STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MOUNT ARBOR NURSERIES, INC., and MID-WESTERN NURSERIES, INC., Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 81-CE-39-1-D 9 ALRB No. 49

DECISION AND ORDER

On September 30, 1982, Administrative Law Judge (ALJ)[1/] Marvin J. Brenner issued his attached Decision in this proceeding. Thereafter, Respondents, General Counsel, and the Charging Party each timely filed exceptions and a supporting brief, and Respondents and the Charging Party each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm his rulings, findings and conclusions, as modified herein, and to adopt his recommended remedial Order, with modifications.

[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] All section references herein are to the California Labor Code unless otherwise specified.

On December 3, 1975, the United Farm Workers of America, AFL-CIO (Union or UFW) was certified as the exclusive collective bargaining agent of the agricultural employees of the original Mount Arbor Nurseries, Inc., whose assets in bankruptcy were purchased by Respondent Mid-Western Nurseries, Inc. (Mid-Western) in December 1979. On the same day that it purchased the original Mount Arbor's assets, Mid-Western deeded the assets to its subsidiary company, Midwestern Acquisition Company, which immediately took steps to change its name to Mount Arbor Nurseries, Inc. (Mount Arbor), the other Respondent herein. On February 29, 1980, the UFW and Respondent Mount Arbor signed a collective bargaining agreement in which Mount Arbor recognized the UFW as the exclusive bargaining representative of all the company's agricultural employees in Kern County, California, in the bargaining unit certified by the ALRB.

During contract negotiations, Respondents had informed the Union of their intention to go out of business in California as of March 1, 1981. The signed contract provided that the agreement would be in effect from November 1, 1979 through March 1, 1981. A modification of the contract was memorialized in a February 15, 1980 letter from Respondents' attorney Fred Morgan to the Union, in which he stated the parties' intention that the contract run to the date of expected shutdown, but that if the company continued its business past that time it would immediately bargain with the Union concerning continued operations.

Mount Arbor's president, Les Cashmere, testified that after the company's first successful year, it was no longer necessary to sell the California property merely to produce cash, and

management began to consider growing a more valuable crop, almonds. A firm decision to plant the almond trees was made toward the beginning of October 1980. In late December 1980, Respondents began leveling the land and purchased 200,000 almond trees, of which about 35,000 were planted on the McFarland, California property. Testimony from Respondents' witnesses indicated that the almond trees will not produce a cash crop until $4\frac{1}{2}$ years after the planting.

We affirm the ALJ's conclusion that both Mount Arbor and Mid-Western were successors to the original Mount Arbor Nurseries, Inc.[3/] We also affirm the ALJ's conclusion that Respondents are alter egos of each other and that both functioned, regarding their California agricultural operation, as a single employer for purposes of the Agricultural Labor Relations Act (Act). As successors, Mount Arbor and Mid-Western had a duty to bargain with the certified bargaining agent (John Elmore Farms (1982) 8 ALRB No. 20) and, because they were alter egos, service of a bargaining request on one constituted service on the other as well. (Sturdevant Sheet Metal Co. v. N.L.R.B. (10th Cir. 1980) 636 F.2d 271 [105 LRRM 3302].)

By letter dated December 5, 1980, the UFW requested bargaining about a new contract, and the Union repeated that request several times thereafter. We affirm the ALJ's finding that Respondents' answers to the Union's requests for bargaining were

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[3/] The ALJ properly rejected Respondents' theory that their successorship was limited to the rose production operation. In the face of the Employers' stated intention of going out of business, the UFW cannot be held to have waived the right to bargain about future operations. Further, Respondents cited no authority for their theory, and section 1156.2 states, in part: "The bargaining unit shall be all the agricultural employees of an employer." (Emphasis added.)

designed to deceive and confuse the Union[4/] and constituted unlawful refusals to bargain.

The ALJ treated Respondents' decision to grow almonds and their decision to use a labor contractor as a single "subcontracting" decision. We will consider these two decisions separately, since the decision to grow almonds did not necessarily require the use of a labor contractor.

The ALJ analyzed Respondents' almond growing decision in terms of a change from growing roses to growing almonds. However, we believe it is more accurate to say that Respondents made a decision to grow almonds instead of going entirely out of business with respect to their California agricultural operations.[5/] General Counsel never contended that Respondents did not give adequate notice of their intention to phase out the rose business; such was Respondents' intention from the beginning, and their collective bargaining agreement with the UFW was negotiated with that understanding. Rather, General Counsel contended that Respondents gave

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[4/] For example, Mount Arbor's December 29, 1980 letter to the UFW disingenuously stated that, "Since Mount Arbor will have no agricultural employees, we do not believe it would serve any purpose for us to meet and confer concerning a new Agreement," although Respondents at that time had already made their decision to plant almonds. Les Cashmere's March 24, 1981 response to a bargaining request asserted, "We do not know to whom you refer when you state that we now have agricultural employees," and stated that "our present plans would be for cotton and almonds," although by that time the ground had already been leveled and the almond trees planted by labor contractor-furnished employees.

[5/] Our dissenting colleague errs in stating that roses were a minor portion of Respondents' business. Although only about 20 percent of the original Mount Arbor's total business (which included operations in Iowa and Washington) involved roses, Les Cashmere testified without contradiction that the McFarland operation was primarily a rose-growing business.

no notice thereafter of their subsequent decision to begin growing almonds. We find that the decision to grow almonds did not affect wages, hours or other terms and conditions of employment, and therefore was not a subject of mandatory bargaining.[6/] (Labor Code section 1155.2.)

However, we conclude that Respondents' decision to engage a labor contractor and use new employees furnished by the contractor constituted an unlawful unilateral change in hiring practices. The collective bargaining agreement between Mount Arbor and the UFW included provisions concerning union security, a seniority system, and hiring, layoff, and recall procedures. Under the hiring provision, the employer was required to hire new or additional workers through a location or person designated by the Union. The article relating to seniority provided for the filling of vacancies and new jobs, and for layoffs and recalls based on seniority and the skills and qualifications to perform the job. Although the contract had expired at the time Respondents engaged the labor contractor, Respondents violated their duty to bargain by unilaterally instituting a new hiring procedure and thus changing the status quo ante. (Peerless Roofing Co., Ltd. (1980) 247 NLRB 500 [103 LRRM 1173]; Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85.)

Moreover, we infer from Respondents' letters of December 1980 and March 1981 to the Union that their decision to employ a

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6/Since the decision was to grow almonds rather than go out of business, the decision did not have any impact on the continued availability of employment. Thus, it is not appropriate to analyze the decision under the guidelines of First National Maintenance Corp. v. N.L.R.B. (1981) 452 U.S. 666 [107 LRRM 2705].

labor contractor's nonunion almond workers was not based only on profitability, but was at least in part motivated by Respondents' desire to rid themselves of the Union. Although the ALJ found no anti-union animus evident from farm manager Robert St. Clair's conversation with four workers after their termination,[7/] we find that such animus is clear from Respondents' deceptive letters telling the Union that the company was ceasing agricultural operations in California (when they had already begun their almond operation), purporting not to know to whom the Union referred when it stated that Respondents still had agricultural employees, and failing to disclose the relationship and transactions between Mount Arbor and Mid-Western.

We conclude that Respondents violated section 1153(e) and (a) by refusing to bargain with the UFW upon its request for bargaining about a new contract, and by unilaterally changing their hiring practices without giving the Union prior notice thereof and an opportunity to bargain about the change. We also conclude that Respondents violated section 1153(c) and (a) by hiring nonunion employees furnished by the labor contractor.

