Guadalupe, California
Lompoc, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN ELMO RE FARMS, KUDU, INC . , and ROBERT WITT RANCH,	Case Nos.	77-CE-4-SM 77-CE-4-1-SM 77-CE-5-SM 77-CE-5-1-SM
Respondents,		
and	8 ALRB No. 20	
UNITED FARM WORKER OF AMERICA ALF-CIO		
Charging Party		

DECISION AND ORDER

On November 26, 1979, Administrative Law Officer (ALO) Jeffrey S. Brand issued the attached Decision and recommended Order. Thereafter Respondents timely filed exceptions with a supporting brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (Board or ALRB) 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, findings, and conclusions of the ALO to the extent consistent herewith, and to adopt his recommended Order as modified herein.

This case presents two variations on the same theme: the extant to which the bargaining obligation survives certain

[1/] All code citations are to the California Labor Code unless otherwise stated.

kinds of changes in the employing entity.

Following a Board-conducted representation election on September 17, 1975, we certified the United Farm Workers of America, AFL-CIO (UFW), as the collective-bargaining representative of the employees of John Elmore Farms (Elmore)[2/] in Lompoc and Guadalupe. John Elmore Farms (Feb. lo, 1977) 3 ALRB No. 16. After the election, but prior to our certification of the UFW, certain changes took place with respect to the organization and operations of Elmore, as a result of which, it is contended, the duty to bargain with the UFW was suspended as to the employees of Elmore's Lompoc ranch and terminated as to the employees of its Guadalupe ranch.

At the time of the election, both the Lompoc and Guadalupe ranches were farmed by John Elmore, functioning as a sole proprietorship. In November of 1975, John Elmore and his two sons formed the Elmore Corporation. One month later the name of this corporation was changed to Elmore, Inc., and in May of 1976 the name was changed to Kudu, Inc. (Kudu). At the hearing the parties stipulated that Kudu was a successor and alter ego of the original employer at both ranches.

Kudu's successorship to Elmore as the employing entity is not the only change we have to consider, for in January 1977 Kudu leased the Guadalupe ranch to Robert Witt and Kelley Elmore Witt, the son-in-law and daughter of John Elmore. Prior to

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[2/] According to the record in the present proceeding, there never has been an entity called John Elmore Farms; the correct name of the employer as of the date of the Petition for Certification was simoly John Elmore.

leasing the Guadalupe ranch from his father-in-law, Robert witt had not previously operated a farm; it was John Elmore who suggested to him that he try farming. Victor Anderson, Secretary-Treasurer of Kudu and John Elmore's business manager, testified that before offering the Guadalupe ranch to Witt as lessee Elmore had asked his son, Howard, to take over the ranch, but Howard had declined. Anderson also testified that one of the reasons for Elmore's incorporating was his desire to "semi-retire" and to let his children take over the business. The term of the lease was for one year so that Witt would have a chance, as John Elmore testified, to "see if it works out" and "if it fits with everybody." Thus, from the beginning, it was always possible that the transfer of the Guadalupe operation to his son-in-law might not be permanent.

Victor Anderson testified that Kudu agreed to pay the expenses incurred by Witt for operating the ranch until he got his operation going. In fact, Kudu paid virtually all of Witt's expenses until Witt established a line of credit, the sole security for which were the signatures of John Elmore and his wife. Although the yearly rental was $116,250, payable in equal installments on January 1 and July 1, no payments were made until June 22, 1977, when Witt paid the entire yearly rental out of monies obtained from the line of credit for which John Elmore and his wife were guarantors. Thus, John Elmore essentially provided the working capital for Witt or, through his alter ego, Kudu, carried Witt's operations until they were capitalized. When Witt began farming, he simply assumed Kudu's crop-sale agreements, took over practically all of Kudu's equipment through

a lease-purchase agreement, and retained Kudu's supervisorial personnel.[3/]

On the basis of the totality of the circumstances, some of the major points of which we have just outlined, the ALO found that Respondent Robert Witt Ranch (Witt) had a duty to bargain with the UFW as either a successor to, or as an alter ego of, or as a joint employer With, Kudu. Witt would be obligated to bargain with the UFW whether it was a successor to, alter ego of, or joint employer with, Kudu. For the reasons stated below, we do not need to engage in such an exhaustive inquiry.

Although related concepts, the doctrine of successor and alter ego traditionally serve somewhat different purposes. The term "successor" is ordinarily used to describe a business entity which takes over the operations of another entity in a bona fide business transaction, such as a merger, consolidation, or purchase of assets. See Golden State Bottling Co. v. NLRB (1973) 414 U.S. 168, 182-83 n. 5 [84 LRRM 2839]. The term "alter ego," on the other hand, is reserved for those situations in which a successor entity is:

> ... merely a disguised continuance of the old employer. (Citations.) Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effects of the labor laws, without any change in the ownership or management. Howard Johnson Co., Inc. v. Detroit Loc. Jt. Ex. Bd., Etc. (1974) 417 U.S. 249, 260 [86 LRRM 2449]. (Emphasis added.)

[3/] There was no continuity in the non-supervisory labor force used by Kudu and that used by Witt. However, since Kudu used labor contractors, there was apparently no continuity from year to year in the labor force of Kudu considered alone.

The consequences of being an alter ego differ from those attendant upon being a true successor: the alter ego is subject to "all the legal and contractual obligations of the predecessor," ibid., while the obligations of the successor can vary depending upon the nature of the obligation sought to be imposed. The bargaining obligation, however, attaches in either case.

The focus in a joint-employer case is whether two or more business entities demonstrate a sufficient degree of interrelatedness on a number of levels to be considered a single employer under the Act, Rivcom Corporation (Aug. 17, 1979) 5 ALRE No. 55; Abatti Farms (Nov. 18, 1977) 3 ALRS No. 83. Since in a true successor case the predecessor has ceased to be the employing entity, where a successor is found to exist, there is no reason to inquire further whether the predecessor and the successor together constitute a joint employer. The matter is otherwise with respect to an alter ego which, as we have noted, is simply the original employing entity in another form; where an alter ego is found to have been created, and the predecessor employing industry continues to exist, there may well be cases in which the predecessor and its alter ego together constitute a joint employer, See, e.g., Whitehall Packing Co. (1981) 257 NLRB No. 43 [107 LRRM 1449]. In determining whether a business entity is a successor or an alter ego, the employer's motive, as we have noted, is often

a probative factor,[4/] although it is not a necessary one, see, e.g., Lewis Canter (1979) 242 NLRB 659 [101 LRRM 1226], Atlanta Paper Co. (1958) 121 NLRB 125 [42 LRRM 1309] . The determinative factor in all such cases is whether the new employing entity is in actuality the original one in a new form. In this case, although Respondents used the change from Elmore to Kudu and the lease from Kudu to Witt as reasons to refuse to bargain, there is no evidence that the lease arrangement between Kudu and Witt was motivated by a desire to avoid the collective-bargaining obligation. Whatever the effect of such changes, it appears that they were motivated primarily by personal or business considerations.

Absent anti-union animus, the NLRB takes into account a variety of considerations to determine whether there has been any real change "in the structure and identity of the employing entity," such *as* elements of common ownership or control, Aluminum Tubular Corporation and American Flagpole Co., Inc. (1961) 130 NLRB 1306 [47 LRRM 1492], or the totality of the circumstances; see, e.g., Mackie's Roofing and Sheet Metal Co.

[4/] For example, in NLRB v. Tri Cor Products, Inc. (10th Cir. 1980! 636 F.2d 266 at 270 [105 LRRM 3271], the Court said: "... [A] determination *as* to whether a second employer is a mere successor to a first employer or its alter ego involves a consideration of numerous factors. There is no hard-and-fast rule. If an employer makes changes in its business operation to deliberately get rid of the union, the employer is more likely to be an alter ego. If, however, the employer has legitimate economic reasons for the changes, and is not motivated by anti-union sentiment, the second employer is more likely to be deemed a mere successor to the first, In connection with this particular aspect, we think evidence of anti-union sentiment by an employer, occurring either before or after the change in the structure of the business, is germane.

(1975) 221 NLRB 277 [90 LRRM 1716]. In accordance with our approach in Highland Ranch and San Clemente Ranch (Aug. 16, 1979) 5 ALRB No. 54, enforced (1981) 29 Cal.3d 848, 874 [176 Cal.Rptr. 753, 768] we shall utilize a totality-of-the-circumstances test in considering whether an employer is a successor or alter ego.

We conclude that Robert Witt was an alter ego of Kudu. There are elements' of common ownership: Kudu owns, at least jointly, the equipment Witt is lease-purchasing; similarly, the crop-share agreements between Kudu and Witt show common ownership of the crops grown by Witt for Kudu. Equally significant is the financial dependence of Witt on Kudu. As John Elmore testified, Witt's leasehold was specifically made a year-to-year arrangement in order to see whether it would "work out"; for the first months of Witt's tenancy, Kudu carried the Guadalupe ranch, and thereafter Witt was enabled to operate "independently" on money essentially borrowed by his father-in-law or on monies from crop agreements which, without consideration, he simply assumed. Moreover, John Elmore still retains, by virtue of his being a guarantor of Witt's line of credit, a substantial financial interest in the Guadalupe ranch. In Young's Metal Fabricators and Roofing, Inc. (1979) 241 NLRB 978 [101 LRRM 1070], the national board affirmed the finding of an alter ego on the basis of facts similar to those found here, including the significant financial interest of a father in the business of his son, the performance of contracts by the father's firm which had been originally contracted for by the son's, the lack of any equipment independently owned by the father's firm, and the use of the same supervisors.

In Ramos Iron Works (1978) 234 NLRB 897 [97 LRRM 1388], the national board affirmed the finding of an alter ego in a situation in which "the operational control and business purposes of the entities [were] so molded that they cannot be regarded ... as separate enterprises." Ibid, at 901. Many factors relied upon by the Administrative Law Judge in that case are present in this one, e.g., the financial dependency of the alter ego on the original employer, the taking over of contracts undertaken by the original employer, and the relative inexperience of the manager of the alter ego, giving rise to an inference, similar to that drawn by the ALO in the instant case, of the continued participation of original management in the operations of the alter ego.[5/]

Having thus concluded that Witt was an alter ego, it follows" that he was obligated to bargain with the UFW to the same extent as Kudu. Since the question of Kudu's duty to bargain was settled by the stipulation of the parties that Kudu was a successor to and alter ego of the original employer involved in the election, the only remaining issue is whether Kudu and Witt could rely on section 1153(f)[6/] to refuse to bargain with the Union. We note that Kudu relied on that section to contend that

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[5/] Such participation was denied by Robert With, but the ALO specifically discredited him. Although John Elmore also testified that he did not interfere in Witt's running of the ranch, there is uncontradicted evidence of a great deal of assistance supplied to Witt by Wilkinson, Elmore's general manager.

[6/] Section 1153(f) makes it an unfair labor practice for an agricultural employer "[t]o recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part."

it had no duty to bargain until the Board either amended its certification or clarified the bargaining unit and, in fact, did commence bargaining after the Regional Director issued his report on clarification of the unit. Witt, however, absolutely refused to bargain on the grounds that he had no relation to Kudu and that section 1153 (f), in any event, prevented it. In Highland Ranch and San Clemente Ranch, Ltd., 5 ALRB No. 54, we rejected the reading of section 1153 (f) urged by Respondents and our interpretation was upheld by the Supreme Court. The Court rejected as:

> ... totally without merit the suggestion ... that [Section 1156, a section similar in import to 1153 (f)] should be interpreted to preclude the imposition of successorship liability upon a new employer under any circumstances.
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> . . . . . .
>
> [N]othing in the legislative history of the ALRA suggests that section 1156 was intended to abrogate the obligations of a successor employer with regard to a union that has been selected in a secret ballot election among its predecessor's employees and, in our view [such an] interpretation would undermine the integrity of such election results by permitting an employer to subvert a union's victory by a simple change in corporate ownership. (Emphasis added.) San Clemente Ranch v. ALRB (1981) 29 Cal.Sd 874, 885 n. 12 [176 Cal.Rptr. 768].

In that case, no amendment of our certification was required to ratify the existence of the successor employer's bargaining obligation; rather, the Court affirmed our conclusion that in appropriate circumstances the obligation will attach under our Act just as it does under the National Labor Relations Act.

In Montebello Rose Co., Inc. (Jan. 22, 1982) 8 ALRB No. 3, we imposed the make-whole remedy for the period of Respondent's refusal to bargain based upon a similar claim. In

accordance with our decision in that case, we shall impose it, as a joint-and-several obligation, as to both Kudu and Witt.[7/]

We note that the parties stipulated, in part, that:

> In order to encourage good faith bargaining and for the purposes of this hearing, the parties agree that any liability of Kudu, Inc., in Lompoc herein will be determined with regard to events prior to the date ... April 7, 1978.

We announce here the compliance tool of designating make-whole obligations for bad faith bargaining in, as far as is possible, discrete periods of time. Ordinarily, the initial period would be from when the respondent is found to have engaged in bad faith bargaining to the end of the hearing on the underlying charge. The make-whole obligation would continue thereafter until such time as the employer commenced to meet its statutorily-imposed obligation to meet and bargain in good faith with the union, on request. In light of the above stipulation and the fact that hearing on this matter commenced on June 12, 1973, the make-whole obligation herein imposed on Respondents shall commence on March 8, 1977, continuing until April 7, 1978, and thereafter until such time as Respondents commence good-faith bargaining with the UFW, which leads to a contract or a bona-fide impasse.

ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that

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[7/]Although, according to our discussion in Montebello Rose Co., Inc., supra, 8 ALRB No. 3, a respondent's good faith belief in the reasonableness of the section 1153(f) argument is irrelevant, we note here our affirmation of the ALO's conclusion that Kudu's refusal to bargain was in bad faith.

Respondents John Elmore, Kudu, Inc., and Robert Witt, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive bargaining representative of their agricultural employees.

(b) 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 with respect to the said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment and if agreement is reached, embody such agreement in a signed contract.

(b) Make whole their agricultural employees for all losses of pay and other economic losses they have sustained as the result of Respondents' refusal to bargain, as such losses have been defined in Adam Dairy (Apr. 26, 1978) 4 ALRB No. 24, for the period from March 8, 1977, continuing until April 7, 1978, and thereafter until such time as Respondents commence good-faith bargaining with the UFW which leads to a contract or to a bona-fide impasse.

(c) Preserve and, upon request, make available to

this Board or its agents, for examination, photocopying, and otherwise copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this Order.

(d) 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.

(e) Post at their premises copies of the attached Notice for 60 consecutive days, the period(s) and places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

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

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order, to all of the agricultural employees employed by Respondents at any time from March 3, 1977, to the present.

(h) Arrange for a representative of Respondents or a Board agent to read the attached Notice in appropriate languages to the assembled employees of Respondents on company time. The reading or readings shall be at such time(s) and place(s) as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees

may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(i) 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 it. Upon request of the Regional Director, Respondents shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

IT IS FURTHER ORDERED that the certification Of the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of the agricultural employees of John Elmore Farms, Kudu, Inc., and Robert Witt Ranch be, and it hereby is, extended for one year from the date of issuance of this Order.

Dated: March 10, 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 Santa Maria regional office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all farm 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 it is true that you have these rights, we promise that:

WE WILL in the future meet and bargain in good faith, on request, with the UFW about a collective bargaining contract covering our agricultural employees.

WE WILL give back pay to all of our workers who were employed from March 8, 1977, continuing until April 7, 1978, and thereafter to the date we began to bargain in good faith with the UFW, to reimburse them for any loss of wages and economic benefits they have suffered as a result of our failure and refusal to bargain in good faith with the UFW.

Dated: JOHN ELMORE FARMS, KUDU, INC., and ROBERT WITT RANCH

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 500 South Broadway, #115-B, Santa Maria, California 93454; the telephone number is 805/922-5791.

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

DO MOT REMOVE OR MUTILATE.

CASE SUMMARY

John Elmore Farms, Kudu, Inc.,
Robert witt Ranch

8 ALRB No. 20
Case Nos. 77-CE-4-SM
77-CE-4-1-SM
77-CE-5-SM
77-CE-5-1-SM

ALO DECISION

On September 17, 1975, the UFW won a Board-conducted election among the agricultural employees of Respondent John Elmore (also known as John Elmore Farms and later as Kudu, Inc.) at Lompoc and Guadalupe ranches. On January 1, 1977, Kudu, Inc., leased the Guadalupe ranch to -Robert M. Witt- and Kelley Elmore Witt (son-in-law and daughter of John Elmore) who formed Respondent Robert Witt Ranch. On February 18, 1977, the Board certified the UFW as the exclusive bargaining agent for the employees of both the Guadalupe and Lompoc ranches. On March 8, 1977, Robert Witt refused to bargain with the UFW. From April 7, 1977, when the UFW requested bargaining with John Elmore Farms, through at least March 30, 1978, when the Regional Director determined that Kudu, Inc., was the alter ego of John Elmore Farms, no bargaining took place between Kudu, Inc., and the UFW.

The ALO concluded that Kudu, Inc., and Robert Witt Ranch were alter egos of, successors to, and joint employers with, John Elmore Farms and therefore obligated to bargain in good faith with the UFW. The ALO also concluded that section 1153 (f) of the Act was no bar to immediate bargaining obligations devolving on an alter ego or a successor employer. Section 1153 (f) states that it is an unfair labor practice for an employer to bargain with a labor organization which has not been certified by the Board.

BOARD DECISION

Relying on the factors that the lease arrangement between Kudu and Witt was contingent and on a year-to-year basis, the degree of interaction between the supervisory staffs of Kudu and Witt, and other considerations, including the economic interrelation between the two entities, the Board found Witt to be the alter ego of Kudu, Inc. (the parties had stipulated at the hearing that Kudu was a successor and alter ego of Elmore). The Board therefore found it unnecessary to address the successorship and joint-employer doctrines. The Board adopted the ALO's reasoning regarding the section 1153 (f) challenge, noting that the California Supreme Court had rejected a similar challenge as without merit in San Clemente Ranch v. ALRB (1981) 29 Cal.3d 894.

The Board, in adopting the ALO's recommended make-whole remedy for Respondent's refusal to bargain, announced the compliance tool of dividing the make-whole time in refusal to bargain cases into discrete periods insofar as possible.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: JOHN ELMORE FARMS, KUDU, INC., ROBERT WITT RANCH, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 77-CE-4-SM 77-CE-4--1-SM 77-CE-5-SM 77-CE-5-1-SM

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DECISION OF THE ADMINISTRATIVE LAW OFFICER

JEFFREY S. BRAND, Administrative Law Officer: This case was heard before me on June 12, 15, 19, 20, 21, 22, 23, 26, 27, and 28, 1978 in Santa Maria, California. The hearing concluded with one additional day of hearing on July 11, 1978 in Salinas, California.

I. JURISDICTION

John Elmore Farms, Kudu, Inc., and Robert Witt Ranch, Respondents herein, are agricultural employers within the meaning of Section 1140(c) of the Agricultural Labor Relations Act (hereinafter referred to as the "Act.")

Further, the United Farm Workers of America, AFL-CIO (hereinafter "the Union") is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

On March 30, 1978, a consolidated complaint issued in the above-captioned matter alleging various unfair labor practices as to each Respondent.

As to Respondent John Elmore Farms, Kudu, Inc., it was alleged that Respondent had, through such means as conditioned bargaining, refusal to provide information upon request and refusal to and delay in meeting with the Union, not bargained in good faith, thereby violating Sections 1153(a) and (e) and 1155.2 of the Act.

As to Respondent Robert Witt Ranch, the same violations were alleged in that Respondent had refused to recognize, provide information for, or bargain in good faith with the duly certified Union. As to Robert Witt Ranch, it was further alleged that Respondent had violated Section 1153(a) and (c) of the Act by refusing to reinstate agricultural employees Irmilio Gallegos, Thomas Gallegos and Maximiliano Gallegos to their former positions as irrigators at Respondent's ranch because of their union activities.[1/] Finally, as to Respondent Witt, it was alleged that the employer made unilateral changes in the terms and conditions of employment at Respondent's ranch without proper consultation with the Union (see Consolidated Complaint, General Counsel Exhibit—hereinafter GC--4).

