San tlarcos Greenhouses, Inc. on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading's), the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

3. It is further ORDERED that the protections afforded during the one year period following certification, as provided for in Section 1156.6, be extended to one year from the date the parties first meet prusuant to the order to bargain in Paragraph 2(a) above.

DATED: December 15, 1980.

JAMES WALPMAN
Administrative Law Officer

DO NOT REMOVE OR MUTILATE

NOTICE TO EMPLOYEES

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Realtions Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help any union;
3. To bargain as a group and to choose anyone they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect each other; and
5. To decide not to do any of these things.

Because this is true, we promise you that:

WS WILL NOT terminate or refuse to hire or consider for employment or otherwise discriminate against any employee or previous employee because he or she exercised any of these rights.

WE WILL offer Mary Hickey, Salvador De Casas, and John Martinez their jobs back and pay them any money they lost because they were terminated.

WE WILL offer jobs to Dorthy Van Cinder, Patricia Daltorio, Petro Gonzales , Scorro Vega, Reynaldo de Casas, Andreas Gonzaies, Conrodo Luna, and Duayne Giron, replacing if necessary any present employees , and we will pay each of them any money they lost because we failed to hire them. If we do not have enough jobs available to hire all of those employees immediately, we will rut their names on a list to be hired as soon as positions become available.

WE WILL meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL make all our employees, including those named above, while for all pay and benefits lost because of our failure to meet and bargain with the UFW.

SAN NARCOS GREENHOUSES, INC.

By: _____
Representative Title

BABBITT ENGINEERING AND MACHINERY, INC.

By : _____
Representative Tile

This is an official notice of the Agricultural Labor Relations Board and agency of the State of California.