We shall order Respondents to bargain in good faith and to make whole the affected employees for all economic losses suffered as a result of Respondents' failure and refusal to bargain. The

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[7/] Four employees testified that several weeks after their termination they went to ask St. Clair why they had been laid off, and he replied that it was because the company did not want a union and that it could obtain workers more cheaply through a labor contractor. St. Clair admitted speaking to the workers, but denied saying anything about the Union. The ALJ credited St. Clair's denial, and discredited the four workers' testimony about the conversation, as he found that they testified inconsistently with each other.

makewhole period will run from the date of Respondents' first refusal to bargain[8/] until the date the hearing commenced, and from that date until Respondents begin good faith bargaining with the UFW which leads to a contract or a bona fide impasse. We shall also order, as a means of restoring the status quo that existed prior to Respondents' unlawful change in hiring practices, that Respondents immediately offer to their agricultural employees who were terminated on or about January 9, 1981, full reinstatement to positions substantially equivalent to their former jobs or other employment for which they are qualified, and make them whole for all losses of pay and other economic losses resulting from such change.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondents Mount Arbor Nurseries, Inc. and Mid-Western Nurseries, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in section 1155.2(a) of the Agricultural Labor Relations Act (Act), on request, with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive collective bargaining representative of their agricultural employees.

(b) Unilaterally changing their hiring practices or

[8/] The makewhole period in this case shall begin on December 8, 1980, three days after the UFW's first request to bargain about a new contract. (John V. Borchard, et al. (1982) 8 ALRB No. 52.)

other working conditions without giving prior notice to the UFW, and an opportunity to bargain over such changes.

(c) Failing or refusing to give the UFW prior notice and, on request, an opportunity to bargain over the decision to hire employees through a labor contractor, and the effects of any such decision.

(d) Failing or refusing to hire, rehire or recall, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she is a member or supporter of any labor organization.

(e) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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 regarding a collective bargaining agreement and/or any proposed changes in their agricultural employees' working conditions and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request of the UFW, rescind the decision on or about October 1, 1981, to engage a labor contractor, and thereafter meet and bargain collectively in good faith with the UFW, at its request, as the certified exclusive bargaining representative

of their agricultural employees regarding such changes.

(c) Make whole all agricultural employees employed by Respondents at any time during the period from December 8, 1980 to March 16, 1982, and from March 17, 1982 to the date Respondents commence good faith bargaining with the UFW which leads to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondents' refusal to bargain, such losses to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(d) Offer to all of their agricultural employees who were terminated on or about January 9, 1981, immediate and full reinstatement to employment substantially equivalent to their former jobs or other employment for which they are qualified, without prejudice to their seniority or other rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Respondent's change in hiring practices, such losses to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(e) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under

the terms of this Order.

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

(g) Provide a copy of the attached notice, in all appropriate languages, to each employee hired by Respondent during the twelve-month period following the date of issuance of this Order.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between December 8, 1980 and March 16, 1982, and thereafter until such time as Respondent commences to bargain in good faith with the UFW.

(i) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) 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.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined 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 the employees may have concerning the Notice

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

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: September 2, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

Member Waldie, Concurring and Dissenting:

I concur with the decision of the majority in all respects except its characterization of Respondent's decision to grow almonds. I would not find, as the majority does, that the decision to grow almonds was analogous to opening a new line of business. Rather, I would find it a decision to change from growing roses to growing almonds.

Respondent's predecessor, Mount Arbor Nurseries (MA I), farmed land in California, Iowa, and Washington. Its California property consisted of approximately 375 acres near McFarland, less than 20 percent of which was devoted to roses, the remainder to cotton. A subsidiary of Mid-Western Nurseries (MW) purchased the assets of MA I from bankruptcy on December 7, 1979, and immediately began using the name Mount Arbor Nurseries (MA II). At the time of purchase, Respondent informed the UFW that it intended to go out of the rose business.

When it purchased MA I, Respondent may have believed

it would go out of the rose business and sell that part of the McFarland property but, if so, it took no action to implement that decision. Instead, it immediately began to harvest the existing roses, and also continued to plant and grow cotton, as its predecessor had always done. On May 9, 1980, five months after it acquired the business, Respondent tentatively decided to grow almonds in place of roses.[1/] During those five months, Respondent did nothing to effectuate its December 1979 decision to terminate the rose operations. The planting season for new roses occurred two months before Respondent's acquisition of the business and the subsequent planting season had not yet arrived. Although Respondent's decision to plant almonds was not communicated to the UFW for nearly a year, Respondent made arrangements during that period to order almond trees and, at the end of 1980, began land preparation for the almonds. In fact, almond work was being performed by nonunion employees of Respondent at the same time that its rose workers concluded the 1981 rose harvest and were terminated. Thus, even if Respondent had initially decided to terminate the rose operations, it had taken no action to implement that decision prior to changing its mind and taking another course; i.e., growing almonds in place of roses. Respondent's pertinent decision should therefore be described as one to change its California operations from cotton and roses to cotton and almonds.

[1/] The notes of a May 9, 1980, meeting of Respondent's Board of Directors indicate there was discussion that "future plans call for the introduction of almonds." (GCX 19)

As I have stated in Paul W. Bertuccio (1982) 8 ALRB No. 101 and Cardinal Distributing Co. (1983) 9 ALRB No. 36 (Dissent), I believe crop decisions should be analyzed on a case-by-case basis, with bargaining required only if the decision to change crops was economically motivated and the employees can effectively address the employer's economic concerns with concessions such as wage and benefit cuts or work rules that increase productivity or improve quality control.

Considering all of the factors present in this matter, I would find that Respondent's decision to change the rose operation to almonds could have benefited from the bargaining process and that Respondent would not have been unduly burdened by that obligation. Roses were but a minor portion of Respondent's business. Its decision to change to almonds was motivated by a desire to increase the profitability of the land. Whenever a proposed change involves the profitability of a product, the union can address the employer's goal with concessions related to such factors as wages, benefits, productivity, quality control, and work rules. There were no time exigencies as Respondent was able to consider its tentative decision to plant almonds for many months prior to making the decision final and taking actions thereon. Although some capital expenditures were involved, the nature of the business did not change substantially. Cotton remained the primary crop. The record indicates that the change resulted in less work for the bargaining unit and it is possible that different skills or training would be required if the unit members were to continue working.

Based on the factors set forth above, I would find that Respondent unlawfully failed to bargain with the UFW by unilaterally changing part of its operations from roses to almonds without giving the union prior notice thereof and an adequate opportunity to request collective bargaining as to that change.

Dated: September 2, 1983

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, Mount Arbor Nurseries, Inc. and Mid-Western Nurseries, Inc., 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 with your certified exclusive bargaining representative, United Farm Workers of America, AFL-CIO (UFW), and by using a labor contractor to furnish us with agricultural employees instead of hiring workers through the Union. 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 other farm workers in California 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 NOT hereafter fail or refuse to meet and bargain collectively, on request, with your certified exclusive bargaining representative, the UFW.

WE WILL NOT change our hiring practices or other working conditions without giving prior notice to the UFW and an opportunity to bargain over the proposed changes.

WE WILL NOT refuse to hire or rehire, or in any other way discriminate against, any agricultural employee because he or she is a member or supporter of any labor organization.

WE WILL reinstate all of the employees whom we terminated on or about January 9, 1981, to their former jobs or to other jobs for which they are qualified, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because we refused to rehire them, plus interest.

WE WILL, in the future, bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, WE WILL reimburse all workers who were employed at any time during the period from December 8, 1980, to the date we begin to bargain in good faith for a contract, for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.

Dated:

MOUNT ARBOR NURSERIES, INC. and
MID-WESTERN NURSERIES, INC.

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 627 Main Street, Delano, California, 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Mount Arbor Nurseries, Inc.,
and Mid-Western Nurseries, Inc.
(UFW)

9 ALRB No. 49
Case No. 81-CE-39-1-D

ALJ DECISION

The ALJ concluded that Respondents were alter egos of each other, and were successors to the corporation whose assets in bankruptcy were purchased by Respondents.

The ALJ concluded that Respondents had unlawfully refused to bargain with the Union over a new contract, and had made unilateral decisions to lay off bargaining unit workers, change crops from roses to almonds, and engage a labor contractor to perform bargaining unit work, without giving prior notice to or offering to bargain with the Union. The ALJ recommended that Respondents be ordered to pay backpay for a limited period, and to make whole their employees for economic losses sustained by them as a result of Respondents' refusal to bargain.