Respondents John Elmore Farms and Robert Witt Ranch filed answers denying in substance any violation of the Act.

[1/] The portions of the complaint relating to the Gallegos' were settled during the course of the hearing and are not part of this opinion.

(See GC 5 and GC 6) Respondent John Elmore Farms, Kudu, Inc. interposed affirmative defenses claiming in essence that they were always ready, willing and able to bargain with the Union and that, in fact, the Union had refused to bargain in good faith.

III. THE FACTS

A decision cannot be reached in this matter without a full understanding of the relationship of the Respondents John Elmore Farms, Kudu, Inc., and Robert Witt Ranch. The relationship of these entities cannot, in turn, be understood without first examining the agricultural operations of Kudu Inc. and its President John Jameson Elmore.

A. The agricultural holdings of John J. Elmore and the evolution of Kudu Inc.

John Elmore owns or leases approximately 20,000 acres of land in California and Arizona. (R.T. 8:63) Of those 20,000 acres, he owns 5,000 by himself; he owns approximately 1,500 to 2,000 acres with other members of his family; and, the rest of the acreage he leases. (R.T. 8:100)

For the purposes of this decision, it is not necessary to consider, nor does the record reflect, all of the Elmore operations. The following enterprises in which Elmore is involved are germane to the action herein and require some detailed explanation.

1. The Elmore Company

John Elmore, along with his sisters Hettie Jordan and Marian Harthill and his brother Steven Elmore, jointly own

approximately 7 thousand of acres of land in the Imperial-Valley where they engage in agricultural enterprise as the Elmore Company. (R.T. 4:65 and 8:100)

2. John Elmore (aka: John Elmore Farms)

Aside from his holdings in the Elmore Company, John Elmore also operated as a sole proprietor engaged in agricultural enterprise in the Imperial Valley. (R.T. 5:25-26) The sole proprietorship went by the simple name of John Elmore.[2/]

In 1974, John Elmore, acting in his capacity as a sole proprietor and not as a member of the Elmore Company, purchased two pieces of property which are the focus of this hearing. In June of 1974 John Elmore and his wife, Ann Kelley Elmore, purchased a piece of property in Santa Barbara County hereinafter referred to as the Lompoc Ranch. (GC 43 C). In October of the same year, John Elmore and his wife purchased a piece of property in San Luis Obispo County hereinafter referred to as the Guadalupe Ranch. (GC 43 H). The day subsequent to the purchase of the Guadalupe Ranch, the Elmores obtained the water rights to the Guadalupe Ranch from the vendor, Santa Maria Properties. (GC 431).

3. John Elmore (aka: John Elmore Farms) becomes Kudu, Inc.

In December of 1975, John Elmore formed a corporation to carry on his agricultural enterprises on the Guadalupe

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[2/] The sole proprietorship owned by John Elmore was always called John Elmore and not John Elmore Farms. Somewhere along the line, however, the name John Elmore Farms was used by the Board instead of simply John Elmore. It should be noted that throughout the course of the hearing it became clear that the sole proprietorship John Elmore and the company known as John Elmore Farms were one and the same.

and Lompoc Ranches. The sole proprietorship known as John Elmore now became the John Elmore Corporation and included the Lompoc and Guadalupe Ranches as well as some Arizona holdings of John Elmore. (R.T. 4:77).

John Elmore testified that he formed the corporation for all "the normal reasons" (R.T. 4:79). He explained that he exchanged the properties in the corporation for shares. He and his wife held all the shares in the corporation which totaled 40,000 in number. At the time the corporation was formed, John Elmore's sons Howard J. Elmore and Richard D. Elmore were named as the directors. (Stipulation 24, GC 50).

Because the name The Elmore Corporation might be confused with the separate and distinct Elmore Company, the Elmore Corporation, on December 30, 1975, changed its name to Elmore, Inc. (S 25, GC 50). Finally on May 14, 1976, Elmore, Inc. changed its name to Kudu, Inc. (S 26, GC 50).

At the time of the first shareholders meeting of Kudu Inc., on June 1, 1977, John and Ann Elmore were still the only shareholders of the corporation. On December 28, 1977, John and his wife Ann gave each of their children, Richard, Howard, Margaret and Kelley, 100 shares of Kudu Inc. On March 28, 1978, each of the four children purchased an additional 2,470 shares each of Kudu from John and Ann with monies from trust funds which John and Ann had set up for the four children. (R.T. 4:54, S. 31, GC 50).

The officers of Kudu Inc. are as follows: President, John J. Elmore; 1st Vice-president Howard Elmore;

2nd Vice-President Richard Elmore and Secretary-Treasurer, Victor Anderson. (S 29 GC 50).

It is stipulated by the parties that Kudu Inc. and John Elmore (the sole proprietorship) are successor and alter egos in San Luis Obispo and Santa Barbara Counties. (R.T. 4:99) . In fact, the business offices of John Elmore (the sole proprietor) are located at the same address in Brawley, California as the present corporate offices of Kudu, Inc.—the Elmore Building, 550 West Main Street, Brawley, California (S-37, GC 50). The only properties located in California that are part of Kudu Inc. remain the Lompoc and Guadalupe Ranches as well as one additional small piece of property. (S. 36, GC 50) 4. Sahara Packing Company

John Elmore has been involved in agriculture in California since 1946. Originally John Elmore acted only as a grower and contracted with others to package, sell, and ship his crops. For example, in the past John Elmore has used such companies as Admiral Packing and Royal Packing to pack and ship his crops. As his agricultural business expanded, it became apparent that it was financially beneficial to not only grow, but also pack, ship and sell his own crops. The philosophy is reflected in the testimony of John Wilkinson, the now general manager of the Lompoc Ranch:

> He (John Elmore) grew lots of stuff for lots of people. And at some point in time, he thought, "Well, gee, maybe *I* ought to get in and do this myself", and he started a packing company....at least a portion of his crop is now handled—-harvested, packed, handled, sales by a packing company in which his is part owner. So that's a nice set up. In

other words, nobody is going to drop the ball, except yourself ....R.T. 8:56.

John Elmore, along with his brother Steve, and a third individual, Lou Hausman own the Sahara Packing Company. Originally, Sahara Packing operated in the Imperial Valley. When John Elmore and his wife purchased the Guadalupe and Lompoc Ranches he also wanted to extend the operations of Sahara, Brother Steven Elmore disagreed with this idea and at the time of this hearing John Elmore was in the process of buying out Steven Elmore's interest in Sahara Packing.

5. Kudu Inc., Sahara Packing and the Lompoc and Guadalupe Ranches prior to January 1, 1977

In 1975, the crops grown at the Lompoc Ranch, which covers 640 acres, were lettuce, sugar beets, sweet peas, broccoli, cauliflower, celery, spinach, marigold and alisa. By 1976, Lompoc was no longer growing sugar beets, spinach or marigolds, but added garlic and grew more lettuce.

In 1975, the Guadalupe Ranch grew broccoli, beans, beets, cauliflower and nasturtuium. Lettuce, celery and garlic were added in 1976.

In 1975, the general supervisor of the Lompoc ranch was Tony Garcia. Garcia remained in that position through the time of this hearing. The general supervisor of the Guadalupe ranch was Willie Assistin who remained in that position through the early months of 1977. (S 38, GC 50, see also infra.) The men were responsible for the daily operations of the respective ranches. Each reported to Howard Elmore who inspected the operations and conveyed instructions from John J. Elmore. (S 38, GC 50)

Because of the differences between Steven Elmore and John J. Elmore, Sahara Packing did not officially do the harvesting, packing and shipping for Kudu Inc. at the outset of Kudu's operations at Guadalupe and Lompoc. Thus, through January 1, 1977, Kudu was both a grower and packer/shipper.

Despite the fact that during this time period, Kudu was in fact the enterprise that was doing the harvesting and packing, they used Sahara labels and boxes (apparently without objection from Steven Elmore.) This was done because Sahara was a known packer/shipper and because John Elmore envisioned that Sahara would ultimately become the actual packer/shipper for Kudu. At this time, however, prior to 1977, Sahara was in the area in name only.

By the end of 1978, Kudu Secretary Treasurer Victor Anderson testified, the situation would change. Kudu would strictly be a grower and Sahara would do the packing for Kudu and other growers in the area. Steven Elmore would be bought out and Elmore would have the integrated process that he envisioned. (R.T. 5: 28-29)

6. The general manager of the Lompoc Ranch—John Wilkinson

John Wilkinson is currently the general manager of the Lompoc Ranch. He is a 28 year old political science major who was a buyer for chain stores prior to entering agriculture. He was originally hired to work for Sahara Packing by Sahara's general manager Lou Hausman. (R.T. 4:86) Originally, Wilkinson, whose father was a friend of the Elmore •family, sold cantaloupes for Sahara from' their Imperial Valley offices. (R.T. 5:32)

Sometime in 1976, while still on the payroll of Sahara, Wilkinson began making trips to the Santa Maria area where he began observing farming operations at the Guadalupe and Lompoc Ranches. Between March and June of 1976, he visited the Santa Maria ranches approximately one half dozen times to acquaint himself with the operations.

He knew little of farming, but during the hearing maintained that he knew 75% of what he had to know within six months of his arrival. He testified that he "relied on John Elmore quite a bit" and "always followed his farming advice". (R.T. 7:134-135) Other knowledge he gleaned from Willie Assistin and Tony Garcia. He noted the difficulty of going to an area to supervise people who knew more then he did.

Specifically, Elmore taught him "in part" about farming the crops. (R.T. 8:23) Also, Elmore taught him about tractor work, irrigation practices, fertilizers, pesticides and herbicides. Elmore gave him a "pretty good run down on farming." (R.T. 8:24) "At one time or another we have dis-

cussed all farm operations". (R.T. 8:26)

One of Wilkinson's purposes was to facilitate the expansion of Sahara to the Santa Maria area. Eventually, he assumed the general manager role for the Lompoc Ranch. At first he was on the payroll of Sahara, but with his transfer to Lompoc he switched to the Kudu payroll in 1976. Vie Anderson testified that as of March 1978 Wilkinson had returned to the Sahara payroll—an indication that Sahara's full presence in the Santa Maria area was nearing completion. As John Elmore put it, Wilkinson wears two hats—one for Sahara and the other for Kudu. He is the general manager of Lompoc, but also fulfills Sahara duties by being the lead sales person. (R.T. 4:106.)

7. Vie Anderson: the Secretary-Treasurer of Kudu Inc.

Vic Anderson is presently the Secretary-Treasurer of Kudu Inc. (R.T. 5:'4.) Prior to Kudu's formation, Anderson was the business manager for John Elmore (Farms) comprising both the Lompoc and Guadalupe Ranches.

According to Elmore, Anderson also does what is necessary for Sahara Packing, such as overseeing the books. (R.T. 4:5) Anderson does not work for the Elmore Company. (R.T. 4:7)

His duties for Kudu include financing, managing, contracts, payroll and any other administrative work. (R.T. 5:11.) He supervises the payroll for both Kudu and Sahara. (R.T. 5:11.)

He has worked for Mr. Elmore for the past fifteen years and has been given extensive authority such as

authorizing loans to a certain limit. (R.T. 5:14.) Anderson also pays the company taxes and takes care of its insurance policies.

Anderson is not trained as a Certified Public Accountant although he does have his Bachelors in Business Administration. (R.T. 5:23-24.)

Andersen's duties in regard to labor relations are outlined, infra.

B. The agricultural enterprises of some other relatives of John J. Elmore

John J. Elmore has helped to establish various members of his family in farming operations. The relationship of these other family members to John Elmore is important in trying to understand the relationship of John Elmore to Robert Witt Ranch.

1. Steve Jordan

The son of Hettie Jordan (John Elmore's sister) is Steve Jordan who farms in the Santa Maria area and grows crops which Kudu (and now Sahara) packs and ships. (R.T. 4:163! Elmore testified that he spends much time with Steve Jordan since he grows the most delicate crops. He also testified that as the packer/shipper for Jordan, he (Elmore) can veto Jordan's choice of land for a particular crop. (R.T. 8:73) The number of acres he farms and which crops are to be grown are also joint decisions.

2. Otis Kramier

Hettie Jordan's son-in-law is Otis Kramier. Originally he was in business with Steve Jordan, but they

have split up. Like Jordan, he grows crops for Sahara/Kudu. John Elmore testified that he influenced Otis Kramier the least.

3. Cal Mason

Marian Harthill's (also John Elmore's sister) son-in-law is Cal Mason who farms 160 acres in the Lompoc area. Mason, as with the other members of the family, also grows crops for Kudu/Sahara. Elmore testified that he may spend 1/2 or 1/3'd of his time with Mason when Elmore is in the Santa Maria area. As with the other members of the family, he testified, the amount of time he spends will depend on the nature of the visit and whether or not there is a crisis. Elmore testified that he is unclear how he influences Mason, but he noted that he may tell him about leveling or crop prices. In any event, the advice is "low key". (R.T. 8:70)

With each of these individuals, Mr. Elmore stated that he helped get them started in farming. In each case a relative of Elmore's observed others in the family and decided they would like to give it a try. John Elmore's statement about Cal Mason is typical:

> He married my niece and observed his brother-in-law and a couple of other nephews farming, and thought that looked like a pretty good life and felt he could do it, and decided to do it. Along the line he did ask for some advice and counsel from me. I told--mostly just amounted to I thought he could do it if he wanted to...(R.T. 8:64)

In fact, at the time of the hearing every person that John Elmore (i.e. Kudu/Sahara) had a crop share agreement with was a member of the family. (R.T, 4;165). (But see also footnote #3)

C. The certification of the Union at John Elmore Farms/ Kudu Inc.

On September 17, 1975 an election was held pursuant to the Act at the Lompoc and Guadalupe Ranches. The Union won the election by a vote of 68 for the Union; 27 no Union and 4 challenged ballots. The employer filed objections to the election and argued that Lompoc and Guadalupe did not constitute a single definable agricultural area. The Board upheld the election and on February 18, 1977 the Union was certified as the bargaining agent of all employees of John Elmore Farms which included both the Guadalupe and Lompoc Ranches. (see 3 ALRB No. 16 (1977))

D. The Robert Witt Ranch

1. Robert Witt

Robert Witt was born October 31, 1951 in Torrence, California. He received his Bachelor of Arts in Accounting and Finance from the University of Southern California and worked for Coldwell Banker for four years in management and sales.

On July 31, 1976, Witt married Kelley Elmore the daughter of John Elmore. Robert Witt had absolutely no pre-

vious farming experience. Prior to his work with Coldwell Banker, he worked in roofing, electrical work, and as a lifeguard. (R.T. 3:11)

It was John Elmore who suggested to him that he might like to try farming. He explained what he had done for other members of his family and stated that he would do the same for his daughter. Elmore stated that Witt had apparently never considered farming before, because when he suggested it to him, "it seemed to register a surprise." (R.T. 8:66)

Apparently Witt liked the suggestion of his father-in-law and on January 1, 1977 officially became the lessee along with his wife Kelley , of the Guadalupe ranch which Kudu owned. (GC 43K)

Until January 1, 1977, as noted supra, the Guadalupe ranch was one of the two California properties operated by Kudu Inc. As also noted above, the Guadalupe Ranch along with the Lompoc Ranch was certified as a single bargaining unit by the Board in February of 1977. It was the leasing of the Guadalupe property to Robert and Kelley Witt that served as the catalyst for the refusal to bargain on the part of Robert Witt Ranch. Further, the leasing of the Guadalupe Ranch by Kudu Inc. was the event that prompted Kudu Inc. to demand clarification of the bargaining unit (see infra) rather than to begin immediately negotiating with the Union. Thus, it is the factual setting of the leasing of the property and the relationship of Robert Witt to Kudu Inc. that demands the closest factual scrutiny.

The findings of fact in regard to this relationship must, in large part, be drawn from documentary evidence and the testimony of persons other than Robert Witt himself. This is because -Witt, during his three appearances on the witness stand, was often evasive, difficult to follow, and lacked memory at critical junctures. Because of the problems with his credibility, I have devoted a separate section to an evaluation thereof (see pp. 40-54, infra).

2. The lease agreement for the Robert Witt Ranch

GC 43K is the lease agreement signed by Robert Witt and his wife, Kelley Elmore Witt, for the leasing of the Guadalupe property. The testimony of Vie Anderson is un-contradicted that there were no bids or advertisements for the property and that no other growers were approached to lease it. (R.T. 5:54) Instead, John Elmore talked to some other family members about leasing the property and then finally broached the subject with Witt who accepted. (R.T. 5:55)

In regard to the terms of the lease, there were really no negotiations as the term is commonly used. Rather, Anderson testified that Witt and John Elmore just worked out the basics and he drew it up. (R.T. 5:57) John Elmore also agreed that there were no negotiations, just an attempt to do what was fair.

In regard to the price per acre, Elmore testified that it was based on discussions with Willie Assistin and some of the neighbors as well as looking at the potential return of

the land. Elmore testified that he did not recall discussing the price with Witt. (R.T. 4:156.)

The length *of* the lease — 1 year, see GC 43K, Paragraph 4-- was set because it would give Witt a chance "to see if it works." (R.T. 4:156-157.)

No collateral was required under the lease agreement. Elmore testified that it was not needed in that Kelley had alot of money and "her name on a bank statement is as good as mine." (R.T. 4:158)

The total yearly rental was $116,250 dollars based on 775 acres at 150 dollars per acre. The rent was to be paid in two equal installments on January 1, and July 1 of the calendar year. GC 43K, paragraph 5. The testimony is uncontradicted that the first installment was not paid, but rather a single check covering the entire rental for the year was paid by Witt to Kudu on June 22, 1977. (see GC 43Y) It is further uncontradicted that as of the time of the hearing Witt had not paid any money on the lease agreement for rents covering the calendar year 1978.

Both Elmore and Anderson commented on the late rental payments. Elmore testified that this was not unusual. He stated that in his business dealings he would often give an extension just based on a phone call. He stated he is not a prompt bill collector and rarely exercises a legal right. (R.T. 4:161-163.)

Anderson stated that the rent issue was not pushed with Witt because Elmore owed Kelley a good deal of money based on monies that Elmore had borrowed from the prin-

cipal of Kelley's trust account. (R.T. 5:61.) Anderson stated that at the time of the hearing the money which Elmore owed his daughter was no longer an outstanding debt. Nonetheless, it had been three months since he had first talked with Witt regarding the late rental payment. (R.T. 5:63)

Insofar as Witt's recollection of the lease is concerned, he stated that he could not recall what discussions he had with Vie Anderson about it. (R.T. 3:74). Witt did contend that he discussed the lease price with Elmore. (R.T. 3:74) He stated that he intended to pay the rent the same way in 1978 that he had in 1977, but again he could not recall any discussion in specific that he might have had about the late rental payments. He acknowledged that he had not been warned about being in default on the lease. (R.T. 3:83)

Witt testified that he told Anderson that he intended to renew the lease, but Anderson denied that such a conversation ever took place. Anderson stated that he just assumed that Witt would renew for 1978.

3. The lease-purchase agreement for the Robert Witt Ranch

GC 43X is the lease purchase agreement entered into between John Elmore and the Robert Witt Ranch for machinery and equipment. It is essentially undisputed that virtually all of the equipment that Robert Witt used at the Guadalupe Ranch was equipment which he received through the lease purchase agreement. It also seems clear that this same machinery was used on the Guadalupe Ranch prior to Witt's taking possession in 1977.

As with the lease of the land itself, Elmore did not say that it was negotiated. Rather it appears that he, along with Vie Anderson, set the terms of the agreement and Witt agreed. Robert Witt disagreed to the extent that he claimed to have negotiated the agreement by paying as little as he could. (R.T. 3:35.)

Here Witt's testimony is extremely evasive. He could not recall any specifics of the negotiations. He claimed to have discussed it with several people, but then several minutes later said that he only discussed it with Vie Anderson. (R.T. 3:21) Anderson could recall no changes made by Witt in the lease agreement other than dropping a Chevy "Luv" vehicle from the itemized list because it was in fact not on the property. (R.T. V: 121) It is clear, and I so find, that the terms were essentially dictated by Anderson and Elmore and that Witt merely agreed.

It is uncontradicted that the machinery was not otherwise advertised nor was there any competitive bidding.

The term of the agreement is for five years. Lease payment was to be made on December 1st and June 1st in two equal installments each calendar year. The price was set at the book value of the items listed in schedule A which is also a part of GC 43X.

As with the lease of the land, Witt did not pay in accord with the agreement. Rather he submitted a check to John Elmore in the sum of $47,299 dollars and 59 cents on August

23, 1977. (see the first page of GC 43X) This constituted payment for one full years lease. At the time of the hearing no payments had been made for the calendar year 1978. As with the lease agreement for the land, Elmore and Anderson indicated that it was neither their intent nor their policy to enforce the legal obligation. Elmore again referred to the money which he owed to Kelley.

4. The crops grown at the Robert Witt Ranch

It is stipulated that after Robert Witt entered the Guadalupe Ranch he continued to grow the same crops on the land that Kudu Inc. had grown before him. These included broccoli, cauliflower, lettuce, celery and garlic. (R.T. 3:96 and GC 50, S 43). The only exception to this in 1977 was Robert Witt's abortive attempt to grow carrots. Witt testified that he was lured into carrots because of its reputation for weed control and because of the sandy soil at Guadalupe. (R.T. 9:20). Witt testified that the December 1977 rains ruined a portion of his crop. Elmore characterized Witt's attempts to grow carrots (Witt's agreement was with Romar Carrot Co.) as a bad deal in which Witt lost money. Elmore testified that Kudu Inc. rejected the idea of growing carrots that year and told Witt that he should stay out, but that Witt rejected the advice. (R.T. 8:11-14)

Witt testified that he was contemplating growing some new crops such as spinach and loose leaf lettuce because they grow in light sandy soil. (R.T. 9:47). He said that spinach was a "low risk" crop and that he had contracted to grow 100 acres for the fall of 1978. (R.T. 9:47).

The record also reflects that his surrounding neighbors grow lettuce, broccoli, carrots, cabbage and cauliflower. (R.T. 9:43) .

5. Cropshare agreements between Kudu Inc. and the Robert Witt Ranch

UFW 5 A-C and 6 A-B and GC 49 A-L are crop share agreements. The agreements are all the standard form used by Kudu Inc. All cropshare agreements between Witt and Kudu are reflected in UFW 5 A-C and 6 A-B. All other Kudu Inc. crop share agreements are reflected in GC 49 A-L. As noted previously all Kudu Inc. crop share agreements are with members of the Elmore family. [3/]

In essence, each crop share agreement sets up percentages whereby the grower and the harvester/packer/shipper share costs and profits according to the set percentage figures. Generally speaking, the harvest/packer/shipper will advance his portion of the costs in increments as the growing of the crop proceeds.

The agreements that are a part of this record help to place in perspective the dual role of Kudu Inc. in 1976 and 1977. In GC 49 A, Kudu Inc. is the grower for Vega-Mix which serves as the packer and shipper. On the other hand, in most of the other agreements Kudu is the harvester/

[3/] GC 49 B-L are standard crop share agreements between Kudu and other members of Elmore's family. They are similar (except for the percentages) to Kudu's agreements with Witt. Only 49A is significantly different. This was an agreement whereby Kudu agreed to grow for Veg-a-Mix. Elmore then subcontracted the growing he promised to do to other members of his family. Witt did not take part in the agreement to grow a portion of the Veg-a-Mix agreement.

packer/shipper with other members of the Elmore family doing growing. During this time, as indicated supra, despite the fact that Kudu was, in fact, the entity doing the harvesting/ packing/ and shipping, Sahara labels and boxes were used.

Vic Anderson stated that John Elmore "set the line" on the crop share agreements in terms of what percentages were to be assigned. If there was a variation from the standard form, John Elmore would approve it. (R.T. 5:37). He described these agreements as ones in which there was no intent to ultimately take the parties to court.

Anderson testified that while any split is possible on the crop share agreement percentages, 75 to 25 and 50 to 50 are the most common. (R.T. 5:33) The record reflects that the split on all Robert Witt crop share agreements with Kudu are 75-25 with Kudu bearing the majority of the risk. All other Kudu crop share agreements are 50-50. See GC 5 A-C; 6 A-B and 49 B-L.

Witt testified that the difference for his contracts was "his business decision" and that it was "negotiated" by him. He claimed that it was possible to make such a decision because the harvester/packer/shippers are "pretty hungry" for contracts. (R.T. 3:152). This explanation contradicts both Elmore and Anderson who stated that Elmore set the line on the percentage splits. For the reasons set forth in my section on credibility of Robert Witt, I choose not to credit his explanation in this regard.

One crop share agreement between Kudu and Robert Witt is of special interest. GC 5C, a 110 acre crop share

agreement for growing lettuce, executed December 20, 1977, indicates that the harvester/packer/shipper Kudu advanced costs in one lump sum payment of 66,000 dollars rather than in incremental payments as reflected in the other agreements. John Wilkinson testified that this was the only agreement that he knew of where such a payment schedule was established. (R.T. 6:30). He said it was "unusual" but that Witt "wanted in that way". He justified the lump sum payment because of all the preparation and groundwork that had been done in advance of planting the crop. (R.T. 7:168) Witt also said this was the only lump sum agreement that he knew of, but also talked of the extensive preparation that justified such a payment.

6. The crop sell agreements of the Robert Witt Ranch

At the time Robert Witt entered possession of the Guadalupe Ranch, Kudu Inc. had a pre-existing contract with Gilroy Foods, Inc. by which Kudu was to grow garlic for a set price. Similarly, Kudu Inc. had a contract with John Inglis Frozen Foods where Kudu was to grow cauliflower. Robert Witt assumed these two contracts and eventually reimbursed Kudu Inc. for the monies that they had previously invested in the crop. (see infra.) Neither Elmore nor Anderson nor Witt could recall the mechanics by which Witt actually assumed these contracts. The record reflects that the process must have been relatively casual. Anderson recalls some conversations over the phone with the companies and "kind of thinks" there was a letter. (R.T. 5:114.) The contracts that Witt

assumed are UFW 7A and B respectively.

In 1977 Robert Witt entered into three additional crop sell agreements where Witt was to grow garlic for Gilroy Foods, Inc. (September 1977, UFW 7C); King City Produce Co. (October 1977, UFW 7D); and, Basic Vegetable Products, Inc. (UFW 7E).

7. Some additional policys of the Robert Witt Ranch and comparison with policies at Kudu Inc.

a. fertilizer

Robert Witt testified that he has instituted certain changes in regard to the use of fertilizer at the Guadalupe property. He testified that because fertilizer prices were not competitive he decided to install a fertilizer tank on his own property. This technique differed from that used by Willie Assistin when the property was operated by Kudu Inc. UFW Exhibits IB are receipts and checks which verify the lease of equipment of which Robert Witt spoke. (R.T. 3:50)

In regard to fertilizers Elmore had advised Witt that he thought most fertilizers were essentially the same and that he should choose that which was most cost efficient. (R.T. 8:80)

b. herbicides and pesticides

In terms of the application of herbicides and pesticides, Witt also adopted a method of bulk application and purchased equipment to make such application feasible. (See UFW 1C, see also R.T. 3:55.) Witt testified that as with the fertilizers, the changes were made because it was more efficient.

Witt also made changes in the method of pesticide application. Witt testified that the change over came in October or September of 1977. Witt, rather than rely on sales agents from the companies, hired his own entomologist as a consultant and then purchased pesticides based on those recommendations. (R.T. 3:181.) Witt testified that it was "the first one in the valley. Brand new. A victory. No other like it." Id.

John Elmore testified that as a result of the pesticide changes made by Witt, he adopted the procedures himself. He stated that Witt was "bragging" and "puffing" about what he had done. (R.T. 8:87.)

Witt also testified that since he operates Guadalupe he now does some of his own herbicide application,

c. bookkeeping techniques

Vie Anderson testified that he keeps in touch with Robert Witt over the phone and that he also keeps in touch with Witt's bookkeeper Debbie Gorinan. He testified that Witt hired Gorman because he could not handle his own books. He further stated that whenever Witt has trouble with his books, he contacts him. In fact, Anderson gave Witt the format for his books. Finally, Anderson testified that Witt has only made "slight changes" in bookkeeping techniques in the time that he has taken over. (R.T. 5:67-71.) Witt uses the same payroll forms as does Kudu to pay his employees, but Anderson testified that it is a form commonly used for such a purpose. (R.T. 5:71.)

Robert Witt's accountant is also John Elmore's economic advisor. (R.T. 4:212 and 9:90).

d. insurance

The records reflects that Robert Witt has the following insurance policies: A Workers Compensation Policy with Great American which took effect March 15, 1977; a Employer Liability Policy with Home Insurance Company which began on May 2, 1977, and another Employer's Liability Policy with North West National Insurance Company effective May 25, 1977. (R.T. 4:6.) Witt also carries a Mobil Ag Policy with Great American Insurance Company which began March 22, 1977 for the vehicles he uses in his business. (R.T. 4:9.) Finally, Witt has a Western Growers Assurance Trust Health Plan 23 for his employees which took effect April 1977.

In regard to the health plan, the workers at the Guadalupe Ranch were previously covered by a policy with Penn Mutual which was taken out by Kudu Inc. prior to the lease arrangement with Robert Witt. Witt testified that he changed the health plan at the behest of his workers who wanted the best Health Plan. (see e.g. R.T. 9:22)

Robert Witt Ranch does not have crop insurance. (R.T. 3:142)

The record in regard to the insurance policies of Kudu Inc. is somewhat more vague. John Elmore testified that he was not aware of the specifics (R.T. 4:169) and Vie Anderson had some difficulty recalling the particulars. (R.T. 5:19-20). Nonetheless, it is clear that Kudu, like Robert Witt does not have crop insurance. Kudu has a workers compensation policy with the State Compensation Insurance Company of California.

(R.T. 5:21) The medical plan for Kudu employees remains with Penn Mutual. Anderson also testified that Kudu had liability insurance on all its operations. (R.T. 5:17)

e. miscellaneous practices

Robert Witt testified that when he took over the Guadalupe Ranch he made some additional changes in the means by which tractors were used on the land. He said he reduced the tractoring on the land by trial and error and after discussion with his neighbors. (R.T. 9:85).

Witt also testified that he changed the work procedures for the sprinkling to germination that was done at Guadalupe. He said that when he arrived the practice was for seven or eight men to be involved in sprinkling and moving the pipes in the early morning. These men would then hoe for the rest of the day. Witt said that he felt it would be more efficient to just have two men doing it all the time. (R.T. 9:18).

In fact the changes in regard to the number of irrigators were testified to by Manual Padilla, who is currently an irrigator at the Robert Witt Ranch. (R.T. 6:95). He stated that he found out that Witt was the "boss" at the Ranch in January or February of 1977, and since that time he has had only the help of Francisco Martinez in performing his duties. Prior to that time he had considerably more help. He stated that in May of 1978 he had two arguments with Witt over the issue of the lack of help. (R.T. 6:113).

It should be also noted that Witt stated that he maintained the same numering system for the fields as was used

when he took over Guadalupe as did Elmore, but he stated that he has subdivided the fields more. (R.T. 9:42).

John Wilkinson also testified regarding the numbering system. He stated that it was the same as when he was responsible for managing the property. He also testified that "we refer to the Witt Ranch as Guadalupe." (R.T. 6:30-32). f. employee benefits

In 1977, Kudu Inc. provided the following paid holidays: New Years, Labor Day, Thanksgiving, and Christmas. Witt paid for July 4, Labor Day, Thanksgiving and Christmas.

In 1978 Kudu has paid or will pay for Memorial Day, July 4, Labor Day, Thanksgiving, Christmas and New Years. S 51, GC 50 and R.T. 7:77. In 1978, Witt will have the same paid holidays with the exception of New Years.

As noted above, both Kudu Inc. and Witt provide medical insurance for their employees--Witt through Western Growers and Kudu through Penn Mutual.

Both Witt and Kudu maintain a practice of giving an annual vacation bonus of 4% of annual earnings to each of their regular employees at the end of each calendar year. (GC 50, S 51).

Kudu maintains a pension plan for its employees. (R.T. 4:187-188). Robert Witt Ranch does not maintain a pension plan. (GC 43 T, p. 3)

Robert Witt paid his tractor drivers $4.25 per hour and his irrigators $3.45 per hour. An increase in pay was given to tractor drivers working the "nitrogen side dressing"

from $4.25 to $4.50 per hour. General field workers were paid $3.40 per hour until July of 1977 when the rate went to $3.45 an hour. GC 43 T, p. 3.

At the time of the hearing Kudu Inc. also paid its field workers $3.45 per hour. (R.T. 7:165)

g. bank accounts

From 1974-1976, John Elmore Farms and Kudu Inc. kept a single bank account for both ranches at the Security National Bank in Brawley. Kudu Inc. transferred its account to Crocker National Bank in Brawley since John Elmore is on the Board of Directors at the Crocker Bank.

Robert Witt keeps the Guadalupe Ranch account at the Crocker Bank in Santa Maria. GC 50, S 53 and 54.

h. labor s

It is stipulated that the labor s used by both John Elmore Farms and later by Kudu Inc. are the AB and Z Labor Contractor, Frank T. Almaguer and Eugene Acosta. It is also stipulated that Robert Witt Ranch employed Frank T. Almaguer at the Guadalupe ranch in .

As to the number of actual labor s in the Santa Maria area, the record is not clear. Wilkinson testified to theseadditional names: Felipe Zepeda, Raoul Velasquez, Mario Sanchez, Larry Martinez and Felix Malva. Thus at least eight exist in the area and are reflected in the record. Wilkinson stated that he probably recommended or mentioned certain labor contractors for Robert Witt to deal with at the time that Witt took over at the Guadalupe Ranch, (see infra.)

8. The supervisorial personnel at the Robert Witt Ranch—Willie Assistin

It is stipulated that Juan Uvalle, Alejandro Uvalle, Alberto Hernandez and Willie Assistin were the supervisorial personnel at the Guadalupe Ranch during the first half of 1977. (R.T. 3:184). These were the same foremen who had worked for Kudu Inc. at the Guadalupe property prior to January 1, 1977. (R.T. 3:184).

Willie Assistin was the Ranch Manager at Guadalupe while it was operated by Kudu Inc. and during the first eight months of as Robert Witt's tenure as lessee. In August of 1977 Willie Assistin became the "harvest supervisor" for Kudu Inc. in Lompoc. GC 50, S 41.

The factual circumstances regarding Assistin's change of position merit some discussion. Witt testified that he and Willie Assistin got along very well, but they differed on business matters and as a result Witt fired him in August of 1977. (R.T. 4:26). Witt denied that he asked Elmore to get rid of Assistin. (R.T. 4:26) . He enumerated some of their differences as involving tractor techniques; sprinkling; and the number of men to use in irrigating. Witt contended that Assistin could not "accept" change and always "resisted" it. As a result he just fired him. He stated that Assistin went to work for "Sahara" and he, Witt, did not know how or why. (R.T. 9:18-20).

The testimony of Wilkinson, Elmore and Anderson differ from this scenario. Elmore stated that Witt said he did not "need" Assistin. Elmore also stated that he did not know

of any bad feelings between Witt and Assistin, but Elmore also said that Witt was complaining about Assistin and wanted him off of the ranch.

Anderson also drew a picture of a transfer because of "mutual consent" rather than Assistin being fired by Witt. (R.T. 5:31).

Finally, Wilkinson said that "it took a little deciding". (R.T. 8:41). Elmore phrased it thusly: "Sahara needed him and that was alright with Bob." (R.T. 4:110-112). Elmore described the relationship between Witt and Assistin when he stated that when Witt first came to Guadalupe Witt sort of idolized Assistin. At some point that broke down and Witt asked Elmore if he could use Assistin and remove him from the Guadalupe Ranch. (R.T. 8:83-84).

Thus, two different scenarios for the transfer of Assistin emerge. One is that of Witt—a hard business decision, made on his own, nothing more than a firing. The other is that of Elmore, Wilkinson and Anderson—a decision by request and one of mutual consent based in part on Witt's continuing adjustment to being a farmer. For the reasons stated in the portion of this opinion dealing with the credibility of Robert Witt, I choose not to credit Witt's version of the incident.

9. Non-supervisorial personnel at the Robert Witt Ranch

While there was complete continuity of supervisorial personnel from Kudu to Witt, there is no similar factual record for the non supervisorial employees. General Counsel in its post hearing brief conceed that there was no "substantial continuity in the identity of the workforce..." within the

meaning of Howard Johnson Co. v. Detroit Local Joint Executive Board (1974) 417 US 249. See GC Post Hearing Brief, p. 44, et. seq.

The record reflects that there is no interchange of employees between the Robert Witt Ranch and Kudu Inc. No such exchange has taken place since Witt took possession. (R.T. 9:48-49; 7:140-142).

Witt testified that he was responsible for the hiring of employees at the ranch as well as labor contractors. (R.T. 9:48) .

10. Robert Witt learns to farm

Robert Witt testified that in prepartion for taking over the Guadalupe Ranch he made at least 1/2 dozen trips to the Ranch. He stated that he looked over the property with Willie Assistin and spoke to local farmers about property values. (R.T. 3:36) .

When Witt took over the Ranch he denied that he relied either on John Wilkinson or John Elmore for advice. (R.T. 4:28). He emphatically stated that despite the fact that Elmore was on the ranch two or three times a month for an hour (R.T. 4:30), he did not get advice from him about the operations of the farm. "Any discussions I had with John Elmore were not about the operations of that ranch. I ran that ranch." emphasis added, R.T. 4:29. He claimed that all discussions with Elmore were only about capital improvements such as tiling and leveling, (R.T. 4:30). When pressed as to whether John Elmore gave him instructions he stated: "Ho. Never. I operate that ranch completely independently of John Elmore" (R.T. 4:31).

Witt claimed that he learned from local farmers and from materials that he read through the University of California. (R.T. 4:46).

Witt testified that he did rely on Willie Assistin, but that his greatest help was from his neighbors. Ultimately Witt said that it only took him two months to learn the operations so that he could run the ranch "without any problems." (R.T. 9:12).

John Elmore testified that he talked to Witt about the farming operations "as much as he'd listen." (R.T. 4:150). He also stated that Witt showed "little" concern about his lack of knowledge. (R.T. 4:151). While Elmore indicated that he gave some advice to Witt, he also characterized as miminal the amount of input which he gave to Witt. He testified that he gave some advice about fertilizer (get the cheapest) (R.T. 8:79); none about herbicides R.T. 8:80; none about tractors R.T. 8:80; he mentioned crop rotation R.T. 8:80; and, he explained paying practices but never told him who LO hire or not to hire. (R.T. 8:81) Finally, he testified that as to this early advice h<= never followed up. (R.T. 8:83)

Elmore testified that it was Willie Assistin who gave him all of his initial input. (R.T. 8:83.)

John Elmore testified that when he visits the area he probably spends more time with Witt than with any of the other family members. He attributed this, in part, to the fact that the Witt's now have a baby which causes him to spend more time with them. "It depends on when you start logging the time" he said. (R.T. 8:69). Ultimately, he said he spends a similar

amount of time with Witt as with other members of the family. (R.T. 8:69). It only increases if there is some special project or some other crisis. (R.T. 8:69). He stated he spends one third more time with Witt than with Jordan.

Elmore also testified as to his own ideas about how to become a good farmer. He suggested the UC libraries; asking successful people; and interest and enthusiasm. (R.T. 8:89). He felt that Witt had adapted well and that he was especially good on costs. (R.T. 8:85).

It was John Wilkinson who was told by Elmore that Witt would be taking over R«T. 6:17, and Wilkinson said that he showed Witt around. (R.T. 6:18). The first visit that Wilkinson recalls was after December of 1976 when they "made the rounds" as Wilkinson was "trying to get him to know the area." He "spent a good amount of time (with him)...in the early months." The mechanics of farming he learned from Willie Assistin testified Wilkinson. (R.T. 6:20-21).

During the early months of 1977 Wilkinson testified that he visited the property once a day R.T. 6:21, but that from April until the time of the hearing it had tapered off to one time per week. (R.T. 6:21) . Wilkinson said that he helped Witt when he could, but that Witt had Willie Assistin for most of that. (R.T. 8:37).