BOARD DECISION

The Board affirmed the ALJ's conclusions that Respondents were successors to the original Mount Arbor Nurseries, Inc., and were alter egos of each other. The Board also affirmed the ALJ's conclusion that Respondents had unlawfully refused to bargain with the Union over a new contract.

The Board noted that the ALJ had analyzed Respondents' almond growing decision as a change from growing roses to growing almonds. The Board concluded that Respondents had actually made a decision to grow almonds instead of going entirely out of business. Because the decision to grow almonds did not affect the terms and conditions of employment, the Board concluded that the decision was not a subject of mandatory bargaining. However, the Board concluded that the Respondents' unilateral decision to engage a labor contractor and use nonunion employees furnished by the contractor constituted an unlawful change in hiring practices. The Board further concluded that the decision to engage a labor contractor was at least in part motivated by anti-union animus.

The Board ordered Respondents to bargain upon request of the Union, to rescind the decision to engage a labor contractor upon the Union's request, and to make whole their agricultural employees for economic losses resulting from Respondents' refusal to bargain. The Board further ordered Respondents to offer their terminated employees reinstatement to their former jobs or other employment for which they are qualified.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
MOUNT ARBOR NURSERIES, INC., an Iowa Corporation, and MID-WESTERN NURSERIES, an Oklahoma Corporation,	Case No. 81-CE-39-1-D
Respondents,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

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DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Officer:

This case was heard by me on March 16, 17, 18 and 19, 1982. The original Complaint issued on October 6, 1981 and was based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as "UFW" or "Union"). An Amended Complaint issued on January 13, 1982. During the hearing, I allowed General Counsel to file an "Amendment to Amended Complaint."

All parties were given a full opportunity to present evidence 1/ and participate in the proceedings. The General Counsel, Charging Party and the Respondents filed briefs after the close of hearing.

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

FINDINGS OF FACT

I. Jurisdiction

It was stipulated by the parties that Respondents, Mount Arbor Nurseries (hereafter referred to as "MA(II)") and Mid-Western Nurseries (hereafter referred to as "MW"), to the extent they had employees working during the period in question, were agricultural employers within section 1140.4(c) of the Agricultural Labor Relations Act (hereafter referred to as the "Act"). Accordingly, I find that Respondents are agricultural employers within the meaning of section 1140.4(c) of the Act. Respondents admitted in their Answer that Charging Party was a labor organization within the meaning of section 1140.4(f) of the Act (G.C. Ex 9, para. 1; G.C. Ex 10, para. 1), and I so find.

II. The Alleged Unfair Labor Practices

The General Counsel in his Amended Complaint has set forth six causes of action in which it is alleged that Respondents, with respect to their California operation, have at all times functioned as a single integrated employer; and that as such, Respondents have acted as alter egos of one another. Because of certain significant decisions that took place during the relevant time frame which impacted upon bargaining unit employees, Respondents are charged with making certain changes unilaterally without notice to or bargaining with the UFW about them, all in violation of sections 1153(a), (c), and (e) of the Act. The question to be decided here

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1. Hereafter, General Counsel's exhibits will be identified as "G.C. Ex ___"; Respondents' exhibits as "Resps' ___"; and Joint exhibits as "Jt. Ex ___". References to the Reporter's Transcript will be noted as "TR. ___, p. ___".

is whether two business operations, one a wholly owned subsidiary of the other, were so closely inter-connected, one with the other, as to be considered, for purposes of the Act, the same employer; and if so, whether their conduct vis-a-vis the UFW, the certified bargaining representative of their employees, violated the Act.

The Respondents denied they violated the Act in any way and plead various affirmative defenses, including, inter alia, waiver and estoppel. (G.C. Exhs 9 and 10.) 2/

III. The MW "Family"

A. MW

MW is an Oklahoma corporation with its principal office in Tahlequah, Oklahoma. It is a nursery business which grows (both in the field or in containers), ships, and markets a large assortment of plant material. Its growing operation is primarily in the state of Oklahoma, and the company is also incorporated there.

MW was founded in 1968 by Robert (Bob) Berry. Berry presently holds a 25% interest which is the largest single share of ownership in the company. He has been President and a member of its Board of Directors since the creation of the corporation. Berry receives as compensation both a fixed and a variable income. The latter sum, which has reached as high as 22%, is based upon a formula which takes into account the pre-tax profits of MW and its subsidiaries that exceed a certain pre-arranged figure.

Les Cashmere, a certified public accountant by profession, is MW's Financial Vice President. Since August of 1981, Cashmere has also served as a member of MW's Board of Directors; and since 1976, has owned a 3% stock interest in the corporation. He is paid under the same compensation plan as Berry except Cashmere's percentage under the variable formula is less.

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2. During the hearing the General Counsel moved to strike Respondents' Fourth Affirmative Defense, which asserts that the employees do not want nor have wanted the UFW as its representative. The Motion was taken under advisement. (Respondents do not address the issue in their post-hearing Brief.) The Motion is granted, and the defense is hereby stricken. The desires of the employees of an alleged successor or alter ego employer are not determinative of whether there is, in fact, a successorship or an alter ego relationship. This is especially true where the present employees have jobs now only because they displaced others who were unlawfully laid off without bargaining with the UFW, infra. Once a union has been certified, it remains the exclusive collective-bargaining representative of the employees in the unit until it is either decertified or a rival union is certified. Whether or not recognition should be withdrawn or terminated by the employer must be left to the election process. (Nish Noroian Farms (1982) 8 ALRB No. 25.)

The Secretary of MW, since about March of 1980, is Robert Bracken who is a full time MW employee. He also earns his salary from the fixed and variable plan but receives a lower percentage than Berry or Cashmere.

MW's business decisions are formulated by a six-member "Management Team" led by Bob Berry. Cashmere is also a member of this group and has been so since 1976. Other members include Allen Brostrom, Ronald Hendrix, and Larry Ahrens. (All three have an ownership interest in MW and serve as vice presidents of the company. Brostrom and Hendrix are also members of its Board of Directors.) (G.C. Ex. 21.) Each member of the team has a special area of responsibility and each, as Cashmere expressed it, ". . . is held accountable to the team as a whole." Cashmere's area of responsibility is the conduct of MA(II)'s business operations, infra.

MW owns several other companies in the nursery business, and Berry serves as a member of the Board and Vice President of each of them: MA(II), Midwestern Transit, Inc., Midwestern of Tennessee, Midwestern of Alabama, and Beauty Gro Barks. They are all connected with the nursery business and are all wholly owned by MW. Bracken, in addition to being Secretary of MW, is also Secretary to each of the subsidiary corporations within the MW family, including, MA(II). In these positions, he performs essentially the same duties as he does for MW. While working as Secretary for the subsidiaries, Bracken is paid by MW. 3/

B. MA(II)

MA(II) is an Iowa corporation with its principal office in Shenandoah, Iowa. It is a wholly owned subsidiary of MW. The company grows, harvests, processes, ships and markets nursery products. It farms more than 2,000 acres in Iowa and owns considerable amounts of farm equipment and inventory. From 1979 until the present, MA(II) has merchandised approximately 40% of the combined business of all the other MW subsidiaries.

MA(II) was created by its parent, MW, in 1979 because the latter determined, infra, that it was interested in purchasing the assets of the original Mount Arbor corporation, then in bankruptcy, (hereafter referred to as "MA(I)"). While the purchase was being arranged, the MW Management Team selected Cashmere to be MA(II)'s President and Chief Executive Officer, and Cashmere has served

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3. An offer of proof was submitted to the effect that Berry would testify that there was an administrative inter-company charge, not based on any time records but on a certain percentage, which was made for Bracken's work and assessed against the appropriate subsidiary. (TR. 2, p. 156.) This charge was of a very minor nature.