Ultimately both Wilkinson and Elmore contended that their relations with Witt was now that of harvester/ packer/shipper rather than operator. Elmore stated he had no control over Witt other than for capital improvements as owner of the property and control of crops through the crop share

agreement. (R.T. 8:92). Wilkinson similarly testified that he visited the property only because Witt was under contract to grow. (R.T. 7:138) .

11. The financial resources of the Robert Witt Ranch

Robert Witt was a man of moderate income when he entered the farming business after his marriage to Kelley Elmore. He testified that he had an income in 1976 of 15 thousand dollars and investment income which he "could not remember". (R.T. 3:64) His 1976 income tax return (RW Ex.1) reflects an income of less than 10,000 dollars. At the time of his marriage, Witt also owned a home (with an outstanding mortgage) in Southern California.

Records adduced at the hearing indicate that a sizeable amount of cash was necessary to begin and maintain the farming operations of Robert Witt Ranch. Because of the evasive and often hostile testimony of Mr. Witt himself, it is difficult to piece together how the farm was financed.

Nonetheless, the following facts do appear from the hearing. First, as indicated supra, Witt, at the time he decided to come to Guadalupe assumed certain obligations such as the yearly rental for the land and the yearly rental for the lease-purchase agreement on the equipment. Aside from these obligations, Kudu Inc. had expended money on crops already in the ground. Witt, of course was obligated to reimburse Kudu for these amounts.

Further, once Witt assumed possession of the property he expended sums of money for payroll, equipment, and other necessities for growing his crops.

It is clear that for the first quarter of 1977 Kudu Inc. loaned Robert Witt money for all of these ex-

penses and did not press payments of the lease agreements. UFW Ex. 2 is an important exhibit consisting of three statements with attached itemizations. The first statement dated January 1977 and addressed to Robert Witt represents the $78,120.96 that Witt owed Kudu for the expenses paid by Kudu for crops already in the ground prior to Witt's taking possession. This same statement reveals that Witt made a payment on that amount in the sum of $28,181.58 leaving $49,939.38 owing as of January 1, 1977. UFW 3 is the check with which Witt payed the $28,181.58.

The second statement is dated January 31, 1977 and indicates that during the month of January 1977 Kudu Inc. paid $44,575.31 in expenses for the Robert Witt Ranch. These expenses are itemized on pages attached to the statement and indicate that they went for such items as herbicides, fertilizer, payroll, etc. By January 31, 1977 Witt owed Kudu $94,612.69.

The third statement is dated March 1, 1977 and indicates that during the month of February, for items similar to those paid in January, Kudu paid an additional $35,190.75 in expenses for Witt. Thus on March 1, 1977 Witt owed Kudu $129,803.44.

Anderson stated that the expenses were advanced to Witt because there was an agreement to help him while a line of credit was being established for his use. (R.T. 5:93) Witt characterized the agreement as a "workable transition". Witt also stated that Kudu was making the payments because he

was waiting for his own checks and for his own books to be set up. (R.T. 3:108)

The record also reflects, however, that the first $28,000 payment was made with a temporary check. Witt apparently received his checks as of March 14, 1977. On that date Check #00001 in the amount of $674.10 was written by Witt on Account £122 2305 1282 10888. See UFW 10, p. 1.

In April Witt began paying his own expenses on his own checks. Thus, the Witt balance remained at the figure of $129,803.44. Witt finally paid this balance with a check in that amount on June 22, 1977. The check was written on Witt's own checks from the Crocker Bank in Santa Maria. (see p. 1 UFW 2)

The testimony is uncontradicted that for the months in which Kudu advanced payments for Witt and for the period of time until payment was finally made by Witt no interest or other service charge was ever charged to the Robert Witt Ranch. (R.T. 3:16)

As to where Robert Witt obtained the money to pay the $129,803.44 the record is also clear. By the time the payment was made, Witt had begun to receive payments on crop share agreements that he had entered into with Kudu. Witt had also begun to receive monies on crop sell agreements. More importantly, however, the payment of June 22, 1977 coincides with a line of credit that was issued to Witt by the Crocker Bank in Santa Maria. The line was applied for the previous week (June 15, 1977) and was established in the sum of $300,000. (see UFW Ex. 4) The

first loan on the line of credit was made on June 22, 1977--the same date as the $129,000.00 payment from Witt to Kudu. The loan was in the sum of $250,000. UFW 4 also indicates that since that time Witt has borrowed a total of $365,000 (through May 18, 1978) on the line of credit. It is stipulated that of these sums a total of $190,000 had been repaid at the time of the hearing. (R.T. 4:6)

It is also uncontradicted (although Witt was not quick to so admit, see infra) that the sole collateral for the line of credit were the signatures of John J. Elmore and his wife. (R.T. 4:179) That is, John J. Elmore and his wife co-signed for the loan and were responsible if there should be a default.

There are two versions in the record of how the sum of $800,000 was arrived at. Robert Witt denied that Vie Anderson told him how much to ask for for his initial line of credit. He said he "may have" discussed it with Anderson (R.T. 10:42), but said that he arrived at the figure with Crocker Bank. He also emphatically stated that Elmore was not involved in setting the figure either.

The testimony of John Elmore and Anderson is to the contrary. Anderson stated that he told Witt it was normal to take a loan, that Witt should choose a bank and that he would help him with the budget. Elmore was even more specific. He stated that he discussed the amount with Robert Witt and that he and Anderson probably arrived at the figure. (R.T. 4:175) Ultimately it was Elmore and Anderson who arrived at the figure. (R.T. 4:177) As indicated infra, it is

the Elmore-Anderson explanation which I credit.

Where Robert Witt obtained the $28,000 for his first payment to Kudu is not clear. By his own testimony, it came from his own cash, Kelley's money from her trusts, and immediate income from broccoli and cauliflower harvests. When pressed, however, Witt could not recall what amounts of money came from each source. He admitted that he-did not personally have enough cash to cover the $28,000 payment. It appears more likely that most of the money came from Elmore related sources such as trust money of his wife Kelley and money owed by Elmore to Kelley on monies he borrowed from the principal of his daughter's trust account.

During the course of the hearing, several financial statements of Robert Witt were made a part of the record. UFW 14 is the financial statement filled out by Witt at the time he applied for the $800,000 line of credit which his father-in-law cosigned for.

UFW 16 which is Robert and Kelley Witts financial statement as of December, 1976 reflects that John Elmore-borrowed a total of $244,000 from his daughter and her trusts. It also reflects that the Witt Ranch borrowed $30,000 from Kelley's money. (see Note Receivable--John Elmore and Note Receivable—Robert Witt Ranch on UFW 16, respectively. See also R.T. 10:12 .)

Those same outstanding loans are also reflected in UFW 17 which is Robert and Kelley Witt's financial statement as of June, 1977. The financial statements of Robert

Witt (UFW 14, 15, 16 and 17) as well as his tax returns warrant further discussion in the section relating to the credibility of Witt.

Finally in regard to the finances of Robert Witt it should be noted that in UFW 10 a chart was prepared indicating that Witt's payments for leases and expenses (i.e. approximately 321 thousand) were exceeded by payments to Witt for crop share agreements with Kudu by approximately 102 thousand dollars. Witt opined that these figures were not representative because the figures had to "be understood in light of sales of 900 thousand dollars." Witt further explained that his 1977 tax return (RW 3) shows a total farm sales of 904 thousand dollars. (See R.T. 9:52 and 63.)

E. The credibility of Robert Witt

Throughout the course of the hearing, Robert Witt testified on four different occasions and was on the witness stand for nearly three days--see Transcripts Volumes 3 (June 20, 1978); 4 (June 21, 1978); 9 (June 28, 1978); and 10 (July 11, 1978). I find that Mr. Witt was not a credible witness. His testimony was frequently evasive, prone to exaggeration, conveniently forgetful, sometimes cute and at times totally unbelievable. All volumes of the transcript must be read to garner their full flavor, but to support my finding, I cite herein some of the more flagrant examples.

1. Some of the examples are relatively minor. For example, Mr. Witt had his ranch in the Santa Maria area,

yet UFW 1A indicates that he purchased a pickup truck for the ranch in Brawley where John Elmore kept his main offices. Counsel for the Union and General Counsel, of course, argue that this is yet another indicia of Witt's reliance on John Elmore. This argument does carry some weight in that Witt himself stated that he did not get a particularly good deal from the Brawley dealership.

Whether the purchase of the truck indicates what the General Counsel suggests, is not the point. The point is that Mr. Witt understood where counsel was going and became evasive in his responses. He characterized the owner of the dealership, Clay Williams, as a "personal friend", but later said he was an "acquaintance." At first he stated that he could not recall how they met, maybe it was in Brawley, maybe not. When pressed he finally admitted that Williams was a friend of the Elmore family. John Elmore testified that, in fact, Clay Williams was a "duck hunting" friend of his and that he (Williams) introduced Williams to Witt. (R.T. 4:183)

2. It is in the area of his personal finances that Mr. Witt was most prone to lack of credibility. For example, when asked about his 1976 income, he related that it was around 15 thousand dollars and that there was additional investment income which he could not recall. At first he stated that there were no documents to reflect his 1976 income, but then later stated that he "supposed" he had a 1976 income tax return. (R.T. 3:64) After discussion with

counsel, he stated that his income from Coldwell Banker was $14,000 and his investment income $30,000. (R.T. 3:71) Witt's 1976 tax return, however, indicates an income of under $10,000 from Coldwell Banker {see line 9 of RWl) and'income from the sale or exchange of capital assets (line 30a of p. 2 RWI) of $25,235.

3. It is stipulated by the parties that the collateral for UFW 4, the $800,000 line of credit, was solely the Elmore signature. (See R.T. 10:3, UFW 4A) Yet, in an attempt to apparently disassociate himself from Mr. Elmore, Mr. Witt gave an extremely convoluted response as to what the collateral was. He stated that it was "several different things". (R.T. 3:126) Previously, Mr. Witt had stated "We will produce financial statements. We will show the collateral put up for the loan". (R.T. 3:126) The documents do show the collateral (UFW 4A) and it is not "several things" but solely the Elmore signature.

As previously noted supra, there was also a contradiction between Witt's testimony and that of Elmore and Anderson as to how the $800,000 dollar figure was arrived at. As also noted previously, I cannot credit Mr. Witt's version that it was reached by him in consultation with Crocker Bank in Santa Maria and without the aid of Anderson or John Elmore. (see pp. 37 - 39, supra.)

At one point in regard to this line of questioning, Mr. Witt said that he was trying to cooperate, but that he "could take a fork in the ..." (R.T. 3:127)

He did not finish his statement as he was cut off by the next question from counsel for the UFW.

4. Several times during his first day on the stand Mr. Witt was admonished to listen to the question and answer it directly (e.g. R.T. 3:175, 1. 22: 3:176 1. 17: 3:194 1. 8:) At one point during the first day of his testimony Witt finally told his counsel "I'll behave, Cal (Watkins). You don't have to talk to me." (R.T. 3:195, 1. 4-5). In the very next page of the tran-cript, however, Mr. Witt had to be told by his own counsel "Just answer the question."

5. Perhaps the most blatant example of Mr. Witt's lack of credibility and his evasive and often arrogant nature is reflected in his discussion of his and his wife's, Kelley's assets. Several documents in the record reflect the joint assets of Robert and Kelley Witt.

UFW 14 is the financial statement that was supplied by Witt to Crocker Bank when he applied for his $800,000 line of credit. It lists Mr. Witt's employment income as $2,000 per month. It lists no additional "Annual Income." It is dated March 25, 1977 and lists no assets of his wife.

UFW 15 is a loan application for a residence filled out on behalf of Witt and his wife dated November 15, 1976. It reflects a monthly income of $1,600 dollars per month and additional assets of $16,450 dollars (including $13,250 in savings and checking accounts.) (UFW 15) It does not specifically itemize the assets of his wife Kelley.

UFW 16 is a document reflecting the assets of Robert and Kelley Witt as of December, 1976. It lists as assets : cash-—$25,000; Note Receivable-John Elmore--$159,000 and $95,000; and, Note Receivable-—Robert Witt Ranch—-$30,000, for a total of $309,250. It lists no outstanding Debts.

UFW 17 is a financial statement of Robert and Kelley Witt as of June, 1977. It lists as assets: cash—-$25,000; Note Receivable Kudu Inc. $154,000 and $93,750; Note Receivable—-Robert M. Witt Ranch—-$30,000; and Real Estate Equity $75,000 for a total of $378,450.00. It lists an Outstanding Home Mortgage of $50,000 as the only Liability.

These documents, in conjunction with Witt testimony about them shed convincing light on his credibility.

In regard to the assets listed in UFW 15, General Counsel attempted to elicit an indication of whether the approximately $16,000 in assets was his and Kelley's, or his alone. He was then asked about a car loan also reflected in the exhibit. His responses are as follows:

> Q. (By Ms. Mocine) Could I direct your attention to the second page of UFW 15, Mr. Witt?
>
> A. Yes.
>
> Q. There is a column on the left titled "Assets." Do you see that?
>
> A. Yes.

Q. Okay. It lists a certain amount of cash and then money in checkings and savings account and an automobile and some furniture. Are those your assets as opposed to your wife's assets?

A. I don't make any distinction.

Q. Does this column reflect the assets held by both you and your wife?

A. That's correct.

Q. Does it represent all of the assets held by both you and your wife as of November of 1976?

A. I have no idea.

Q. Does it reflect your wife's trust income?

A. I don't know.

Q. Whose name was the Home bank account in?

A. I don't know.

Q. What about the Union bank account?

A. I don't know.

Q. Whose name was the '70 Mustang in?

A. I don't know.

Q. Did you ever drive that car?

A. Yes

Q. When did you first begin to drive that car?

A. I don't know.

Q. Was it before 1974?

A. I don't know.

Q. Could I direct your attention to the middle of the page, it says "List previous credit references: Home Bank in Redondo Beach." Do you see that?

HEARING OFFICER: Where are you looking? Oh, I see.

THE WITNESS: Yes.

Q. (By Ms. Mocine) Was that your loan?

A. I don't know.

HEARING OFFICER: Well, whose loan was that, Mr. Witt?

THE WITNESS: I don't know. You're asking me about a financial statement back in 1976. I don't know.

R.T. 10:6-7

Finally Witt stated that the car loan was out of Redondo Beach and was paid off prior to his marriage. Still when asked if this meant it was his loan, he stated "I don't know." (R.T. 10:6-8.)

General Counsel asked Witt to explain the $10,000 difference in assets on UFW 15 (16,000 plus) prepared in November of 1976 and UFW 16 (25,000 cash) which allegedly reflected his assets only one month later. First he stated that UFW 16 was only his "best-guess" then he incredibly stated that he "did not know" where the $25,000 in cash was held. (R.T. 10:9.) As to the difference between UFW 15 and 16 he again responded: " I don't know."

It is now apparent from the record that the entries Note Receivable--John Elmore and Note Receivable--Kudu Inc. represent monies owing to Kelley Elmore by John Elmore for sums he borrowed from the principal of his

daughters trust accounts. Mr. Witt stated that there were two separate trust accounts and two separate notes made and that these are the sums reflected in UFW 16 and 17. (R.T. 10:17.) The route to this conclusion was circuitous indeed. Mr. Witt even had to be admonished for banging the table.

> Q. (By Ms. Mocine) Okay, on page two of UFW 15 where it lists "Assets" the total is $14,000—-$14,250. The third entry under "Assets" is "Note Receivable: John Elmore." Do you see that, Mr. Witt?
>
> A. Yes.
>
> Q. Okay, what does that represent?
>
> A. It is also a note receivable. I don't understand what a note receivable represents. That question has got me really baffled.
>
> Q. Is that involved with Mrs. Witt's trust, or is that separate from the trust?
>
> A. That's true. Yes—no-—well, trusts are cashed out, the notes were then made to John Elmore.
>
> Q. When did that happen?
>
> A. I can't remember.
>
> Q. Was that before you got married?
>
> A. I can't remember.
>
> Q. Was it while you knew Mrs. Witt?
>
> A. I don't know. I just can't remember.
>
> Q. What is the difference between the first note receivable from John Elmore and the second note receivable from John Elmore?

(Mr. Witt bangs table)

HEARING OFFICER: Mr. Witt, please stop banging the table.

THE WITNESS: About $60,000.

Q. (By Ms. Mocine) I'm aware of that difference in the amounts, Mr. Witt.

A. I don't know.

Q. The last entry there in "Assets" is a trust account. It lists $50. Do you see that?

A. Yes.

Q. W hat is that trust account?

A. Well, it's a trust account with $50 in it.

Q. What kind of trust account, Mr. Witt?

A. I'm not sure.

(R.T. 10:14-15)

It is also now clear that the Note Receivable Robert M. Witt Ranch reflects a $30,000 dollar loan to the Ranch by Kelley. Robert Witt so testified. (R.T. 10:12.) Yet his testimony regarding the 30 thousand dollar is equally circitous, evasive and inherently unbelievable.

Q. (By Ms. Mocine) The second entry, it says, "Note Receivable: Robert Witt Ranch, $30,000." Do you see that?

A. Ah huh.

Q. What does that represent?

A. It's a note receivable to Robert Witt Ranch.

Q. Mr. Witt, do you owe this --

A. I don't understand. Why don't you --

Q. -- money to yourself?

A. I owe this money to the ranch. It's a -- okay, it's *a* personal loan to the ranch. There is a distinction.

HEARING OFFICER: What's the distinction?

THE WITNESS: Well, it is just an accounting distinction.

Q. (By Ms. Mocine) What is it?

A. Pardon.

Q. What is it?

A. It's a personal loan to the ranch.

Q. Yes, what is the accounting distinction that you are making?

A. Well, it is just made for my own personal notes, okay.

Q. I don't understand.

A. I don't understand either.

HEARING OFFICER: Mr. Witt, are you having trouble with the question?

THE WITNESS: Yes.

HEARING OFFICER: Okay, you listed here—- I'm sorry to keep interrupting you, Ms. Mocine. 'If you want to continue, and then—- I'm sorry.

Q. (By Ms. Mocine) This represents, then, a loan from you, Robert Witt, to the Robert Witt Ranch; is that correct?

A. It's a loan from my wife to the ranch.

Q. Where did she get the $30,000 from?

A. I don't know.

Q. Was that from cash she had?

A. I don't know.

Q. Was that from her trust account?

A. I don't know.

Q. Did you ever discuss it with her?

A. Yes.

Q. What did she say?

A. I don't remember.

Q. You have no recollection --

A. No.

Q. -- about a $30,000 loan that your wife made to your ranch?

A. That's correct.

(R.T. 10:11-13.)

Finally Counsel asked Witt whether $40,000 dollars had appeared (10 thousand represented in the increase in assets from November to December, 1976 and $30,000 dollars loaned from his wife) whose source he could not explain. After an admonition that he was under oath by myself, this was his response:

Q. In other words, in your family 40,000 dollars appeared and you don't know where it came from. Is that correct?

A. Right.

(R.T. 10:14)

Finally, a brief recess was taken, and upon his return Witt's demeanor was more agreeable but his answer not much more instructive. (R.T. 10:18.)

Mr. Witt constantly characterized himself as a businessman involved in a large business. "We do a million dollars in sales. You better run that thing like a business

or you're going to be out of business. That's where I'm at. I run it like a business. I don't give a damn about anything else." (R.T. 4:47-48.) He also characterized himself as being constantly involved in business decisions, e.g. the sum needed for a line of credit or the decision to cash out Kelley's trust into notes receivable from her father and later from Kudu Inc. (R.T. 10:45.)

But if he was involved in the decision to cash out the trust why would he put almost one-quarter million dollars into a no-return note as he first said it was? (R.T. 10:45.) And if there was a return on it, why was he unfamiliar with what it was? (R.T. 10:47)

If he is correct, in his own self perceptions then his responses and vagueries to counsel's questions are totally unbelievable. If he was being honest in his responses than he cannot be the businessman he claims.

Other examples abound in the record. The point however, is clear. In regard to testimony about his finances Witt was unknowledgeable, unresponsive, and totally uncooperative. Perhaps Witt's own statement that he "would like to have come in a little better prepared, but I just didn't have the time" (R.T. 10:47) best reflects his callous attitude toward the hearing process. He made this statement despite the fact that almost two weeks had elapsed since his last appearance on the stand.

Of course, as stated in my conclusions infra, the finances of the Robert Witt Ranch is of critical im-

portance in ferreting out the relationship of Witt to Kudu. It is for this reason that Witt's credibility in regard to these matters deserves the extended discussion it has received.

6. There were several other occasions where the testimony Robert Witt was inherently unbelievable. When asked whether he knew that John Elmore was a member of the Western Growers Association and on the Board of Directors, Mr. Witt stated: he did "not know anything about his (Elmore's) business." (R.T. 4:23.)

Perhaps nothing is quite so believable, however, as his testimony regarding how he came to be represented by counsel in this hearing. The following facts are undisputed: Witt was represented by Cal Watkins, Jr. at this hearing. When Cal Watkins, Jr. entered the case on behalf of Witt he was with the Law Firm of Dressier, Stoll and Jacobs. Peter Jacobs of that firm represented John Elmore during the course of this hearing. Further, Dressier, Stoll and Jacobs is house counsel to the Western Growers Association. John Elmore is on the Board of Directors and a member of the Western Growers Association.

Witt at one point in his testimony admitted that his legal fees were being paid by the Western Growers Association. (R.T. 4:17.) Apparently Witt sensed that it would not be beneficial to his position to have his fees paid by an association of which he was not a member but in which John Elmore was on the Board of Directors. This

incredible line of testimony then ensued:

(By Hearing Officer) When you spoke to Mr. Watkins and explained your legal problems did he ask you whether or not you were a member of any association?

A. I can't recall.

Q. Did you tell him you were a member of any specific association?

A. I certainly wouldn't tell him I was a member if I were not.

Q. Well did you know what Mr. Watkins was doing in that building at the time?

A. No.

Q. Well when you went to Mr. Watkins were you concerned about the amount it would cost to have Mr. Watkins represent you in any legal proceedings?

A. No.

Q. Money was no issue?

A. No.

Q. You expected to pay money for a lawyer?

A. I expected that he would be compensated. Yes.

Q. Well how did you expect that would happen?

A. I don't know.

Q. Well did you think it might come out of your own pocket?

A. I don't know.

Q. Well did you think it might?

A. I didn't know.

Q. Well what did you expect when you went to speak to Mr. Watkins regarding

payment for legal services?

A. It wasn't discussed.

Q. Well it must have been on your mind; wasn't it?

A. No.

(R.T. 10:40-41.)

At another point, this exchange took place:

Q. Mr. Watkins has now spent a considerable amount of time on your case has he not?

A. Yes.

Q. Do you know how Mr. Watkins is being paid for his services?

A. No.

Q. You never thought about it?

A. No.

(R.T. 4:43.)

(See also R.T. 4:16-et. seq.)

At one point in this dialogue I stated: "... there's got to be some arrangement and I don't know it. I haven't the foggiest idea what's going on and that's all I'm trying to find out. I mean all I know is that you have a very competent lawyer who I have dealt with on many other matters representing you for what you tell me is for free. And I want to understand how that happened..." (R.T. 4:39-40.) The mystery remains unresolved. Either Mr. Witt is lying or he cannot keep track of his own affairs like the "businessman" he claims to be should. (See R.T. 4:47-48.)

F. The alleged, refusals to bargain. 4/

1. The union negotiator--Peter Cohen

Peter Cohen is a negotiator for the Union herein and has been in that capacity since 1971. (R.T. 7:4-5) His responsibilities include determining worker needs, handling the logistics and substance of negotiations, and dealing with any problems that may arise during the course of a contract. (R.T. 7:5-6) The record indicates that he has extensive training and experience in the field of labor negotiations. See e.g. R.T.:6-7. During his tenure, he has attended about 100 negotiating meetings. (R.T. 7:8) During the relevant time period herein, he was assigned by the Union to handle the negotiations in regard to both the Guadalupe and Lompoc Ranches .

2. The alleged refusal to bargain by the Robert Witt Ranch

As previously indicated, on February 18, the Board issued a certification certifying the Union as the bargaining agent of all the employees of John Elmore (Farms) which included both the Guadalupe and Lompoc Ranches. Also, as noted previously, John Elmore leased the Guadalupe property to Robert Witt on January 1, six weeks prior to the certification.

On March 3, Peter Cohen spoke by telephone to Robert Witt who informed him that he ran the Guadalupe Ranch and that he was the son-in-law of John Elmore. (R.T. 7:9-10)

4/ All dates listed in this portion of the opinion, unless otherwise specified, refer to 1977.

The following day, Cohen received a phone call from Cal Watkins, Jr. At the time, he stated that he knew Watkins was with the law firm of Dressier, Stoll and Jacobs which represented Elmore. (R.T. 7:11) Cohen said that Watkins told him that Kudu was the successor of Elmore, but that "Robert Witt Ranch was a separate entity and probably won't bargain." (R.T. 7:11)

In a second telephone conversation with Watkins, on March 8, Cohen said that Watkins officially refused to bargain on behalf of his client, Robert Witt Ranch. This refusal came despite the fact that Cohen told Watkins that the Union considered Witt obligated to bargain. (R.T. 7:12)

On April 27, Cohen sent GC 18 5/ which officially stated the Union position and requested information of the Witt Ranch so that bargaining could begin. Cohen testified that the Union has never received any information from Witt and that Witt has never bargained. (R.T. 7:18) Witt has stipulated that he refused to bargain and send information. (R.T. 7:43) Cal Watkins spelled out this position in writing to the Union in GC 19 which stated that Witt was neither an alter ego, successor of nor joint employer with Kudu Inc.

3. The alleged refusal to bargain on the part of Kudu Inc

a. Events prior to the meeting of October 7

On April 7, the Union sent a letter from Cesar Chavez requesting negotiations and certain information so that the

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5/ It is stipulated that all letters referred to herein are exact copies as they exist in the record and that they were all received by the persons to whom they were addressed.

Union could begin to formulate *a* bargaining position. (See GC 17 and also R.T. 7:24.)

On May 9, Donald Dressier counsel for Kudu Inc. sent GC 20 to Gilbert Padilla of the contract administration department for the Union. First, the letter stated that the form of John Elmore (Farms) had changed. It informed the Union to send all communications to Kudu.

Secondly Dressier suggested that Kudu was not clear as to the Union's bargaining rights because of the change and suggested that the Union file a petition for clarification. Dressier assured his co-operation. It is apparent from GC 20 that the unit clarification issue would have to be resolved prior to the commencement of any negotiations by the Company. The Company's stated reason was fear of an unfair labor practice being filed against it. Dressier did also state, however, "I assume that such a motion for clarification or amendment of certification could be taker} care of very quickly and that, to protect the rights of the farm workers involved and your union, perhaps we should also not delay in scheduling dates for negotiations..." (GC 20)

Thirdly, Dressier requested certain information so that the company could prepare its negotiating position.

On May 20, Padilla responded to Dressier's May 9 letter (GC 20a) and said the matter was referred to the Union's legal department. Padilla again requested information and dates.

On May 31, Dressier sent a letter to Peter Cohen. (GC 21) The letter contained a list of employees for October 1974 to December 1976. Cohen testified that since this list was not current,

it was of little use. (R.T. 7:30-31)

On June 7, Cohen sent a letter to Dressier. (GC 22) Cohen stated that the issue of the certification was with the legal office, but he saw "no reason why we shouldn't immediately commence the bargaining..." Cohen requested the earliest possible date. Finally, Cohen complained about the inadequate employee list and requested the additional information in the Chavez letter of April 7.

On June 13, Dressier responded to Cohen. (GC 23) Dressier essentially reiterated the Company position that until the Unit was clarified there would not be much sense in negotiating. He hoped the Union would act as quickly as possible.

Cohen testified that he was confused by this response. "I found it to be somewhat ambiguous. *I* couldn't make out from this letter what exactly Mr. Dressier's intentions were in regard to scheduling a meeting with us." (R.T. 7:33)

Thus, on June 15, Cohen called Dressier who told him that the meeting date would be set once the Unit clarification issue was resolved. (R.T. 7:33-4)

Cohen again contacted Dressier by phone on June 16. Cohen told Dressier that the Union felt they could immediately go ahead with bargaining regardless of the issue of Unit clarification. As he had the day before, Dressier said that the Company needed some timetable before it could schedule any negotiating sessions. Cohen indicated to Dressier that the Union would need alot of information regarding the relationship between Kudu, Elmore and Witt. Dressier said he would cooperate. Finally Cohen told Dressier the Union position regarding Witt and Dressier said that there should be a

new election at the Witt ranch. (R.T. 7:37)

On June 24, Daniel Boone, Union lawyer, wrote a letter to Donald Dressier. (GC 25) Boone said he was responding to Dressler's letter of May 9. (GC 20) He stated that the idea of Unit clarification to untangle the relationship between Kudu, Elmore and Witt might be a good idea, but that the Union needed more information in regard to the relationship of the companies. "However," wrote Boone, "as to Kudu, Inc., you have indicated a willingness to meet and bargain. That should be done as soon as possible. In addition, the UFW asks that you put in writing that Kudu, Inc. acknowledges that it is obligated to bargain with the UFW as the certified bargaining representative for that portion of the John Elmore Farms Certification covering the Lompoc Valley." Finally Boone again requested the information the Union had previously requested in regard to the relationship between Kudu, Witt and Elmore.

On June 25, Boone wrote letters to John Elmore and Dressier requesting information to clarify the Witt/Kudu problems. Boone again stated that a Petition for Clarification might be appropriate at some other time, but that there could be no decision on this until the Union had the information requested in the letter. (GC 26)

On July 18, Dressier responded to Boone's June 25 letter. (See GC 27) Dressier stated:

> At the outset there are a couple of comments I think are very important. First of all, John Elmore Farms is not doing business as Kudu, Inc. Kudu, Inc. is an independent employer whom we have indicated to you in our letter of May 9, 1977 replaced John Elmore Farms operations in the Santa Maria-Lompoc areas.

Dressier then stated that the Union statement that the "employer and its counsel have informed the UFW that the Lompoc-Guadalupe unit has been broken into two parts. The Lompoc farming operation is now called Kudu, Inc. and the Guadalupe operation is now called Bob Witt..." is "categorically untrue, false, and not based in fact."

Dressier concluded GC 27 by stating:

> In your letter to John Elmore Farms, dba: Kudu, Inc., you are under a misapprehension that John Elmore Farms is doing business as some other entity. That is not correct.

Finally Dressier stated, in sum, that if the clarification issue were not settled first, he feared that the Company night be committing an unfair labor practice by negotiating with an improperly certified representative. Dressier quoted from his letter of May 9. He stated the company would be glad to provide information on the Unit clarification issue. Dressier suggested that he sit down and talk with the Union face to face to "openly discuss and deal with the questions of fact that your Union has."

On July 20, Cohen wrote Dressier (apparently prior to receiving Dressler's July 18 letter) again formally requesting that bargaining begin. He listed dates he was available. (GC 28) (It should be noted that similar letters were sent to Watkins and Witt also on July 20. GC 29)

On July 25, Dressier responded to Cohen's letter of July 20 (GC 30) and suggested they meet "to sit down across the table and deal with the questions of fact that your union has." He suggested August 15 or 16 at his office in Newport.

A meeting was scheduled for August 15, but Peter Cohen had to call, on August 14, to reschedule. Dressier and Cohen agreed

that they would get in touch at the end of the month. On September 3, Cohen called Dressier. Dressier suggested they meet in Lompoc which Cohen agreed would be much easier.

On September 12, Cohen again called Dressier and was told that the case had been trasferred to Peter Jacobs of his office. (R.T. 7:51) Cohen called Jacobs who said it would take two weeks to get the file. (R.T. 7:51-2) Finally a meeting was set up for October 7, in Guadalupe.

b. The meeting of October 7, 1977

On October 7, Peter Cohen for the Union met with Peter Jacobs, counsel for Kudu Inc., John Wilkinson and Cal Watkins, Jr. who Cohen admitted was representing Witt at the meeting. (R.T. 7:90)

John Wilkinson had no labor management training. (R.T. 6:39) Yet, in September of 1977 he had been appointed by John Elmore to represent the Company at any negotiating sessions. He stated he spoke to both Elmore and Anderson about the question of labor management, but he could not recall the contents of any of those conversations. (R.T. 6:41) He testified that he did not recall ever seeing a request for information on behalf of the Union. (R.T. 6:45 and 6:43) He stated that he recalled, at some point having discussed a request for information on the part of the Union with John Elmore, but he could not recall the substance of that conversation. (R.T. 6:52)

Wilkinson recalled the meeting of October 7 in this fashion. He stated it lasted about 2 and 1/2 hours. (R.T. 6:75) Nothing very definite was discussed, he stated. Wilkinson stated that the meeting was the first time that he recalls being given--either

orally or in writing, he was not clear—a request for information. (R.T. 6:50) He believes he may have been given GC 26. (R.T. 6:50)

Peter Cohen's recollection of the meeting was significantly more detailed. Cohen stated that he began the meeting by indicating that the Union position was that they represented all the employees at Lompoc and Guadalupe. At that time, Cal Watkins informed him that Witt's position remained the same and Witt would not bargain. (R.T. 7:53)

Peter Cohen then said he referred the people present to GC 18, 24, 25, and 26, and asked if they were ready to proceed. Jacobs, according to Cohen, responded for Kudu. He said that Kudu had fears of proceeding because of letters written by some of the employees in 1975 indicating that they were opposed to the Union. Jacobs said that he feared proceeding prior to Unit Clarification would potentially make the company liable for Unfair Labor Practice Charges. (R.T. 7:54)

Cohen countered that those letters had already been disposed of with the issuance of the certification by the Board.
(R.T. 7:54-5)

He stated the employers gave no information as requested during the course of the meeting. (R.T. 7:55-6)

Cohen asked Jacobs if the Company was refusing to bargain Jacobs said "no they weren't but that they had a serious problem and that they wanted to get something in writing from the Board before they would proceed." (R.T. 7:56) Cohen reiterated there was no need to condition the bargaining. He stated that the Union

would cooperate in seeking clarification, but that they should, in the meantime, begin negotiations. Cohen said he was afraid it would take too long to get anything from the Board. Jacobs again reiterated the Company's "problem." At the end of the meeting Jacobs suggested a joint petition to the Board seeking clarification of the Unit. Cohen said he would take it up with the Union. (R.T. 7:56-58) He denied, however, that he was in favor of that route, but did tell Jacobs it might make things move faster. (7:89)

Finally Cohen stated that he suggested to Jacobs that Elmore put a stipulation in writing to the Board that Kudu was, in fact, the successor to John Elmore (Farms). Jacobs said that could not be done because of the problem with the employees. (R.T. 7:58-59)

On cross examination of Mr. Cohen by Mr. Jacobs at this hearing, Mr. Cohen said that he recalled, more or less, Jacobs telling him "that (Jacobs) was representing a different entity from the one which was certified." He also recalled Jacobs telling him that the Company feared ULP charges being filed. (R.T. 7:84)

Cohen stated that by the time of the meeting on October 7, it was clear to him that the Company position was that they would not bargain until the clarification issue was resolved. (R.T. 7:88) He said he had not been clear on this because of ambiguity in the Dressier letter of May 9. (See supra and also R.T. 7:86-88.)

Finally, Cohen stated that he renewed the request for information stated in the Chavez letter of April 7 at the meeting of October 7. (R.T. 7:92) He vehemetly denied that the Boone request for information on June 25 (GC 26) about the Kudu/Witt/

Elmore relationship in any way suspended the previous request for information by Chavez in regard to contract demands. Cohen pointed to his letter of June 7, (GC 22) and stated that that request for bargaining information was always operative. In essence, Cohen denied that the Boone letter of June 25, was an admission by the Union that they had adopted the Company notion of seeking clarification prior to the commencement of contract bargaining. (R.T. 7:90) Cohen admitted however that there was no formal request for bargaining information between June 7 and October 7 because "there was no need to." (R.T. 7:96)

c. Events after the meeting of October 7

Cohen testified that a couple of days after the meeting, in a phone conversation with Jacobs, he suggested that Jacobs draw up a draft Petition for Clarification. Thereafter, on October 25 Cohen received a letter from Jacobs (GC 31) which contained such a draft.

Cohen testified that it was unacceptable because it again referred to the 1975 letters which he felt had already been litigated. (R.T. 7:61) Secondly, he stated that many of the letter writers were relatives of Tony Garcia. Thirdly, he objected to the statement in the petition that "John Elmore Farms divested itself of its Lompoc ranch to Kudu, Inc., a company which John Elmore Farms has no business connection." See GC 31, p. 2, no. 3. (R.T. 7:61)

On October 31, Cohen wrote to Jacobs and stated that the Petition was unacceptable. He again requested the information in regard to Kudu-Witt-Elmore. He quoted the Dan Boone letter of June 25, stating that a petition might be appropriate, but that the

Union needed more information. On cross examination Cohen stated he did not spell out his specific reason for rejecting the Petition to Jacobs. (R.T. 7:80-81}

Additional letters were exchanged (see GC 33 and 34) and on December 19, Cohen relayed to Jacobs "the answers to the questions you asked regarding the relationship of Elmore Farms and Kudu Inc." (GC 35)

Prior to his receipt of GC 35, however, Cohen, on December 21, mailed Jacobs GC 36 in which he told Jacobs that the Union still maintained that the unit included employees at both Lompoc and Guadalupe. He also said (in response to a question Jacobs had posed in a letter of December 14, GC 34) that the Union could not stop the Company from filing a unilateral petition.

The same day, again prior to the receipt of GC 35 by Jacobs, the Union filed an unfair labor practice charge against the Company alleging refusal to bargain.

Jacobs responded angrily to the filing of the charge. On December 23, 1977, he wrote Cohen and said that he viewed the filing of the charge as a "breach of trust." (GC 37) Jacobs cited what he felt were his own good faith efforts in regard to the Joint Petition and the sending of GC 35 to the Union. He accused Cohen of giving the company a slap in the face with the filing of the charge. (GC 37)

Cohen testified that he called Jacobs in early January of 1978 to say that there was nothing personal in the filing of the charge. (R.T. 7:68) He sent a letter to the same effect on January 5, 1978, but also reiterated his position that the change to Kudu Inc. from John Elmore Farms was "barely more than a change in nomenclature." (GC 38)

Jacobs responded with a rapproachment of sorts on January 24, 1978. (GC 39) Jacobs hoped for a trusting relationship. He again raised the company position regarding the employees of 1975 and then wrote:

> Kudu Inc. is a different legal and geographical entity from John Elmore Farms; its management is different and it would appear that a large number of its employees are opposed to Unionization. GC 39, p. 2.

On January 18, 1978, the Company unilaterally filed a petition for clarification with the Board. (GC 41) The petition again stated that "John Elmore Farms divested itself of its Lompoc ranch to Kudu, Inc., a company which John Elmore Farms has no business connection." GC 41, p. 2.

Finally, on March 30, 1978, the Regional Director issued his opinion stating that Kudu should be required to bargain with the Union. The opinion also stated that Robert Witt should be required to bargain. GC 42 p. 30. GC 44 is a letter indicating that given the opinion of the Regional Director, Kudu was now ready to bargain. Of course, Robert Witt never has agreed to bargain.

d. General Counsel 35

One particular exhibit merits further factual analysis. GC 35 was prepared by John Wilkinson and was made in response to GC 26 (see supra). Response 3 states: "Kudu Inc has no stockholders." Wilkinson testified that this statement was probably from Vie Anderson. He doubted that it come from John Elmore. (R.T. 6:59) The information in GC 35 was the only information that Kudu ever sent. (R.T. 6:65)

Response 2 states: "John Elmore Farms discontinued operations for no other purpose than to incorporate under Kudu, Inc."