MA(II) in that capacity since. 4/ At the same time, he continued to function as MW's Financial Vice President. 5/

When MW bought the MA(I) property, one of the assets it acquired was a rose growing operation in McFarland, California, close to Delano, infra. Though Cashmere testified he had no previous experience with roses or with any kind of farming for that matter, Cashmere was still placed in charge of all the functions of the new company. However, he testified that he did not spend much time at the McFarland ranch. Since MA(II)'s formation, Cashmere visited California only once in 1979 and three times in 1980, the last time being in the fall. (Cashmere also testified that MA(II)'s Vice President, Rex Whitehill, likewise visited the McFarland property infrequently. 6/

The Vice-President of MA(II) is Rex Whitehill. Prior to 1979 he was Vice President and General Manager of MA(I). Though at MA(I) he had all managerial functions, many of these were taken over by Cashmere at MA(II), and Whitehill presently has reduced authority.

As mentioned previously, Bracken is the Company's Secretary.

MA(II) has a Board of Directors which meets once a year, and its meeting occurs on the same day as the annual meeting of its parent, MW. Members of its Board include Cashmere 7/ (since the formation of the company in October, 1979), Berry, Bracken, Brostrom, Hendrix, and Ahrems.

1. MA(II)'s McFarland Operation

By acquiring MA(I), MA(II) obtained properties in Iowa, Washington, and McFarland, California, the latter of which has since been sold, infra, so that currently MA(II) owns no land in California. However, during the time of its ownership, Robert

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4. More accurately, Cashmere was initially installed as the President of the Midwestern Acquisition Company which later became MA(II), infra.

5. Cashmere testified that during 1979 he spent 75% of his time on MA(II) business and 25% on MW matters.

6. In contrast, Berry testified that between December of 1979 and January of 1981 he visited the McFarland operation approximately every 6-8 weeks.

7. In addition to MA(II) and MW, Cashmere is also on the Board of MW's subsidiary, Beauty Gro Barks and has served, prior to October, 1979, as a member of the Board for most of the others, as well.

St. Clair functioned as its McFarland farm manager. According to Cashmere, St. Clair had responsibility for the day-to-day operation, including the hiring of labor contractors, but had no authority over decision making areas; e.g., what crops were to be raised or phased out, the buying or selling of expensive equipment, investments, conveyances, etc. Cashmere testified that St. Clair reported to Whitehill, who would then report to Cashmere. Cashmere denied that MW in any way supervised St. Clair's activities or that he (or Whitehill) reported to MW personnel.

St. Clair testified that he was employed by MA(I) in 1975 and functioned as ranch manager of the McFarland property under the supervision of Whitehill. After the sale of MA(I) to MA(II), St. Clair testified he kept the same duties as before only that now he carried out the orders of Bob Berry and reported to him, as well. St. Clair testified that he ordinarily would telephone Berry several times during the week at his office in Oklahoma; in addition, Berry would visit the McFarland property once every month - six weeks.

Finally, St. Clair testified that he had no authority over anything major; that Berry made those decisions. When asked if he was familiar with Cashmere, he testified: "I have met him on occasion." (TR. 3, p. 8.) St. Clair also testified he did not speak to Cashmere very often, and if he did, it was only concerning bills or fees. St. Clair could not remember if Cashmere ever came to the McFarland operation.

St. Clair left MA(II)'s employment in March of 1981.

C. The Sales

1. The Initial Interest in the Purchase of MA(I)'s Business

During the summer of 1979, Berry, who had been buying nursery material in California, had occasion to drive through the MA(I) property in McFarland. Berry denied that he had any thought at that time to purchase the property and testified he was simply a businessman interested in seeing a competitor's operation. 8/ Berry also denied that prior to the purchase of this property, he ever discussed with anyone the possibility of buying the property and subsequently, discontinuing the rose business. 9/

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8. Berry testified he considered the McFarland property at that time a competitor of the operations of MW even though McFarland was devoted mainly to rose-growing and some cotton.

9. This testimony is in direct contradiction to St. Clair's who testified that Berry came to California (he thinks a couple of months before the purchase) with a view towards buying the McFarland property and that he accompanied Berry around the ranch showing him the roses and cotton which were being grown. According to St. Clair, Berry indicated that if the property were bought, the rose operation would be terminated.

Cashmere testified that Berry and he, as members of MW's Management Team, became interested in the prospect of purchasing MA(I)'s assets when it became common knowledge in the industry that MA(I) had declared bankruptcy. Accordingly, both he and Berry reviewed MA(I)'s holdings with Tom Flynn, the Receiver in Bankruptcy, in July or August, 1979 and decided to attempt to purchase the property. Pursuant thereto, they obtained a loan on behalf of MW from the Fourth National Bank of Tulsa in December of 1979.

At this time, MA(I)'s McFarland operation was primarily a rose-growing business, and it supplied around 50-70% of the roses for MA(I)'s total production. Both Cashmere and Berry testified that since no one at MW had experience in the growing of roses and since there was a fear it would be a losing proposition, it was their intention to ultimately sell off the McFarland, California, portion of MA(I)'s assets. In addition, a section of the loan agreement provided that the California properties could be sold off to provide cash, if needed. (Resps' 4 and 5.)

2. The Sale to MW

On December 7, 1979, the bulk of the assets of MA(I) (property in Shenandoah, Iowa, the State of Washington, and approximately 375 acres near McFarland, California, including land, farm and office equipment, storage facilities, nursery inventories in the field, and its name and good will) was conveyed by corporate and individual deed to MW. MW paid the Referee in Bankruptcy five million dollars, plus $650,00 additional payment for losses incurred between approximately October 1 and December 7, 1979. The payment consisted of 3½ million dollars in cash and 1½ million dollars of MW capital stock (125,000 shares valued at $12 per share or approximately 25% of all of MW's stock at the time).

3. The Formation of MWAC: MW's Sale of MA(I)'s Assest to MWAC

MW management decided to create a corporation, the Midwestern Acquisition Company (hereafter MWAC), for the specific purpose of purchasing the MA(I) assets. This company was formed on October 2, 1979, with assets of $10.00 representing the issuance of 1,000 shares of capital stock at one cent per share. (G.C. Exs 13A, 13B and 13C.) 10/ MW also installed Cashmere as President of the new corporation. 11/

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10. All shares have been issued and are held by MW.

11. Cashmere testified that it was a common corporate practice to create a subsidiary company in order to establish a separate entity in a new state of operations while at the same time taking advantage of the tax laws.

On the same day MW purchased the assets of MA(I), it conveyeed all of them by warranty deed to MWAC. MWAC paid MW for this purchase exactly the same amount MW had paid earlier that day to the Bankruptcy Referee. However, MWAC did not pay cash because it had no such funds. Instead, the sale was effectuated through accounting procedures whereby MW's corporate books reflected an inter-company transfer (or a "book transfer"); and no formal note, loan agreement or pledge was executed.12/ As mentioned, at the time of the conveyance, MWAC's only assets consisted of the $1,000 from the issuance and purchase of its stock by its parent, MW; and its only line of credit was with MW.

4. The Re-emergence of Mount Arbor

Immediately upon the sale to MWAC, MWAC began using the name, "Mount Arbor" in oral communications, checks, letterheads, and in representations to vendors and purchasers even though MA(I) was still in existence and the name could not legally be used until the bankruptcy was concluded. Cashmere testified that one of the reasons he wanted to begin using Mount Arbor as soon as possible was to capitalize on the former company's good name. Berry testified that he was also aware that MA(I)'s name was being used immediately following the purchase. However, officially the name change from MWAC to MA(II) was not effectuated until January 31, 1980, when MWAC formally amended its Articles of Incorporation (G.C. Ex 13B). 13/

5. MA(II)'s Sale Back to MW; the Decision to Grow Almonds

On March 19, 1981, MA(II) executed a warranty deed (G.C. Ex 12H) conveying back to its parent, MW, all of its California agricultural land originally purchased from MA(I) on December 7, 1979, except for a building and land on a railroad siding that was sold to an individual. (Resps' 14A and 14B.) However, this deed was not recorded while the deed from MA(I) to MWAC and the deed

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12. Cashmere testified that the general ledger books of MA(II) (formerly MWAC, infra) evidenced a debt it owed to MW. Likewise, MW's ledger shows an asset reflected under its accounts receivables. However, the loan was apparently non-interest bearing; it had no maturity date and the note was not recorded with any public entity. Moreover, the minutes of the Boards of Directors of both MA(II) and MW do not indicate how or when the note was to be paid off.