When asked why the Company waited until December 14 to

respond to the request made in GC 26 by the Union, Wilkinson stated:

> Well, at the time we didn't feel we had a--we were shooting to get a clarification as to if Kudu—we weren't sure if Kudu should bargain without a clarification, or we weren't sure if we should supply information without a clarification and we were waiting for a clarification on the matter. (R.T. 8:6)

Wilkinson also discussed the formation of the decision that there should be no bargaining until the clarification was handled. While he could not remember the mechanics of the making of the decision, he did state that Elmore and Jacobs were involved and he gave this reasoning:

> "Well because we felt that we were now legitimately operating as Kudu, and that it would be a necessity and a simple matter to get a clarification. And we thought it was the proper thing to do.
>
> Q. What was the necessity?
>
> A. Well I believe that we felt that the election has certified John Elmore and we were now legally operating as Kudu, and we felt that made it necessary.
>
> Q. Because the name had changed?
>
> A. That's correct. (R.T. 8:53)

e. Other testimony regarding Kudu and labor relations

Vie Anderson, at times, handles the labor relations for Kudu. He has no negotiating experience, but has done it at the request of Elmore. (R.T. 5:105) He candidly stated that he is not a negotiator, but does whatever the company needs. (R.T. 5:106) Elmore also testified that Anderson was his representative in the Imperial Valley.

Finally, Manual Mirales works for John Elmore. It is his stated job, according to Vie Anderson, "to keep the employees

happy." (R.T. 5:104} Anderson further said that he takes care of "grievances." id. Mirales, said Anderson, is also not a negotiator. He works out such "minor problems" as insurance or benefits. (R.T. 5:104-107) Mirales has visited both the Lompoc and Guadalupe ranches.

It should parenthetically be noted that John Elmore did not attend negotiating sessions and stated that he left requests for information to Vie Anderson. (R.T. 4:198)

f. Other testimony regarding the Union and the refusal to bargain.

Peter Cohen testified that a response to Don Dresslers' request for information dated May 9 (GC 20) went out within two weeks after it was requested. (R.T. 7:99)

He also stated that the UFW never set up a negotiating committee at Lompoc because they would not get specific dates for the negotiations. (R.T. 7:99)

g. Post April 7, 1978 conduct

The parties stipulated that:

> (I)n its April 7, 1978 letter from Peter Jacobs to Peter Cohen, Kudu, Inc., stated that it was satisfied with the Regional Director's decision and was ready to meet.
>
> In order to encourage good faith bargaining and for the purposes of this hearing, the parties agree that any liability of Kudu, Inc. in Lompoc herein will be determined with regard to events prior to the date of said letter, April 7, 1978 (GCX 44)
>
> The UFW does not waive its right to file a further unfair labor practice charge of bad faith bargaining on the part of Kudu, Inc. herein should the union determine that Kudu, Inc. has not been bargaining in good faith since April 7, 1978. (VII RT 1-2)

IV. DISCUSSION, ANALYSIS AND CONCLUSIONS

A. Robert Witt's Duty to Bargain with the Union

Whether or not Robert Witt is obligated to bargain with the Union herein will depend upon whether Robert Witt may be said to be a joint employer with, a successor to or an alter-ego of Kudu Inc. A finding that Witt is any of the above will necessitate a finding that Witt is required to bargain with the Union.

While each of these is a separate legal theory with its own requirements, they share in common an attempt to discover the essential relationship between the business entities. With regard to the question of joint employer, the-Board seeks to determine whether "the enterprises are sufficiently integrated..." NLRB, 21st Annual Report, pp. 14-15 as cited in Abatti Farms Inc., 3 ALRB No. 83 at 17. To determine the question of successorship the issue is one of "whether the change in ownership has affected the essential nature of the business". Rivcom Corporation, 5 ALRB No. 55. Finally, with regard to the alter-ego issue, the problem revolves around whether the new employer is merely the disguised continuance of the old employer. See e.g. NLRB v. Ozark Hardwood Co., 282 F2d 1, 46 LRRM 2823 (8th Cir. 1960).

Each of these theories is discussed individually below, but to avoid repetition the "essential nature" and "integration" of the enterprises--Kudu Inc. and Robert Witt Ranch -- as indicated from the facts presented herein should be examined.

1. The relationship between Robert Witt Ranch and Kudu Inc.

It would be difficult to imagine two more diverse individuals than John Elmore and Robert Witt at the time that Witt leased the Guadalupe property in January of 1977. On the one hand, John Elmore, well capitalized, with decades of experience in agriculture. On the other hand, Robert Witt, under capitalized, with absolutely no experience whatsoever in agriculture. John Elmore with a vision of total integration for his agricultural operations (see testimony of John Wilkinson cited at pp. 6-7, supra.) and Robert Witt registering surprise at the suggestion of entering agricultural but willing to give it a try. It is these differing economic resources and backgrounds that shaped the relationship between John Elmore as the president of Kudu Inc. and Robert Witt. It is, ultimately, these factors that must define the legal relationship between the enterprises Kudu Inc. and Robert Witt Ranch.

A close analysis of the facts makes it clear that the changes in the operations at the Guadalupe Ranch after the Witt lease of 1977 were more of form than substance. Physically, it is difficult to decipher significant differences between the operations at the Guadalupe ranch while it was operated by Kudu Inc. and after it became Robert Witt Ranch on January 1, 1977. John Elmore had operated the Guadalupe Ranch first as part of the sole proprietorship John Elmore and eventually as a part of Kudu Inc. During that time his supervisorial staff, headed by Willie Assistin, grew crops

which were packed and shipped by Kudu using Sahara labels and boxes. As noted, Elmore hoped that Sahara would formally enter the area and become the packer/shipper for the crops that Kudu Inc. grew.

With Robert Witt's appearance on the scene in January 1977, it was business as usual. There was no break whatsoever in the operation as a result of the lease agreement with Kudu. Witt used the same supervisorial staff, including willie Assistin who remained on the Guadalupe property until August. (See further discussion infra.) The crops that Witt grew were identical (with the exception of carrots-- see discussion infra.) to those grown by Kudu, and were farmed with the same equipment which Kudu leased to Witt.

Just as prior to January 1, 1977, labor contractors harvested the crops, they harvested them after January 1, 1977. In at least one case, the same labor contractor, Frank Almaguer, was used by both Kudu and Witt. Similarly the packer/shipper before and after the lease agreement remained the same--Kudu/Sahara with the major involvment and ownership of John Elmore in both operations.

Kudu crop sell agreements with John Inglis Frozen Foods and Gilroy Foods Inc. were facilely assumed and continued by Robert Witt. The record is devoid of any written assumption of the agreement. Rather, Anderson thought there were just phone calls and perhaps a letter.

Witt retained the same essential format in keeping his books at the Ranch. It is clear that his bookkeeper, Debbie Gorman, keeps in touch with Vie Anderson and that Anderson

trouble shoots for Witt when he has bookkeeping problems. It is also clear that the payroll forms used by Witt are identical (except for name substitutions) to those used by Kudu Inc. Finally, in this regard, Witt retains John Elmore's economic advisor as his own accountant.

Witt continued to pay his field workers the same money—-3.45 per hour-—as paid by Kudu. Witt, with the exception of New Years Day, provided his employees with the same holidays. Witt retained a similar insurance structure which included liability and health insurance but did not include crop insurance. (See further discussion supra.) Witt continued to provide the same employee bonus program that Kudu had provided its employees.

Finally, Witt continued to use the same numbering system for his fields at Guadalupe that was used by Kudu although it is also clear that he subdivided them more than Kudu had prior to the 1977 lease.

If the physical appearance of the operations did not significantly change with the assumption by Witt of the lease, it is the financial relationship between the two enterprises that perhaps most forcefully reflects the integration and interdependance of the Witt Ranch with Kudu Inc. As the record indicates, Robert Witt married the daughter of John Elmore, Kelley Elmore Witt. It is apparent that it was the money of Kelley Elmore Witt and John Elmore which served to finance the Robert Witt Ranch. When Witt agreed to farm the Guadalupe property, he was undercapitalized to take on the venture. To remedy the situation, he was financially

subsidized by his father-in-law John Elmore and Kudu Inc.

As reflected in UFW Exhibit 2, Witt owed Kudu 129,803.44 after the first three months of his tenure at the Guadalupe property. The sum had been building over the three month period beginning with a balance of 49,939.38 owing when he came to the ranch as of January 1, 1977. It is uncontradicted that Kudu paid all bills comprising these sums (e.g. payroll, crop costs etc. see UFW 2) and did not charge Witt for their loan services.

The only payment that Witt made on these monies owing before June 22, 1977 (when he paid the 129 thousand dollar balance) was with monies borrowed from Kelley's trust fund in December of 1976. When Witt finally did pay the balance in June 1977, it was only after his father-in-law, John Elmore, had cosigned an 300,000 dollar line of credit with Crocker Bank for which Elmore served on the Board of Directors. Despite Witts protestations to the contrary, it is clear, and I so find, that Elmore was responsible for determining that the amount of the line of credit should be $300,000.

Beginning in April of 1977, Witt began to pay his own bills and payroll, but again it was Elmore and Kudu which ultimately kept his operation going. As noted in the facts, Witt farmed 450 of approximately 500 acres for his father-in-law. Pursuant to these crop share agreements with Kudu, Witt only bore 1/4 of the risk as opposed to 1/2 which is more common and which is reflected in all other crop share agreements that Kudu entered into other than those with Witt.

Aside from insuring that Witt only have to bare 1/4 of the risk, Kudu, in executing the crop share agreement which is GC 5C entered into the unusual practice of advancing Witt a lump sum payment of 66,000 dollars. Wilkinson testified that this was "unusual," but that Witt "wanted it that way". While Wilkinson attempted to justify this payment as proper because of all the preparation that had gone into the crop before the agreement was signed, he admitted that this was the only such lump sum payment that he knew of.

Further, Elmore and Kudu permitted Witt to delay payment of monies owing on the lease of the land and the lease purchase agreement for the equipment on the land. As to each of these leases, there was no competitive bidding nor was any collateral required.

Again, Witt testified that he negotiated the terms of the agreements but as I have indicated in my section on the credibility of Robert Witt it is evident that there were no negotiations. The terms were set by Elmore with Andersen acting as the intermediary.

While the terms of the leases called for payments every six months, Witt was allowed to be delinquent and pay when he apparently saw fit. It is clear that the 116,250 dollar payment made for the lease on June 22, 1977 (which was 6 months after the first installment was due) was made only after Witt received the line of credit based on the Elmore signature.

A similar analysis may be made for the late payment on the lease purchase agreement which was finally made on August 23, 1977. The August lump sum payment was delinquent.

No attempt had been made to collect it earlier. Again, Witt's ability to pay co-incided with his having a line of credit for which Elmore had co-signed.

As with the advances for payroll monies during the first quarter of 1977, no interest was charged as a result of the late rental payments.

In fact, at the time of the hearing rental payments for the land and equipment were again delinquent. Anderson noted that there was no intent to take any action.

Anderson maintained that the reason no action was taken for the late payments in 19'77 was because Elmore owed his daughter money from her trusts. The same logic could not apply for 1978. By the time of the hearing Elmore had paid the monies owing to his daughter.

Of course this financial interdependence of the two operations--Kudu and Witt--is not surprising in that Kelley Witt, Robert's wife, is a shareholder in Kudu as well as being a co-signer of the lease agreements at the Robert Witt Ranch.

While Witt did institute certain changes and exercise certain control (see discussion infra.) it is clear that without the financial support from Kudu, Witt would not have been able to begin or continue his operations. This is also evident because of Witt's lack of experience in farming operations. As already stated, Witt appeared surprised at the suggestion that he try farming as other members of the Elmore family had. He had no previous farming experience and it was with the assistance of present and

former Kudu personnel--primarily John Wilkinson and Willie Assistin that Witt learned the farming operations. During the first few months of 1977, Wilkinson was on the land showing him around and introducing him to the neighbors. Assistin, who remained at Guadalupe after the signing of the lease agreement, according to Elmore, was idolized by Witt and was the source of much of Witt's knowledge. Wilkinson also testified that Witt learned the mechanics of farming from Assistin.

Both Wilkinson and Elmore maintained that their relationship with Witt was that of harvester/packer/shipper rather than operator. Witt was more emphatic. He denied that Elmore helped him run the ranch and that he had no discussions with Elmore "about the operations of the ranch" see p. 31 supra. He maintained that all discussions with Elmore regarded capital improvements such as tiling and leveling.

I find such a scenario to strain credibility. I have already detailed my reasons for not crediting Robert Witt's testimony. It seems inconceivable to me that the son-in-law of John Elmore with decades of farming experience would not frequently seek the advice of his father-in-law and one of his top assistants, Wilkinson, about an occupation with which he had absolutely no experience. It also seems inconceivable to me that Elmore would not advise his own son-in-law about his life long occupation--especially given the fact that Elmore had a financial stake in the success of the Robert Witt Ranch.

It is evident from the record that Elmore often

visited the Witt Ranch. Witt, by his own testimony stated that he was there 2 or 3 times a month after he took over (4:30), and a worker, Thomas Gallegos, testified that Elmore was on the Guadalupe property three times during April and early May of 1977. Wilkinson, again by his own testimony, was on the ranch even more frequently. Given the other support that Kudu provided Witt--whether it be deferred payments on leases, interest free advances on payroll obligations, arranging lines of credit, or providing large advances on low risk crop share agreements — it is inconceivable that these sane persons did not attempt to make Witt into a fine farmer which would benefit all the parties.

It is within the context of the foregoing framework that the issues of successorship, alter ego and joint employer must be discussed.

2. Robert Witt as a successor of Kudu Inc.

If the Robert Witt Ranch is a successor to Kudu Inc. then the latter has a duty to bargain with the Union. In essence, the argument of General Counsel, in part, states that Robert Witt, having entered into the lease agreement with Kudu Inc., has also succeeded to the bargaining obligation of Kudu in regard to the employees at the Guadalupe property.

NLRB precedent considers an employer who takes over a business to be a "successor" to the previous employer's collective bargaining obligations when there is substantial continuity in the enterprise. In Rivcom cited supra, our

own Board has stated that "We must look to the totality of the circumstances to determine whether the change in ownership has affected the essential nature of the business." emphasis added at p. 20. Our Board's admonition to look to the totality of circumstances is consistent with NLRB statements that the successorship issue may arise in a "myriad (of) factual circumstances and legal contexts" and thus should be judged on a case by case base according to the facts. See e.g. John Wiley & Sons v. Livingston, (1964) 376 US 543.

As the Union points out in their post hearing brief, "the subject of successorship is shrouded in somewhat impressionist approaches..." citing the concurring opinion of Judge Levanthal in International Association of Machinists, District Lodge 94 v. NLRB 414 F2d 1135 (DC Cir., 1969), but several factors aid in determination of the issue:

1. Substantial continuity of the same operation.
2. Whether the new employer uses the same plant.
3. Whether the same jobs exist under the same working conditions.
4. Whether the same supervisors are employed.
5. Whether he used the same machinery, equipment and methods of production.
6. Whether he manufactures the same product or offers the same services; and
7. Whether he has the same or substantially the same workforce.

[citing Bordersteel Rolling Mill, 83 LRRM 1606,

1608 (1973)]

It is clear to me that the first six items listed above are all nearly identical despite the change from Kudu Inc. to Robert Witt ranch. The same land, grows the same crops with the same equipment supervised by the same personnel (including Willie Assistin who remained through August of 1977). Similarly, the working conditions for the employees-—both in terms of pay, benefits and other working conditions has remained essentially the same.

In their post hearing brief Witt argues, and in fact the testimony reflects, that many changes were made by Witt during the course of his tenure. These changes include: a decision to grow carrots in which Kudu did not concur; the signing of three additional crop sell agreements which Kudu did not have prior to the signing of the 1977 lease; changes in fertilizer and herbicide techniques which involved using "bulk" techniques and relying less on commercial sales agents and more on trained consultants; changes in tractoring techniques; changes in sprinkling and germination techniques; changes in irrigation by reducing the number of men used to carry out the irrigating; and the fact that Witt changed his insurance scheme so that he had no pension plan and his health insurance changed from Penn Mutual to the Western Growers.

A response may be countered to some of these changes which did in fact occur. The carrot crop was a financial disaster and all other crops remained the same.

While Witt testified that he had plans for spinach and looseleaf lettuce, these crop changes had not come to fruition at the time of the hearing. While Witt did sign additional crop sell agreements, at least one was with the same Gilroy foods and none were for any different crops than Kudu had signed agreements for. While changes were made in the insurance scheme, as noted above, the basic insurance structure remained identical to what Kudu had. Changes were made in herbicides and pesticides which even Elmore and Kudu adopted in their own operations. Nonetheless, Elmore, in his testimony minimized the importance of the changes, and said that he felt Witt was "bragging" and "puffing" a bit.

To respond to each of these changes, however, is not necessary. Even taking the changes at their face value, they are not significant enough to override the proposition that the essential nature of the business remains unchanged. In Rivcom the Board opined that changes in crop productivity and changes to make the operation less labor intensive were not significant enough to change the essential nature of the operation. The same may be said in the case at bar.

While there is substantial continuity in the operations and the essential nature of Witt's operation remains unchanged from Kudu, one factor in the successor equation demands special consideration. It is agreed by the parties that there is no continuity in the work force and further that there is no exchange of personnel between Kudu and Witt.

Under NLRB precedent, this would be sufficient to

defeat the successor argument. In Howard Johnson, supra, the United States Supreme Court made the issue of worker continuity determinative on the successor issue. Given the differences of the successor issue in the agricultural setting, our Board has seen fit to relax the stringent NLRB standard in successor cases. As the Board wrote in Highland Ranch and San Clemente Ranch, Ltd., 5 ALRB No 54 (1979); "Undue emphasis on the continuity of the work force factor at the expense of other relevant factors would render the important protection provided employees by the successorship principle almost entirely ineffective..." at 15. The factors that mandated that conclusion in Highland Ranch are also present here—high seasonal turnover, varying labor force size, and the use of labor contractors. As in Highland, to demand a showing of majority continuity in the work force would- place an emphasis where it does not belong. Rejecting over emphasis on work force continuity the Board concluded in Highland that:

> Despite the transfer of ownership from Highland to San Clemente, the agricultural operation itself remained almost identical. There was no significant alteration in the nature of the bargaining unit... Unit employees perform the same task for San Clemente which they previously performed for Highland since San Clemente grows essentially the same crops. The size of the unit also remained the same. Furthermore, San Clemente is farming the same land as Highland having acquired the lease to all of Highland's agricultural property. It has also acquired Highland agricultural machinery which it uses in its farming operations. In these circumstances, meaningful principles of successorship can be given effect only by find that San Clemente is Highland's successor. For us to reach the contrary result would be to miss the forest for the trees. at pages 17-18

Much the same may be said in the case at bar. The

agricultural operation itself remained almost identical after the 1977 lease agreement. As in Highland, the same equipment farmed the same land to produce the same crops. There appears to have been no substantial alteration of the bargaining unit either in size or nature of the work performed by the employees, When this is combined with Witt's clear dependence on Kudu personnel for expertise and financial support, to reach a contrary result regarding successorship because of a lack of showing of workforce continuity would also' "be to miss the forest for the trees".

3. Robert Witt Ranch as the alter ego of Kudu Inc.

It is important to emphasize that there is a distinction between the doctrine of successorship requiring Robert Witt to bargain and the notion of finding Robert Witt to be the alter ego of Kudu Inc. which would also require Witt to bargain with the Union. Under the latter theory, the new employer is merely a disguised continuance of the old employer. The doctrines are similar, however, to the extent that in determining whether an enterprise is an alter ego of another enterprise, each case -is to be judged on its own facts. see e.g. Southport Petroleum Co. v. NLRB 315 US 100, 9 LRRM 411; and NLRB v. Herman Bros. Pet Supply 325 F2d 68, 54 LRRM 2682 (6th Cir. 1963).

Cases such as Herman Bros., supra, illustrate the Court's reasoning in determining whether or not business enterprises should be considered alter-egos of one another. In Herman Bros., an inexperienced and "immature" son took over his father's business subsequent to a Board order finding

the father's pet supply shop had committed various unfair labor practices. The Sixth Circuit affirmed the Board's finding that the operation run by the son was in fact a disguised continuance of the father's business enterprise. The Court viewed such facts as the lack of experience and immaturity on the part of the son; the frequent visits and active participation by the father in the companies business activities after the son allegedly took over; the father's giving orders to the son; and the father's arranging for the transfer and discharge of two employees after the "sale" took place as determinative of the issue.

In NLRB v. Ozark Hardwood Co., 282 F2d 1, 46 LRRM 2823 (8th Cir. 1960) the Court also upheld the Board's determination of alter ego status. Therein, subsequent to a Board order finding unfair labor practices, the company was bought under supicious circumstances by two stockholders of the company and the plant manager's wife. The company had ceased operations just prior to the sale and all of its employees had been terminated. Within ten days after the sale, however, the plant reopened as Hardwood Manufacturing Co. and rehired all but five of the old employees. Eventually, the former plant manager resumed his old job with the new company. The new company had the same obligations and inventory as the old company. Despite some changes instituted in the new company and expansion by the new company, the Court found that Hardwood Manufacturing Co. was the alter ego of Ozark and thus responsible for all its labor obligations,

See also NLRB v. Hopwood Retinning Co. 104 F2d 302 :

Monarch Company was found to be the alter ego of Hopwood after it was determined that it was formed by the persons in control of Hopwood; its machinery and equipment and 12 trucks were transferred to New Jersey at a cost charged to the account of Monarch of which only 2,000 dollars had been paid at the time of the hearing; the stock was owned by the former company; Hopwood continued its existence, functioning as the exclusive sales agency for Monarch; Monarch had no other assets or business operations; and, a vice president of Hopwood, although paid solely by it, spent about one half his time with Monarch as did other officers.

As in the successor cases a myriad of factors determine whether or not an enterprise is an alter ego of another. A representative list was suggested in Atlanta Paper Co., 121 NLRB 125, 42 LRRM 1309 (1958) which looked to (1) stockholders and officers; (2) operations; (3) assets; (4) employees; and (5) supervisory force. In a footnote to Howard Johnson, supra, which was not an alter ego case, the United States Supreme Court viewed the issue of alter ego in this manner:

> "Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor." at 259, f.n. 5.

It is clear that the cases on which NLRB alter ego theory have developed are more factually transparent than

the case at bar. Ozark, Hopwood, Herman Bros., and Atlanta Paper cited supra, all represent relatively obvious paper transfers of the various companies. In the case of Robert Witt Ranch, it is incumbent to pierce mere appearance and determine whether Robert Witt represents more than "a mere technical change in the structure" of Kudu Inc. and whether there has been ."any substantial change in...ownership or management." Howard Johnson, supra.

At first blush, Robert Witt Ranch does, indeed, appear to be a separate business entity from Kudu Inc. Robert Witt operated the ranch under his own names, signed his own contracts, hired his own labor contractors, and made certain changes in the operation without consultation or consent of Elmore and Kudu. 6/

Nonetheless, when one looks more closely at the operations of Robert Witt Ranch, including what is farmed; how it is farmed; where it is farmed; who benefits from the farming that Witt does; employee conditions on the ranch; and the administrative functioning of the ranch, the independence of Witt and the substantiality of the changes from Kudu are drawn into question. When one further scrutinizes the financial structure of Witt and its almost total dependence

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6/ Of course, it is not necessary that Robert Witt Ranch be the alter ego of Kudu Inc. to require that it bargain with the Union. Even, if Witt were an independent business entity, the requirements of the successor doctrine outlined, supra, would be sufficient to require it to bargain with the Union herein. While the doctrines reach the same result, they are separate and distinct and do not rely upon each other for enforcement.

upon Elmore-related sources of income, whether it be Kelley's trusts, Kudu's interest free advances, penalty free delayed payments on outstanding lease obligations, or beneficial crop share arrangements it becomes clear that the alleged independence of Witt is more fiction than reality. Finally, the evasive and often inherently unbelieveable testimony by Witt that he is in fact independent of Elmore/Kudu/Sahara leads me to my final conclusion that first blush impressions must be disregarded herein and Robert Witt Ranch must be said to be the alter ego of Kudu Inc.

Much that is determinative of the successor issue is also determinative of the alter ego issue and need only be stated with relative brevity at this point. Further, the discussion on the previous pages regarding continuity of the operations is relevant to the discussion which follows and should be read in conjunction with this portion of the opinion.

As pointed out previously, Witt operated the same land, with essentially the same machinery, growing the same crops, using some of the same labor contractors, with the same supervisorial personnel as Kudu. As also had been outlined previously, Witt was under capitalized and relied on financial backing in loans, advances, lines of credit, and crop share agreements from his father-in-law, John Elmore. Again, not surprising since Kelley Witt was financially involved in both operations.

Other factors previously alluded to should be

re-emphasized in the alter-ego context. There was no break in the operations. Witt, with minor exception, grew exclusively for Kudu/Sahara which was the same function that the Guadalupe property carried out prior to Witt's assumption of the lease.

Those contracts, again with minor exception, that were not with Kudu/Sahara were with companies that had previous contracts with Kudu Inc. and which were assumed by Witt, e.g. Gilroy Foods and Inglass. Even the manner in which these contracts were assumed was a signal to these buyers that there was no substantial change in operation when Witt took over. The contracts were assumed without legal nicety and perhaps a phone call.

As also noted it is incomprehensible that Witt did not receive active help in his planning and decision making from his father-in-law and Wilkinson. It is conceded by Respondent that Witt did get day to day help from a long time Kudu employee, Willie Assistin, who stayed on at Guadalupe and eventually went to work for Sahara.

With the exception of the changes outlined supra, employee working conditions at the ranch remained essentially identical to what they had been under Kudu.

Changes that were instituted by Witt were certainly no greater than the changes alluded to in Ozark where the court found such changes to be "...evolutions, extensions, and developments merely, such as could characterically be expected to occur in the particular business field and in the economic era involved without having so changed

the nature of the enterprise..." to bar a finding of alter ego. Ozark supra, at p. 6.

Several incidents require further analysis, however, in regard to the alter ego issue. The first revolves around the transfer of Willie Assistin in August of 1977. As noted in the Facts section of this opinion, it highlights the credibility problems of Witt who maintained throughout that he was an independent operator. Equally important, however, it demonstrates that while Witt may have hired and/or fired much of his own personnel, Elmore, Anderson and Kudu were still Integrally involved in the transfer of employees among the integrated Elmore operations. Having credited the Elmore/Wilkinson explanation of how Willie Assistin came to leave Witt (see p. 29-30, supra.), it is apparent that it was viewed as a transfer within the organization by those who made the decision rather than as a move of hiring someone who had been fired' from a separate and independent company, "...it took a little deciding," opined Wilkinson, and "Sahara needed him and that was all right with Bob," echoed Elmore during the course of the hearing.

Secondly, the issue of representation by Witt at the hearing itself poses puzzling, unresolved questions which indicate that Witt was not operating independently, but rather was being proped up by the superior financial resources and farming expertise of Kudu Inc. and Elmore. Hyperbole has no place in this opinion, but the testimony of Robert Witt in regard to how he came to be represented by his

capable counsel, Cal Watkins, at this hearing can only be characterized as outrageous. (see pp. 52-54 supra.)

As previously noted, Witt's legal fees were paid by the Western Growers Association of which he was not a member, but of which his father-in-law, John Elmore, is on the Board of Directors.

Further, Kudu Inc. and John Elmore were also represented in this hearing by the law firm that represents the Western Growers members--Dressier, Stoll and Jacobs. Counsel for Kudu herein was Peter Jacobs. While Cal Watkins entered a separate appearance for Robert Witt and listed his law office as P.O. Box 625, Guadalupe, Mr. Watkins is also a member of the law firm of Dressier, Stoll and Jacobs and his name appears sixth in line on the firm letter head. (See e.g. General Counsel Exhibit 23, which is a letter from Mr. Dressier to the Union Negotiator written on the law firm stationery of Dressier, Stoll and Jacobs.)

This connection between Witt and Elmore is a relevant factor in determination of the questions of successorship, alter ego, and joint employer. It is especially relevant and disturbing herein where Witt's constant denials of knowledge regarding how he came to be represented at this hearing leave me with but two alternative conclusions. If Witt was correct that he didn't know how Watkins was hired or how he was paid for the long hours he put in representing Witt, then it is clear to me that he could not have been operating independently of Elmore and Kudu as he claimed. On the other hand,

if he was lieing in his responses to my queries (see especially RT 4: 40-43 cited supra.) then the baldness of his untruthfulness requires that I discredit his other assertions that he "ran the business."

Thirdly, Witt's overall demeanor in regard to and knowledge of his financial situation further buttresses the conclusion that he was not the independent operator that he claimed. As with his testimony about his counsel, Witt's extended testimony about his finances and his reliance on Elmore related money was, as previously noted, evasive and hostile. (see pp. 42-52, supra.) As with his testimony about his counsel, I am forced to conclude that either he was truthful and did not act independently enough to understand the financial workings of his company or that he was lieing and his testimony about the independence of his business is to be discredited. As noted in my section on the credibility of Robert Witt, because of the overall nature of his testimony, I am forced to totally discredit his assertion that "I operate that ranch completely independently of John Elmore" RT 4:31., cited supra. The financial structure of Robert Witt Ranch and Witt's own testimony support the opposite conclusion.

Fourthly, the issue of Witt's relationship to Kudu can not be viewed only from the perspective of Robert Witt. It must also be viewed from the perspective and actions of Kudu Inc. Relevant to that part of the inquiry is the conduct of Kudu in regard to its own bargaining obligations. As I outline in the final portion

of this opinion, it is clear from the facts that Kudu did not bargain in good faith. The bad faith of Kudu adds additional support to my conclusion that there was no "significant" change in the operation, but that such arguments are being made solely to avoid the mandate of certification that Kudu bargain with all employees at the Lompoc and Guadalupe ranches.

Ultimately, changes in Kudu after January of 1977, were more technical than substantial. At best it appears that Robert Witt farmed the Robert Witt Ranch as a highly independent manager operating in the highly integrated structure that characterized the Elmore/Kudu/Sahara operations.[7/]

4. Robert Witt Ranch as Joint Employer with Kudu Inc.

A final theory of liability remains to be discussed in regard to Witts' responsibility to bargain with the union. That is, it remains to be determined whether or not Kudu Inc. and Robert Witt Ranch are joint employers.

7/ The question of workforce continuity is not determinative, of the issue of alter ego under NLRB precedent as it is with the question of successorship. To be sure, it is a factor to be considered in the equation. Despite the lack of continuity in the work force that the record reflects herein, I am not deterred in finding Witt to be the alter ego of Kudu. The same factors that minimize the importance of this requirement in the agricultural context for successor issues are applicable in regard to the issue of alter ego. Pages 80-82 supra, dealing with the relevance of continuity of the work force in the successor context, should also be read in conjunction with this portion of the opinion dealing with the issue of alter ego.

In Rivcom supra the Board recently articulated the oft discussed factors as to what should be considered in determining whether enterprises may be treated as joint employers. "Factors to be considered in establishing such status" wrote the Board "are the interrelation of the operations, common management of business operations, centralized control of labor relations, and common ownership." at 4. citing Abatti Farms, Inc., 3 ALRB No 83 (1977); Louis Delfino Co., 3 ALRB No. 2 (1977). See also: Signal Produce Co., 4 ALRB No. 3 (1978) and Freshpict Foods, Inc., 4 ALRB No. 4 (1978).

As in the case of determining whether a company is a successor and/or alter ego, the Board decries strict formulas and demands that each case be judged on its own facts and in its own context. "No single factor is determinative and we will not mechanically apply a given rule in making this determination." Rivcom, supra, at p. 4.

In its previous decisions, the Board has dealt with two extremes in facing factual situations in regard to the issue of joint employer status. In Abatti Farms, Inc., supra, the employer was composed of two functionally different operations which were integrated under one centralized ownership entity. Each corporation was owned by the same people; the two Abatti brothers each controlled one of the organizations, but consulted with the other on a daily basis in regard to overall operations; the officers were the same; the corporate offices were at the same

location; all employees were paid from a common fund; there was an interchange of employees; and each company had its own function—one grew and the other harvested. Finally, each company was responsible for its own labor relations policy, although there was *a* finding by the IHE that the brothers must have consulted each other as to the labor policy of each of the companies. All of these factors congealed to allow the Board to affirm the IHE's finding of joint employer status.

On the other end of the spectrum, the Board refused to find joint employer status in Signal Produce, supra, where there was no common ownership; evidence of common management was limited, there being no interchange of supervisory personnel between the two companies; there was no interchange of employees; there was no "functional integration" of the operations allowing them to be labeled "family enterprises" despite the fact that the owners of the two companies were related; there was no similarity of operations; and, there were different job classifications and rates of pay between the two groups of employees. As the IHE wrote: "none of the features of an Abatti-type operation such as the single payroll system, the interchange of employees, the invoicing system, the work performed by two specialized entities for an overarching partnership-owner, are present in this case" Signal Produce, at p. 7 of the IHE opinion.

Finally, in Rivcom, the Board's most recent pronouncement on the issue, the finding of joint employer

was affirmed where there was common control over both companies by the president and manager of both, Larry Harris; there was interchange of employees; common ownership of all stock; and, an assertion by the president that one corporation was being used to further the purposes of the other. Finally, in regard to common control of labor relations wage scales for one company were set independent of the other but Harris still exerted daily control over the working conditions of both companies.

Each of these settings can serve only as guides for decision herein. It is not necessary to restate all the facts that have been discussed in regard to the issues of successorship and alter-ego. It appears to me, however, that the Robert Witt Ranch and Kudu Inc. evidences the "functional integration" requisite to a finding of joint employer status. To be sure, the facts are not as transparent as they were in Abatti Farms, but neither are they as lacking as they were in Signal Produce.

INTERRELATION OF THE OPERATIONS

Pursuant to the crop share agreements entered into between Kudu and Witt, Kudu harvests, packs and ships the crops that Witt grows. As has previously been noted, almost all of the crops Witt grows are packed, shipped and harvested by Kudu Inc. This scheme represents the integration of the family farm enterprises

envisioned by Elmore. Whereas the evidence in Signal was scanty that the two operations there were part of integrated family farming enterprises, there is little doubt that that is the situation in the case at bar. As in both Rivcom and Abatti, there is an integration of two functionally different parts.

COMMON OWNERSHIP

As noted, Kelley Witt is a lessee along with her husband Robert of the Guadalupe property and also a shareholder of consequence in Kudu Inc. While this is evidence of common ownership, it does not tell the whole story. The financial support that Kudu Inc. provided and continues to provide to Witt has been extensively articulated. It need only be repeated that without the loans, cash supports, special financial arrangements and business through crop share agreements which Kudu provides for Witt, the Robert Witt Ranch would have difficulty maintaining its existence.

COMMON CONTROL OF LABOR RELATIONS

It is agreed that there is no interchange of employees between Witt and Kudu, and as previously stated, the record indicates that Witt hires and fires his own employees, pays his own employees from his own separate account, and there is no direct evidence that Elmore or Kudu sets the actual working conditions of his employees. Again, however, surface view is belied by the reality of closer scrutiny.

As stated in the portion of this opinion dealing with successorship, except for minor variations the working conditions in terms of wages, holidays and fringe benefits are substantially the same for both Kudu Inc. and Witt. Even the particular bonus system used by Kudu--4 percent at Christmas time—is maintained by Witt. In Abatti, the hearing examiner found that it strained credibility to believe that the two companies did not consult as to labor relations policy. The same may be said in the present case. Witt was inexperienced in farm labor matters and it is inconceivable that he did not consult with Elmore, Anderson and Wilkinson about the appropriate means by which he should treat his employees.

In any event, common control of labor relations is not determinative in finding joint employer status. Canton Corps., 125 NLRB 483, 483-4 as cited in Rivcom, supra.

COMMON MANAGEMENT

Again, I need not repeat all my reasons for believing that Elmore and Wilkinson exercised a significant hand in the management decisions of the Robert Witt Ranch. As previously noted the disparate backgrounds of Witt and Elmore makes an assertion to the contrary incredible especially in light of the fact that Elmore has a financial stake in Witt's operations. The transfer of Willie Assistin is one indication of a common management decision among different, but functionally integrated,

parts of the agricultural process that is Kudu Inc. and Robert Witt Ranch.

Additionally, joint employer status has been found under NLRB precedent where the facts indicate an interrelationship of operations between two or more employers. For example in Dee Knitting Mills, (1973) 88 LRRM 1273, three companies were found to constitute a single employer in view of common location, ultimate product produced by two with the third selling, common president and high status of the president's relatives. Similarly in Bayside Enterprises, Inc., (1975) 88 LRRM 1478 a company that bred and raised poultry was found to be a joint employer with its subsidiary that operated the feed mill and dressed and processed the poultry. Finally, in United Contractors Inc., 90 LRRM 1438 a general contractor and trucking company were found to constitute a single employer since both companies operated as an integrated enterprise with 80 to 90 percent of the trucking company's gross receipts being performed by the general contractor.

Similarly, Kudu Inc. and Robert Witt function as two sides of the same coin. Each functions for the benefit of the other. This is especially true of Witt who does virtually all of his business with Kudu Inc.

I find that Robert Witt and Kudu Inc. share a functional intergration and interdependence of operations and as such are joint employers within the meaning of the

Act. [8/]

B. Kudu Inc.'s Refusal *to* Bargain with the Union.

1. Kudu's Refusal to Bargain.

It is alleged that Kudu Inc. violated Sections of 1153 (a),(e), and 1155.2 (a) of the Act by engaging in conditioned bargaining with the Union, unreasonably delaying the bargaining process, failing to provide knowledgeable negotiators, and failing to provide and delaying in providing information all of which are inconsistent with the good faith bargaining required by the Act. For the reasons set forth below, I concur and find that Kudu Inc. has violated the Act by refusing to bargain in Good Faith.

Unlike the situation outlined in regard to the Robert Witt Ranch, Kudu Inc. did not refuse to bargain nor did they refuse to provide information to the Union. Rather, the facts demonstrate that Kudu engaged in a course of conduct that made it impossible for the bargaining process to proceed in an orderly manner by continually misrepresenting the true facts concerning its business operations, setting

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8/It must be emphasized that my conclusion is not reached merely because Robert Witt is a member-—by marriage-—of the Elmore family. Other members of the family work with Kudu through crop share agreements e.g. Cal Mason, Steve Jordan and Otis Kraimer. The mere fact that they farm for Kudu which is in turn controlled by their father-in-law does not make them successors, joint employers or alter egos. My conclusion in this case is based on the relationships of the business and not on mere consanguinity.

up unreasonable conditions before they would allow negotiating to begin and by raising disingenuous legal theories to avoid their duty to bargain.

Before examining these facts in detail, the following should be noted: (1) The union was certified to represent all employees of John Elmore Farms on February 18, 1977, 3 ALRB No. 16; (2) Subsequent to certification, on April 7, 1977 the union sent their standard letter to Kudu Inc. (which by that time had changed its name from John Elmore Farms) requesting information and negotiations; and, (3) At this hearing Kudu Inc. and the union stipulated that John Elmore Farms and Kudu Inc. are successors and alter egos in San Luis Obispo and Santa Barbara counties (R.T. 4:99). Yet, despite this chain of events, from the date of certification, until April 7, 1978--the time period for which it is stipulated the refusal to bargain charges herein are to cover--the bargaining process at best sputtered and ultimately collapsed.

The company position in regard to all of this is simply stated. They argue that, by the time of certification, the business structure of John Elmore Farms had changed. The name had changed to Kudu Inc. The employees at the Guadalupe Ranch were now under the separate direction, management , and control of Robert Witt. Finally, as to the employees at the Lompoc property, the change in the business operations demanded that the company seek clarification of the bargaining unit so they would not violate the act by engaging in bargaining with the union which had been certified to the

employees of a different agricultural entity-—namely John Elmore Farms as opposed to Kudu Inc.

As counsel for Kudu Inc., Don Dressier stated in his letter of May 9, 1977 to Gilbert Padilla of the union, GC 20, "We are not exactly clear as .to the status of your bargaining rights under the ALRA since it is an unfair labor practice for an employer to bargain with a union which is not certified pursuant to the provisions of the ALRA..."