13. The name had finally become available around this date. MA(I) emerged from bankruptcy under its new name, "Mishana Valley Nursery", and its Articles of Incorporation were amended on January 25, 1980, to reflect the name change. (G.C. Ex 18A.)

from MWAC to MA(II) were. 14/

The reason for the transfer was the decision not to sell the property but rather to retain it for the growing of an almond orchard. Berry testified that in the late spring, early summer of 1980, discussions ensued as to what "we would do with the farm once the roses were harvested and it was at that time — that I started exploring the possibilities of what we could either do with it or sell it, and it was subsequently agreed to between Les Cashmere and myself that the farm would be sold to Mid-Western and the responsibility for that operation would revert to me." (TR. 2, p. 109.) Berry further testified that a firm decision had been made in the late summer, early fall of 1980 that almonds be planted on the McFarland property.

Cashmere agreed with Berry's testimony but placed the date for the decision later in 1980. He testified that he and Berry decided to convey the property back to MW at the same time as the decision was made to grow almonds on the property, and that this would have been around November of 1980.

As to why MA(II) could not operate the almond orchard, Cashmere testified:

> Once the decision was made to plant the property in an almond orchard, the decision to sell that property, from Mount Arbor Nurseries to Mid-Western Nurseries, was due to primary concerns being that Mount Arbor Nurseries, other than that property, had no connection in California; had no operations; had no people; whereas, Mid-Western Nurseries did have an operation, which it was growing various fruit trees and shade trees. And management, specifically Bob Berry from Mid-Western Nurseries, was coming into California on a regular basis; once every 30 to 45 days, and it would be much, much easier for him to manage the development and continuation and maintenance of the orchard than I. (TR. 1, p. 95.)

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14. Bracken explained that it was he who decided that the transfer from MA(II) to MW was valid and need not be recorded in that any such transfer was already in the chain of title, the validity of the conveyance was not affected by the lack of recording, recordation being only a notice requirement, and the conveyance had been executed. The deed apparently was delivered in that it is presently in the possession of MW in its Oklahoma offices. It is worthy of note in this context that Bracken also testified that he did not seek to have the property description contained in the California UCC Financing Statement (G.C. Ex 15) designating MA(II) as the debtor removed following the sale of the property back to MW.

The consideration for this sale was cancellation of the MA(II) debt in the amount of $850,000 15/ which was the appraised value of the property. Cashmere testified that MA(II) had been making payments — cash transfers — to pay off the debt to its parent. 16/ Part of these said cash transfers came from the 40% it received as its part of a loan from the First National Bank of Chicago, negotiated on behalf of the entire MW family, infra.

Cashmere also testified that as a result of this sale, MA(II) no longer held any property nor did any business in California. 17/

D. The Bank Loans

1. The Fourth National Bank of Tulsa

MW needed to borrow money in order to purchase the MA(I) assets. A loan was negotiated with the Fourth National Bank of Tulsa and the Farmers Home Administration (hereafter FMHA) guaranteed 90% of this loan (Resps' 4 and 5). Berry testified that he was also required to give a personal guaranty for the entire debt and that the bank insisted that all of MW's subsidiaries execute guarantees, as well. (Resps' 4.) 18/

2. The First National Bank of Chicago

After MA(II)'s purchase of MA(II)'s assets and throughout 1980, its gross receipts were 6½ million dollars while it incurred operating expenses of between 5-6 million dollars. While it was

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15. The warranty deed (G.C. Ex 12H) listed the consideration as $10, ". . . and other valuable considerations, in hand paid. . . ."

16. Cashmere testified that MA(II) had been making payments on its debt by way of cash transfers to MW, but he was unable to state the amounts paid back: "I don't know what the amounts were because Mount Arbor Nurseries obtained its working capital financing through Mid-Western Nurseries; which is run through an inter-company account receivable account payable, and on many, many occasions, Mount Arbor Nurseries has borrowed money on those accounts as well as paid money back. And I don't know the exact dollar amount." (TR. 1, p. 52.)

17. Currently, MA(II) continues to operate a general nursery business — planting, producing, and shipping — in Iowa, Washington and Oregon. It owns land, farm equipment, inventory, warehouses and general offices employing 350 persons.

18. However, when the McFarland property was conveyed back to MW by MA(II), no written permission was sought or obtained from the Tulsa bank or from FMHA for the conveyance.

making a profit, it was also experiencing difficulty keeping its cash receipts ahead of expenditures. As a consequence, MA(II), along with all the other subsidiaries, obtained through MW an operating loan from the First National Bank of Chicago in the amount of 5 million dollars, 40% of which went to MA(II). 19/ The debtors were MW and each subsidiary company in the MW family. Each subsidiary pledged its accounts receivables and inventories, but it was Bob Berry who signed the loan agreement 20/ on behalf of MW and the subsidiaries; no representative of any subsidiary signed the loan, though Cashmere testified that each subsidiary's Board of Directors had to approve it. A similar loan was taken out in 1981. This time it was Cashmere who signed on behalf of the MW Family.

Bob Berry testified that the lines of credit were secured by crops in the ground, inventories, and receivables of all subsidiaries jointly and that a creditor could look to any of the assets specified in the loan agreement for payment in case of default.

Cashmere testified that as of 1982, MA(II) still owed MW for the initial acquisition from the Tulsa Bank plus the operating loan from the First National and that he would decide almost weekly when payments would be made to the parent by the transfer to it of cash, thereby reducing the indebtedness. But Cashmere also testified that MA(II)'s books did not show it owing the debt because of "our simplistic method" by which monies went to MW first and then were later drawn out by MA(II). 21/ Cashmere was asked why MA(II)'s financing was handled through MW, especially in view of the fact that MA(II) had been making a profit. He responded that MA(II) had the inventory and nursery stock in an amount sufficient to entitle it to direct financing, but it was just simpler to use MW.

E. The Sacramento Settlement of the Prior UFW Claims Against MA(I)

Cashmere testified that prior to MW's purchase of the bankrupt's property, he was shown a copy of a letter from Ben Maddock of the UFW addressed to MW and dated September 26, 1979

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19. The decision of which subsidiary would be allocated which percentage was made according to budgetary requirements subject to the ultimate approval of MW.

20. Bob Berry also signed the Financing Statement on behalf of MA(II) filed January 6, 1981 pursuant to the California Uniform Commercial Code. (G.C. Ex 15.) Berry testified he did so as it was part of the consolidated working capital loan. Despite the passage of time since the sale of the property from MA(II) to MW and the renegotiation of the operating loan, MA(II)'s name has not been removed from this document.

21. MW's books do indicate such an indebtedness. (Resps' 14C and 14D.)

(Resps' 2) requesting bargaining on the grounds that MW was a successor employer to MA(I). Thereafter, Cashmere contacted Fred Morgan and was advised that there was a possibility that former UFW claims against MA(I) could indeed be made against a new purchaser on a successorship theory and that as a consequence, MW could be potentially liable for any such claims. 22/ Since the UFW's claims against MA(I) were not covered by the original 5 million dollar sale price, Cashmere testified that MW determined that such a claim should be settled prior to its taking over the bankrupt's assets in order to relieve it of any continuing liability. For that reason, on December 5, 1979, in Sacramento MW, represented by its attorney, Fred Morgan, entered into settlement negotiations with UFW representatives and attorneys for the General Counsel of the ALRB. The Receiver in Bankruptcy was also present.