Of course, if subsequent to certification, a business changes composition through sale, lease, or any other means, it may be a serious question of fact and law as to whether or not the bargaining duties of the predecessor company survive to the company which succeeds it. Those questions of law regarding successorship, alter ego and joint employer have been extensively examined in regard to Robert Witt Ranch in the preceeding section. That type of change in business, however, is not what occured when the Lompoc property of John Elmore (Farms) became Kudu Inc. It is absolutely undisputed in the record that the change from Elmore to Kudu in regard to the Lompoc property was nothing more than a change in nomenclature. The stipulation that Elmore and Kudu are successor and alter ego is but one manifestation of this fact. Virtually everything else about the operation, the record reflects, also remained identical-—the land, the machinery, the crops, the offices, the bank accounts, the financial structure etc. While it is at least arguable

that as to the Guadalupe Ranch the assumption of the lease by Robert Witt may have changed the bargaining duties of Witt in regard to the union, there is not the slightest shred of evidence in the record that the change at Lompoc from Elmore to Kudu had any arguably similar effect. Elmore and Kudu insofar as it affected the Lompoc property were and remain identical business entities.

Despite this fact, the change from Elmore to Kudu was constantly used by the company as an excuse not to bargain with the union. From the outset, the company position was the same-—we would like to bargain but cannot until the Board tells us it is ok to bargain because of business changes that have occured in our operations.

When one rereads the letters of May 9 and June 13 • (GC 20 and 23) it is clear that while certain vague overtures regarding actual bargaining with the union were being made, the company had no intention of actually bargaining until the "unit clarification issue" was settled to its satisfaction.

In its dealings with the union from April 7 on, the company continually raised the specter of changed business operations when in fact they must have known all along that Elmore and Kudu were identical.

The continual misrepresentation of the facts by the company is disturbing in its intentsity and its duration. It need be recited below.

On May 9, 1977, Dressier wrote to the union that: "You should be aware that the form of the company's operations

have changed since the election...John Elmore Farms no longer operates as such."

On July 18, 1977 Dressier wrote to union lawyer Boone and stated: "At the outset there are a couple of comments I think are very important. First of all, John Elmore Farms is not doing business as Kudu, Inc. Kudu Inc. is an independent employer whom we have indicated to you... replaced John Elmore Farms operations in the Santa Maria Lompoc areas" emphasis added.

A similar position was taken by the company when a meeting was finally conducted with the union October *1,* 1977. (see pp. 61-64 supra.)

When the company submitted a draft petition for clarification to the union, Peter Jacobs, who had then taken over the case for the company wrote: "John Elmore Farms divested itself of its Lompoc ranch to Kudu Inc., a company which John Elmore Farms has no business connection." see GC 31, p. 2. no. 3.

In January of 1978, Jacobs wrote the union and stated:

> Kudu Inc. is a different legal and geographical entity from John Elmore Farms; its management is different and it would appear that a large number of its employees are opposed to unionization, (emphasis added)

The actual company petition for clarification to Board stated: "John Elmore Farms divested itself of its Lompoc ranch to Kudu Inc., a company which John Elmore Farms has no business connection." GC 41, p. 2.

Finally, in December of 1977, when the company submitted certain information to the union in regard to the relationship between Kudu and Elmore it wrote: "Kudu Inc. has no stockholders" see GC 35, response 3.

Technically it may be argued that the quotations cited above (with the exception of whether or not Kudu has stockholders which was an outright fabrication) are at least arguably true. John Elmore Farms ceased existence and Kudu Inc. entered the picture. But such technical niceties have no place in ensuring the Act's objectives of good faith bargaining. The reality is that the company's operations in regard to the Lompoc property, despite Dressler's May 9 assertions to the contrary, had not changed. The reality was that Kudu Inc. was not an independent employer as Dressier would have had the union believe on July 18. The reality is that John Elmore Farms had not divested itself of its Lompoc ranch. The reality is that the management was not different and that Kudu Inc. and John Elmore Farms did have a business connection. John Elmore Farms was Kudu Inc. at the Lompoc Ranch and the company knew it. Yet, despite the reality, the company used the alleged change as a constant excuse to evade its duty to bargain.

Two other corollaries to the main company argument need also be reviewed. First, the company maintains that when it broached the idea of clarification with the union, the union ultimately agreed that it would be a good idea. Thus, concludes the company, the union abated its requests to bargain and its requests for information until such time as the

Unit Clarification issue was settled.

Such a view, however, is not supported by the evidence. The union requested information for bargaining on April 7 and again on June 7, 1977. On June 25, 1977 Boone stated: "As to Kudu, Inc., you have indicated a willingness to meet and bargain. That should be done *as* soon as possible..." Similarly, Cohen asked for negotiations at the time of the meeting of October 7.

While it is true that throughout the course of the period in question, the union indicated at times, a willingness to seek clarification as the company suggested, (see e.g. Boone letter of June 25 stating that clarification might be "an appropriate procedure", Boone's letter to Elmore requesting information (GC 26); and Cohen's own statement that he told Jacobs he would take up clarification with the union legal department.see RT 7:56-58) I do not find anything in the record to discredit Cohen's testimonial assertion that these actions were in no way intended to suspend the previous requests for bargaining information and negotiating sessions.

In any case, even if the union did agree to suspend its previous requests it would not legitimize the company delay in bargaining. The company set up conditions for bargaining based on information which was misleading and at times actually false (e.g. response 3 on GC 35.) The company set up a straw man and then used that straw man to shield it from its obligations. I find that the union, through the correspondence and testimony cited, attempted to bargain but

was continually confronted with the argument that Kudu and Elmore were somehow not the same. Union statements that clarification "might be appropriate" or that they would refer it to their legal department were at best naive attempts to be reasonable for which they should not now be penalized.

Secondly, the company maintained that, at the Lompoc property, there were a substantial number of employees who they believed were opposed to the union and that, in conjuntion with the alleged change in business operations, they feared that bargaining would be an unfair labor practice violative of the demands of the Act for secret elections and employer bargaining solely with certified unions. Jacobs made this argument at the meeting of October 7, and it was also outlined in various correspondence from the company.

Factually, the argument suffers in that there is no evidence to substantiate such a claim. Counsel for Kudu Inc. on the last day of the hearing attempted to introduce letters from employees that were originally used as a basis for objections to the 1975 election. I ruled those letters inadmissible citing CEC 352 and also noting that they were out of order coming as they did on the last day of the hearing. (see Vol. 10: 71-74.)

Further, even if those letters had been admissible they would not factually have overcome the Boards certification, As General Counsel pointed out in her argument, these letters were old and had been submitted subsequent to the election in

1975 at the objections hearing and had not been used in any way by the Board to overturn the election. See Vol. 10, id.

More importantly, however, the letters evidence a reliance on a legal theory that is not justified under the ALRA. The legal argument is propounded by counsel for Kudu at pp. 14-18 of his brief.[9/] In sum it argues that it is a violation of the ALRA to bargain with an uncertified union. citing Section 1153 (f) of the Act. Counsel then outlines the fact that the ALRA is different in this regard from the NLRA and concludes that to require Kudu Inc. to bargain when it has not been certified by the Board would violate the avowed policy of the Act providing for recognition of only certified unions selected through the secert ballot process. Counsel then uses the fact of the existence of the letters to buttress his argument that the company would be subject to unfair labor practice charges if they negotiated with the Union when John Elmore Farms and not Kudu Inc. was actually certified.

9/ Counsel for Robert Witt makes a similar argument on behalf of the Robert Witt Ranch. The response herein to the argument should be considered applicable to both parties.

It should be noted that the argument is not only similar by both counsel but identical. Pages 14-18 of the brief submitted by Peter Jacobs and pages 19-23 of Cal Watkin's brief are essentially identical, but for certain facts applicable to each party. As already noted, both Jacobs and Watkins worked under the umbrella of the law firm of Dressier, Stoll and Jacobs. I have spent much time discussing the inherent improbability of the testimony of Robert Witt in regard to how his counsel was hired. These pages, which were obviously written by the same person, are noted as another small factor that indicates the interrelationship of Witt with Kudu herein.

> The company counsel also cited large numbers of letters signed by employees of the Lompoc facility of John Elmore Farms in September 1975. These letters evidence those employees' opposition to unionization. Thus the company's fear that these employees might file unfair labor practice charges against it if it bargained with the UFW were more than theoretical at p. 24 of brief submitted by Peter Jacobs on behalf of Kudu Inc.

Counsel's argument about the letters is misguided because his legal assumption about the effect of 1153 (f) in the context of this case is incorrect.

Section 1153 (f) provides that it shall be an unfair labor practice for an agricultural employer "to recognize, bargain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the provisions of" the Act. Respondents reason that the UFW has not been certified as the representative of Lompoc's employees and that the prohibition embodied in Section 1153(f) is therefore applicable.

The Board has been called upon to interpret Section 1153 (f) once before, in Kaplan's Fruit and Produce Co., 3 ALRB No. 28 (1977). In that case, several employers argued that a literal reading of Section 1153 (f) prohibited them from continuing to bargain with labor organizations once their initial 12 month certification had ended. In rejecting this argument the Board noted that such an interpretation would run counter to the "Act's central purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state, Section 1, ALRA." One of the policy considerations against

a restrictive interpretation of Section 1153 (f) examined by the Board in Kaplan's applies with equal force here:

> "(T) his theory seriously impairs the employees' right to be represented in their relationship with employers. *If,* as will often happen, certification lapses when the employer has just passed his peak season, the effect would be to preclude the possibility of any representation for employees until the following peak season, when the entire election process would have to begin again. 3 ALRB No. 28, at 6. (Emphasis in original).

Respondent's interpretation of Section 1153 (f) would prohibit any application of the NLRB successorship doctrine. The legislature could not have intended such a result. As the Board noted in Kaplan's;

> The prohibition against an employer's recognizing an uncertified union is clearly directed, not towards an arbitrary time limit on bargaining, but towards preventing voluntary recognition of labor organizations. .The facts in Englund v. Chavez, 8 Cal. 3d 572, are too much a part of the history leading to the enactment of the ALRA for us to consider 1153 (f) as anything but a guarantee of freedom of choice to agricultural employees through the machinery of secret ballot elections. The prohibition against bargaining with an uncertified union does not and should not preclude bargaining with a union that has been chosen through a secret ballot election. 3 ALRB No. 28 at 7.

Here, the employees of the predecessor chose the UFW as their bargaining agent in an election conducted by the Board. Within the twelve month period following the certification, there is an irrebuttable presumption that the union's majority status continues. Section 1156.6 of the Act. If the other requirements for successorship to the predecessor's bargaining

obligations are met Section 1153(f) is not a bar. In these circumstances the original certification must be deemed to be amended to name the new employer.

In Rivcom, supra, the Board noted:

> Respondents contend that Section 1153(f) precludes the use of the successorship doctrine under the ALRA, because that section forbids an employer from bargaining with an uncertified union and, Respondents argue, a union is certified only in relation to the predecessor employer. We reject this argument. Citing NLRB v. Burns Security Services, 406 U.S. 272, 279 (1972).
>
> Footnote 9 at page 21.

2. Kudu's refusal to provide information

In delineating Kudu's bad faith in regard to bargaining, much has been said about the information requested by the Union and Kudu's failure to so provide. Two points should be reiterated. First, the only information submitted by the Company to the Union pursuant to the Union's request's for information of April 7, 1977, consisted of an employee list which Cohen characterized as not helpful because it was outdated.[10/] Secondly, information supplied Kudu pursuant to its request for information about the relationship between Kudu and Elmore was vague and, in parts, untruthful. (see references to GC 35 above.)

Ultimately Kudu provided little information on the theory that they would not bargain with an. uncertified union and/or that the Union had agreed to abandon its request for bargaining information in order to seek Unit clarification. These arguments have been dealt with in detail supra, and will not be repeated herein.

3. Other factors relevant to Kudu's lack of good faith

It is clear from the record that Kudu Inc. did not take its duty to bargain in good faith, as outlined by the

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10/ In contrast to Wilkinson's lack of experience, Peter Cohen, the Union negotiator evidenced a wide range of experience and knowledge in the field of labor relations. It should be noted that he was a candid witness who was on the stand for nearly an entire day. I found his demeanor and responsivness to questioning to be most convincing. It should also be noted that most of his testimony is largely uncontradicted as Kudu did not have other major participants on the bargaining issue, such as Donald Dressier, testify.

act, very seriously. Wilkinson had very little, if any, labor experience. Yet he was chosen to attend, the meeting with Cohen on October 7, 1977. He testified to having spoken with Elmore and Anderson about labor-relations, but then stated that he could not recall the contents of any of those conversations. He apparently was never shown the initial union request for information, and although he recalled discussing it with Elmore, he could not recall the contents. While counsel for Kudu herein also negotiated for the Company and was undeniably knowledgeable in labor matters, it appears to me that a Company which makes labor relations a high priority would not appoint someone like Wilkinson to represent the company at negotiating sessions with no training and little prior consultation.

The fact of lack of interest in labor relations is also evidenced by GC 35 prepared by Wilkinson in response to Union request for information. It represents either a callous neglect of the bargaining process or an outright attempt to avoid it. Clearly, Kudu Inc. had stockholders, but the Union would never know it by reading GC 35. (see again, Response 3.)

Whether the Employer has bargained in good faith with the Union is not a difficult question of law. As the Respondent Kudu properly points out in their post hearing brief, "the Board will examine an employer's conduct as a

whole to determine whether there has been bad faith bargaining. It usually does not rely upon any one factor as conclusive..." at p. 36 citing e.g. NLRB v. Thomson Newspapers, Dothan Eagle, Inc., (1970) 64 LC 11, 250; Steel Workers v. NLRB, (CA, DC; 1971) 66 LC 12, 214, and Sakrete of No. Cal., Inc., 140 NLRB 765.

Similarly an employer may not place unreasonable conditions upon the bargaining process. Lebanon Oak Flooring Co. (1967) 167 NLRB No. 104, 66 LRRM 1172 and Fitzgerald Mill Corp., (1961) 133 NLRB 877, enforced 313 F2d 260 (2d Cir.) cert, den. 375 US 834 (1963).

Finally certification triggers the requirement that the Employer provide relevant information to the union, T.I. Case v. NLRB, (7th Cir. 1958) 253 F 2d 149, 41 LRRM 2679, enforcing as amended, 118 NLRB No. 56, 40 LRRM 1208 (1957). Unreasonable delay in providing such information may constitute such a refusal to provide. Fitzgerald Mills Corp., supra.

Labor Code Section 1155.2 (a) requires the employer "to meet at reasonable times and confer in good faith" with the collective bargaining representative of its employees. It is clear to me, from what has been stated above, that the company did not meet this obligation. Rather, they caused delay in meeting, providing information, and submitting proposals by raising the issue of a change in business operations at the Lompoc ranch when, in fact, no such changes had occurred

The Company accomplished this by providing, at times, false, and frequently misleading information to avoid their duty to bargain in good faith. The totality of the circumstances herein indicates to me that the Company has violated their duties within the meaning of the Act.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that:

1. Respondent John Elmore Farms/Kudu, Inc., its officers, agents, successors and assigns, shall cease and desist from:

a. Refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2 (a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees in violation of Labor Code Section 1153(e) and (a), and in particular: (1) refusing to meet at reasonable times and confer in good faith and submit meaningful bargaining proposals with respect to wages, hours and other terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining; and (3) making unilateral changes in terms and conditions of employment of its employees without notice to and bargaining with the UFW.

b. In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

2. Respondent John Elmore Farms/Kudu, Inc., its officers, agents, successors and assigns, shall take the following additional affirmative actions deemed necessary to effectuate the purpose of the Act:

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

b. Furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining.

c. Make whole the employees employed by Respondent, John Elmore Farms, Kudu, Inc. in the appropriate bargaining unit at any time between the date of Respondent's first refusal to bargain on or about May 9, 1977 until April 7, 1978, (the time period stipulated for liability of Respondent John Elmore Farms, Kudu, Inc., herein), for any losses they have suffered as a result of the aforementioned refusal to bargain in good faith, as these losses have been defined in Adam Dairy, dba: Rancho Dos Rios, 4 ALRB No. 24 (1978).

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

e. Sign the Notice to John Elmore Farms, Kudu, Inc. Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent John Elmore Farms, Kudu, Inc. shall thereafter reproduce sufficient copies in each language for the purposes set forth hereafter.

f. Post copies of the attached Notice on its premises for 90 consecutive days, the posting period 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.

g. Mail copies of the attached Notice in appropriate languages, within 30 days after issuance of this Order, to all employees employed at any time between May 9, 1977, and April 7, 1978.

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

i. 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 it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with the Order.

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative for John Elmore Farms' agricultural employees, be amended to name Kudu, Inc., as the Employer and that said certification be extended for a period of one year from the date on which Respondent John Elmore Farms/ Kudu, Inc. commences to bargain in good faith with the Union.

3. Respondent Robert Witt Ranch, its officers, agents, successors and assigns, shall cease and desist from:

a. Refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW) , as the certified exclusive collective bargaining representative of its agricultural employees in violation of Labor Code Section 1153(e) and (a), and in particular: (1) refusing to meet at reasonable times and confer in good faith and submit meaningful bargaining proposals with respect to wages, hours and other terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining; and (3) making unilateral changes in terms and conditions of employment of its employees without notice to and bargaining with the UFW.

b. In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

4. Respondent Robert Witt Ranch, its officers, agents, successors and assigns, shall take the following additional affirmative actions deemed necessary to effectuate the purposes of the Act:

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

b. Furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining.

c. Make whole those employees employed by Respondent Robert Witt Ranch in the appropriate bargaining unit at any time between the date of Respondent's first refusal to bargain on or about March 3, 1977, to the date on which Respondent Robert Witt Ranch commences collective bargaining in good faith and thereafter bargains to contract or impasse, for any losses they have suffered as a result of the aforesaid refusal to bargain in good faith, as those losses have been defined in Adam Dairy, dba: Rancho Dos Rios, 4 ALRB No. 24 (1978).

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

e. Sign the Notice to Robert Witt Ranch Employees attached hereto. Upon its translation by a Board agent into

appropriate languages, Respondent Robert Witt Ranch shall thereafter reproduce sufficient copies in each language for the purposes set forth hereafter.

f. Post copies of the attached Notice on its premises for 90 consecutive days, the posting period 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.

g. Mail copies of the attached Notice in appropriate languages, within 30 days after issuance of this Order, to all employees employed at any time between March 3, 1977, and the date on which Respondent Robert Witt Ranch commences to bargain in good faith and thereafter bargains to contract or impasse.

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

i. 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 it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with the Order.

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative for John Elmore Farms' agricultural employees be amended to also name Robert Witt Ranch as the employer and that said certification be extended for a period of one year from the date on which Respondent Robert Witt Ranch commences to bargain in good faith with the Union.

Dated: November 26, 1979

JEFREY S. BARAND
Administrative Law Officer

NOTICE TO ROBERT WITT RANCH EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to meet and bargain about a contract with the United Farm Workers of America, AFL-CIO. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives 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

Because this is true, we promise you that:

WE WILL, on request, meet and bargain in good faith with the United Farm Workers of America, AFL-CIO about a contract because it is the representative chosen by JOHN ELMORE FARMS', KUDU, INC. employees and we are a successor to, and alter ego of and joint employer with JOHN ELMORE FARMS, KUDU, INC.

WE WILL reimburse each of the employees employed by us after March 3, 1977, for any loss of pay or other economic losses sustained by them because we have refused to bargain with the United Farm Workers of America, AFL-CIO, plus interest computed as 7 percent per annum.

Dated: ROBERT WITT RANCH

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

NOTICE TO KUDU, INC. EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain in good faith from May 9, 1977 until April 7, 1978. The Board has ordered us to distribute this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives 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:

WE WILL, on request, meet and bargain in good faith with the United Farm Workers of America, AFL-CIO, about a contract because it is the representative chosen by JOHN ELMORE FARMS' Employees and KUDU, INC., is a successor to and alter ego of JOHN ELMORE FARMS.

WE WILL reimburse each of the employees employed by us between May 9, 1977 and April 7, 1978, for any loss of pay or other economic losses sustained by them because we have refused to bargain with the United Farm Workers of America, AFL-CIO, plus interest computed as 7 percent per annum.

Dated: .

JOHN ELMORE FARMS,
KUDU, INC.

By : _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.