Although Cashmere was not a direct participant in those negotiations, he testified (and his testimony was corroborated by UFW representative Ben Maddock) that he kept in close telephone contact with Morgan, whom he considered to be his representative, finally approving a settlement in the amount of $150,000, which was paid, according to Cashmere, by MW to the Receiver. 23/ (Resps' 3A and 3B.) In agreeing to the cash settlement, Cashmere testified he personally believed he was thereby eliminating all claims that the Union had against MA(I), including unfair labor practice allegations, claims for severence, and any claims arising out of the planned discontinuance of the McFarland operation.

Ben Maddock, the Director of the UFW's Delano office, attended the December 5 meeting and testified that all outstanding unfair labor practice charges arising out of MA(I)'s operation were resolved.

F. Collective Bargaining Agreement Between MA(II) and the UFW Covering the Roses

Cashmere testified that even prior to the actual purchase of the MA(I) assets, he became interested in negotiating a labor contract with the UFW on the McFarland property in order to increase the wages and to provide for the harvest of roses up until March 1, 1981, at which time the harvest would be over and MW could then go ahead with its plan to terminate that part of the business. As a result, discussions ensued in November of 1979 between Emilio Huerta of the UFW and Morgan representing MW. After the actual purchase on December 7, negotiations became more serious. Cashmere testified that it was he who would decide what contractual terms were acceptable and that he spoke to Morgan and Bracken from time to time

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22. The Receiver in Bankruptcy had declined to include any UFW claims in the schedule of the bankrupt's debts.

23. No monies were paid directly to the UFW.

regarding proposals. An agreement was reached on February 29, 1980 between the UFW and MA(II) 24/ (G.C. Ex 14), made retroactive to November 1, 1979, the date the old labor agreement between MA(I) and the UFW expired.

MA(I) grew some cotton but primarily was in the business of growing roses. When MWAC/MA(II) took over, it continued the cotton 25/ and harvested roses during 1979, 1980 and January of 1981. But just prior to the 1980 harvest, the amount of land devoted to rose production fell from 25-30% to 15% evidencing the company's intention to liquidate while it continued to farm a cash crop.

In fact, there doesn't seem to be much dispute that from the very start MW intended to cease business after the 1981 rose harvest 26/ and conveyed this intent to the UFW. (Resps' 11.) Maddock testified that early on Morgan represented that MW would be willing to negotiate a contract just covering the roses; and both the UFW and Respondents recognized this when they agreed to the labor agreement's expiration date of March, 1981, around the time when the last roses were to be harvested. 27/

This labor agreement governed the relations between the parties from the time MWAC/MA(II) became the owners of the McFarland operation until the end of the rose harvest, January 9, 1981.

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24. Although there was much testimony as to whether MW informed the UFW that a subsidiary corporation called Mount Arbor would be taking over the property from MW, Huerta testified that Morgan told him in Sacramento that some kind of a subsidiary would be formed to operate the McFarland ranch. Furthermore, Morgan informed the UFW by telegram that MA(II) would sign the labor agreement. (G.C. Ex 22; Resps' 12.)

25. The parties stipulated that in 1979 MA(I) raised 270 acres of cotton at the McFarland operation; that MA(II) raised 214 acres in 1980 and that MW raised 214 acres in 1981. (TR. 4, p. 51.)

26. Cashmere testified that roses were a two-year crop; i.e., they should have been planted in October of 1979 to have a crop in 1981. But since the property was not purchased until December of 1979, the season was missed; and Cashmere testified he gave no consideration whatsoever to staying in the rose business and planting in October, 1980 while skipping that one year of production.

27. Morgan testified that the parties picked an approximate date for the termination of the roses but that if the roses closed prior to that time, the contract would then expire on that date. On the other hand, Morgan testified that he represented to the Union that if the roses went beyond the date of the contract, then he would be willing to negotiate to cover that situation as well.

During that time MWAC/MA(II) used its own workers who were also those who had been represented by the UFW under the previous MA(I) contract. However, upon the completion of the said 1981 harvest, all employees were terminated, except for the manager and a supervisor, and a substantial portion of the company's equipment was sold at an auction during that summer.

G. The Almonds

Despite the original plan to sell off the McFarland operation and cease doing business there, Berry had been exploring the possibility of planting almonds as an alternative. Berry testified that at the MW Board of Directors meeting on May 9, 1980, he announced that he was considering almonds as one of the options for the McFarland property and that it looked like a probability. However, he denied that there were any definite plans at that time. Cashmere, likewise, denied any firm decision had been made that early. However, the minutes of the regular meeting of MW's Board for May 9 were admitted into evidence and contained therein, inter alia, is the following statement: ". . . Further discussion of the California operation and the utilization of its land was held. Mr. Berry stated that at present the California land is planted in Roses and Cotton. Future plans call for the introduction of an Almond orchard on the property." (G.C. Ex 19.)

Nevertheless, Berry testified, initially, that the decision to grow the almonds was not made until the late summer, early fall of 1980; later, he testified it was October of 1980. 28/ In any event, Berry spoke to labor contractor, Wade Hamilton, in December of 1980 concerning the possibility of his doing land-leveling at the McFarland property, and the land preparation work was actually commenced after Christmas of 1980. Thereafter, in January of 1981, MA(II) sold to MW 3 or 4 pieces of equipment worth around $40,000 for tree growing purposes. And between February 17 and March 3, 1981, Bright's Nurseries shipped to MW at McFarland a total of 37,024 almond trees. (Stipulation of Parties, TR. 4, p. 50.) The actual planting of the trees and other work associated therewith was performed by labor contractor Gilbert Renteria. Renteria's workers were not represented by the UFW.

As to the reasons for the decision to plant almonds, Cashmere testified that originally it was felt the property would

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28. But Berry also testified that in May or June of 1980 on one of his California trips, he spoke to Arthur Bright of Bright's Nurseries, giving him a list of approximately 190,000 almond trees MW needed and told him that if he decided to plant almonds on the McFarland farm, part of those trees would go there. (Of the 200,000 trees purchased in 1980 from Bright by MW, around 37,000 went to McFarland, infra, and the rest apparently to MW's Shafter operation.)

have to be sold after the rose harvest to generate cash. But the MW Management Team was pleasantly surprised that a profit had been shown in the first year of the new McFarland operation so that a sale was no longer a necessity. Consequently, the Team reasoned that it could increase its profitability by growing even a more valuable crop such as almonds.

However, Cashmere did not agree with this decision; but as a member of MW's Management Team, he went along with it: "I agreed to it as a part of that team, but reluctantly agreed to it, and did not feel that it belonged as a part of Mt. Arbor Nurseries which strictly was a woody ornamental nursery company." (TR. 2, p. 74.) According to Cashmere, the leading proponent of the conversion of the McFarland property to almonds was Berry.

Cashmere also agreed to the decision because he had an interest in developing a tree business in Oregon for MA(II) which would have limited the amount of time he could devote to a California almond operation while Berry, being in the process of taking over an interest in a business operation in Shafter, California, 29/ as well as making trips to California on other business would be in a much better position to manage the development of the almond orchard.

Cashmere testified that for all the above reasons, he recommended to MA(II) that it sell the land to MW 30/ to allow the plans for almonds to proceed. 31/

H. Operation of the McFarland Farm after the Decision to Plant Almonds Was Effectuated and After Expiration of the Collective Bargaining Agreement

Berry testified that labor contractor Renteria was hired by MW to plant the almond trees because MW had no equipment or expertise to plant an orchard. The records reflect that after the

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29. Cashmere testified that since September of 1981, MW had owned a business in Shafter, growing woody ornamental fruits and shades. Berry testified that MW leased 80 acres in the area for the growing of fruit trees. Pursuant to General Counsel's request of May 6, 1982, I hereby take official notice under Evidence Code sections 452(g) and (h) that Shafter, California and McFarland, California, are approximately 18 miles from each other.

30. It will be recalled that Berry and Cashmere both testified that the decision not to sell the land but to convert it to almonds was crucial to the decision to have MA(II) convey the property back to MW.

31. Berry testified that the McFarland farm today still grows almond trees and is preparing for cotton in mid-April, 1982, though the latter crop is being phased out.

delivery of the 37,024 almond trees between February 17 and March 3, 1981, Renteria surveyed, planted, pruned and wrapped same by March 26, 1981 (G.C. Exs 17A, 17B.) In fact, as early as March 18, he began "straightening" those trees that had not been firmly implanted. (G.C. Ex 18C.)

In addition, land preparation, planting and cultivation of cotton was performed by another labor contractor, Paul Rodriguez. Like Renteria, Rodriguez' employees were not represented by the UFW.

The large bulk of the bargaining unit employees — 26 of 28 — were laid off by January 9, 1981 (G.C. Ex 16). None of these were recalled to work by either MA(II) or MW. When asked about this, Berry answered: "We felt that the contract ended when the roses were harvested, and obviously Mid-Western had never been asked to meet and negotiate with the Farm Workers' Union, and as far as I was concerned, there was no contract and we didn't feel that there was any need to — to pursue it." (TR. 2, p. 118.)

I. Notice to the UFW of the Growing of Almonds

Maddock testified that while he was told by Fred Morgan at the December 5, Sacramento meeting that MW intended to phase out roses, nothing was ever said about another crop being grown in its place. According to Maddock, he never received any notice from the date of the Sacramento meeting until March of 1981, from either MA(II) or MW, that an almond orchard was being planned on the property where roses formerly grew. His first such notice was contained in Cashmere's letter to him of March 24, 1981 (Resps' 9.) 32/

Berry acknowledged that since the acquisition of the assets of MA(I), he never communicated with the UFW and did not inform them either that MA(II) was going to convey the MA(I) McFarland property back to MW or that the land which had previously been in roses would be planted in almonds. And he did not offer to bargain with the UFW over these subject matters either.

On the other hand, it was Berry's position that the UFW never requested bargaining from MW until such a request was made by Maddock on February 24, 1982. (Resps' 6.)

J. Requests to Bargain

Pursuant to a December 5, 1980, UFW request to bargain, Rex Whitehill, Vice President of MA(II), on December 29 wrote to Maddock indicating that rose harvesting would be completed by December 31, 1980, that no further agricultural operations were planned for

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32. Maddock also testified — and this does not seem to be in dispute — that he was also unaware of MA(II)'s conveyance of the McFarland property back to MW in March of 1981.

California and that:

> . . . we hereby advise you that our contract will terminate on March 1, 1981, or, pursuant to our agreement, at such earlier date as the company actually ceases its operation.
>
> Since Mount Arbor will have no agricutlural employees, we do not believe it would serve any purpose for us to meet and confer concerning a new Agreement. However, if for some reason you desire to do so or to discuss any other matter of mutual concern, we would, of course, be willing to meet upon reasonable notice. (Resps' 7.)

But the UFW, sensing that oeprations were continuing at McFarland, contacted MA(II) again on March 19, 1981, and once more expressed its intent to negotiate a contract. (Resps' 8.)

In reply, Cashmere on March 24, writing as President of MA(II), informed the UFW, inter alia:

> . . . We do not know to whom you refer when you state that we now have agricutlural employees. For that reason, we are at a loss to understand what Collective Bargaining Agreement could be negotiated at this time. Of course, if we do have agricultural employees within the meaning of the California law in the future, we will be pleased to bargain with any labor organization which is properly designated as their representative. However, our present plans would be for cotton and almonds, both of which are beyond our skill, experience and expertise; both involve minimal labor requirements which we intend to meet by employing a contractor on an as-needed basis. (Resps' 9.)

Continuing with his letter, Cashmere then added:

> If you would let us know of whose behalf you purport to negotiate or what you have in mind, we will immediately contact you with respect to your requests for a meeting. (Resps' 9.)

MA(II)'s letters of December 29, 1980, (Resps' 7) and March 24, 1981, (Resps' 9) were apparently the only communications with the UFW since the earlier negotiation of the collective bargaining agreement in February of 1980.

K. Labor Relations Policy

Robert Bracken, as previously mentioned, is Secretary of MW and Secretary of MA(II). He is also a lawyer. He testified that most of his job duties consisted in giving advice in connection with his being the Secretary of MW. However, he admitted that he would customarily render in-house legal advice on matters of contracts and the day to day operation. In fact, some of the documents in evidence bear his signature with the title, "General Counsel."

Bracken testified that in matters where he had been selected to render legal advice, he sometimes would refer to himself in such fashion if the nature of the transaction required it.

Bracken also testified that since MA(II) did not maintain a staff counsel, whenever there was a legal problem, it was communicated first to him at which point he would decide whether to handle it himself or retain local counsel. For example, with respect to the present unfair labor practice matter, it was Bracken who issued the authorization that Fred Morgan of Bronson, Bronson, & McKinnon be hired.

Additionally, throughout the course of this litigation, it has been Bracken who was responsible for directing various individuals, either at MW or MA(II) locations, to search the records, collect material and to forward same to Bracken. Bracken would then review these items and send them on to Morgan.

It was stipulated by the parties that during the events of 1979 through 1981 and until the time of the filing of the initial unfair labor practice charge in this matter, Morgan was retained and paid for his services by MW. (TR. 3, p. 1.) It was further stipulated that during the course of the present litigation, Morgan, who represented both Respondent MW, and Respondent MA(II), sent all bills for services only to MW and did not segregate out the accounting for his services between the two Respondents. Morgan was instructed by MW that it would not be necessary for him to bill MW and MA(II) separately in that MW would review the subject matter of the billings and charge accordingly within the inter-company accounting system. (Id.)

L. MW and MA(II) Comparisons

Both Berry and Cashmere testified that in 1979 MW and MA(II) did not jointly use any of the same equipment and that there was no sharing of crops, buildings, or land. Both also testified that MA(II) and MW competed head to head in a few areas, e.g., mass markets such as K-Mart or Sears for plant materials, and that each had its own sales catalogue and its own product line which did not feature the other's products.

Berry and Cashmere further testified that no supervisor for MW worked for MA(II) or vice versa. Cashmere testified that the only MW employees who spent any time on MA(II) business were he, Berry, and Bracken.

Finally, Cashmere testified that in 1979 both companies had differences in rates of pay, overtime, and insurance, vacation, and sick leave benefits. But Berry pointed out that the differences in benefits between MA(II) and MW had existed ever since the

acquisition of MA(I). 33/

M. The Alleged Conversation between St. Clair and Certain Employees

Luis Alejo, Ignacio Morales, Jaime Casiano, and Tomas Mancilla, MA(II) employees, all testified that together they asked St. Clair why they had been laid off in January of 1981 and that he replied that it was because the company did not want a union and that it could obtain workers cheaper through a labor contractor.

On the other hand, St. Clair denied any such conversation though he recalled speaking to these workers individually within a few days of each other after their layoff. According to St. Clair, they inquired as to why they no longer had any work and that in each case he responded that it was because the company had gone out of the rose business, and that there was no further work to be performed. When asked why labor contractor Rodriguez had been hired, St. Clair testified that he explained that it was not for the roses — they were too expensive to continue — but that Rodriguez was employed only for the cotton. St. Clair denied he had made any reference to a union.

CONCLUSIONS OF LAW

I. The Alter Ego Relationship

> Since the 1920's, the National Labor Relations Board had been confronted with the question of whether the acquisition of a business and the retention of some or all of its employees carried with it the obligation to bargain with the union representing the predecessor's employees or to remedy unfair labor practices committed by the predecessor employer. The NLRB — almost uniformly with judicial approval — imposed such obligations if it concluded that the new employer was either the 'alter ego' or the predecessor in a sham transaction designed to evade the mandates of the NLRA, or was the 'successor' in a bona fide transaction as evidenced by a continuity in the work force, supervision, and the processes of production. (R. Gorman, "Basic Text on Labor Law (1976), p. 575.)

Thus, early on, the NLRB held that an employer committing an unfair labor practice could not avoid a remedial order simply by changing its corporate form; the order would be issued directly to the "alter ego" of the wrongdoer as well as to the wrongdoer itself. (Id., citing Hopwood Retinning Co. (1938) 4 NLRB 922, enf'd in relevant part in 98 F.2d 97 (2d Cir. 1938). It therefore became

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33. At the present time, both companies' group health plans have been combined. Berry testified that except for this, there had not been any significant change in the personnel policies or benefits of the respective two corporations.

clear that a successor could be held liable for the acts of his predecessor where there was an identity of interest between the employers. (Regal Knitwear Co. v. N.L.R.B. (1945) 324 U.S. 9, 15 LRRM 882.)

Over the years, the NLRB has continued to direct remedial orders against successors found to be the alter egos of their predecessors, especially where the alter ego carries on basically the same business using the same supervisors and where the companies are owned and controlled by the same persons. (Ozark Hardwood Co. (1957) 119 NLRB 1130, 41 LRRM 1243, enf'd in relevant part in 282 F.2d 1, 46 LRRM 2823 (8th Cir. 1960); Oilfield Maintenance Co., Inc. (1963) 142 NLRB 1384, 53 LRRM 1235.)

The NLRB has found alter ego where the two businesses have substantially identical ownership, management, operation, equipment, supervision, business purpose, and customers. (Crawford Door Sales Co. (1976) 226 NLRB No. 174, 94 LRRM 1393.)

In Royal Typewriter v. N.L.R.B. (8th Cir. 1976) 533 F.2d 1030, 92 LRRM 2013, the parent corporation created primarily for tax purposes a wholly owned subsidiary, Litton Business Systems (LBS). The Board of Directors and officers of LBS were drawn from Litton, and a Litton executive committee oversaw the operation of LBS. Royal Typewriter was later merged into LBS, and the president of Royal was also a vice president of Litton and functioned as the "group executive". In finding alter ego, the Court held:

> While preserving a degree of operational autonomy within divisions, it is clear that Litton reserved to itself a role in major expenditures, budget control, acquisitions and plans, including any decision to close a plant. (92 LRRM at 2023.)

Other cases reflect the same result. In Key Coal Co. (1979) 240 NLRB 1013, 100 LRRM 1444, a parent corporation owned a subsidiary and exercised control over fundamental decisions affecting the subsidiary's future, including its labor policy. Some of the parent's officers and directors served in similar capacities with the subsidiary. A single employer status was found even though it was not an integrated enterprise in the sense that there was no employee interchange, company benefits of the two enterprises were different, and there was no equipment interuse. (See also, V.I.P. Radio (1960) 128 NLRB 113, 46 LRRM 1278.)

The Pony Express Company was incorporated to take over Wells Fargo's general courier services; Wells Fargo remained a separate entity offering primarily security conscious armored car services. Both were wholly owned subsidiaries of a third company. Meanwhile, Pony Express and Wells Fargo shared a number of top officers, and the vice president of personnel rendered advice to both companies. On these facts, Pony Express was found to be the alter ego of Wells Fargo and a single employer. (N.L.R.B. v. Borg Warner Corp. (6th Cir. 1981) 663 F.2d 666, 108 LRRM 2862. See also,

Atlanta Paper Co. (1958) 121 NLRB 125, 42 LRRM 1309 (alter ego found where transferee continued the same operation and employment conditions as the predecessor at the same location with substantially the same employees, supervisors and officers); Tectura, Inc. (1975) 221 NLRB 1193, 91 LRRM 1079 (single employer found where subsidiary was wholly owned and parent's president made major decisions with respect to the appointment of the president of the subsidiary, changes in the subsidiary's production, and the ultimate closing of the subsidiary); and N.L.R.B. v. Tricor Products, Inc. (10th Cir. 1980) 636 F.2d 266, 105 LRRM 3273.)

Often, however, the concept of alter ego is confused with that of successorship. Although in either case the bargaining obligation attaches, an alter ego status serves a different purpose from that of a successor. As the ALRB has pointed out in John Elmore, et al. (1982) 8 ALRB No. 20 (at p. 4):

> The term 'successor' is ordinarly 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) 34/

The legal effect of a finding of a successor as compared to alter ego is that a "mere successor employer generally is not bound by the terms and provisions of any agreement between a union and the predecessor employer" . . . whereas a "second employer who is found to be the alter ego of the first employer . . . is bound by an agreement between the union and the first employer." (N.L.R.B. v. Tricor Products, Inc., supra.)

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34. Where an alter ego is found and the predecessor continues to exist, there may also be cases in which the predecessor and its alter ego together constitute a joint employer. The focus of 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. (John Elmore, et al., supra. See also, Rivcom Corporation (1979) 5 ALRB No. 55, and Abatti Farms (1977) 3 ALRB No. 83.) The bargaining obligation also attaches to a joint employer situation. (John Elmore, et al., supra.)

The ALRB employs a "totality of circumstances" test to determine if there has been any real change "in the structure and identity of the employing entity." (John Elmore, et al., supra. See also, Operating Engineers v. N.L.R.B. (D.C. Cir. 1975) 518 F.2d 1040, 90 LRRM 2321. For evidence of alter ego, the Board in John Elmore looked to the elements of common ownership, financial dependence of the alter ego, the financial interest of the predecessor, including its being a guarantor of the lines of credit, and any lack of bona fide arms-length transactions between the two entities.

A. Common Ownership

MW owns all of MA(II); MA(II) is a wholly owned subsidiary. This, of course, is a factor worth noting in analyzing alter-ego relationships. (Tectura, Inc., supra.)

B. Common Management; the Control over the McFarland Property

Several individuals hold positions of managerial influence in both corporations. For example, Allen Brostrom, Ronald Hendrix and Larry Ahrens are members of both MA(II)'s and MW's Boards of Directors. Each also serves as a vice president of MW and member of its Management Team; and each has an ownership interest in MW, as well.

In addition, while serving in the capacity as President of MA(II), (after having been selected for that position by MW), Cashmere continued as a part owner of MW (paid under the same compensation formula as Berry), as a member of its Management Team, as its Financial Vice President, and (since August of 1981), as a member of its Board. During 1979, 1/4 of his time was spent on MW's business.

Bracken is Secretary of MA(II) and has given the corporation legal advice as well as coordinate its letigation strategy here. He is also (since August of 1980) a member of MA(II)'s Bd. of Directors. 35/ Yet, at the same time, he is a full time employee of the parent, paid under the same variable formula as Cashmere and Berry, and is its Secretary. In fact, even when he performs work for MA(II) (or any other subsidiary corporation for that matter), any inter-company charges for his services are billed to the subsidiary not on the basis of actual hours worked but on the basis of a small fixed percentage formula.

Berry, who was President of MW, a member of its Management Team, and on its Board, was also Vice President of MA(II), and a

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35. Though Bracken testified he was a member of the Board, his name is strangely absent from the 1981 State of Iowa Annual Corporation Report (G.C. Ex 13D).

member of its Board as well. But more importantly, it was he (and not Cashmere) that functioned as MA(II)'s Chief Executive Officer. St. Clair, the McFarland ranch manager, testified (and Berry did not deny this) that while the property was owned by MA(II), it was Berry who gave him orders and told him what to do. It was Berry he telephoned frequently during the week; it was Berry that he saw personally every 4-6 weeks (Berry testified it was 6-8 weeks); it was also Berry who had a knowledge of farming and a particular interest (even in the days the property was owned by MA(I)) in the McFarland ranch; it was Berry who made all the arrangements for the purchase of the almond trees and the employment of the labor contractor. In truth, St. Clair hardly even knew who Cashmere was and only spoke to him from time to time regarding accounting matters. And St. Clair was not even sure what Whitehill's duties were with the new corporation. Thus, the MA(II) executives, whom one would ordinarily have expected to supervise the ranch manager of the company's McFarland operation, simply failed to function in that capacity.

This is not surprising. Cashmere, the President of MA(II), was a C.P.A. with no previous farming background who knew nothing about growing roses or cotton. His expertise, understandably so, was employed to help bring back to recovery a bankrupt corporation and to oversee a large capital loan. It was only natural that he should spend so little time at the site of the McFarland ranch because his presence there could have added very little to the efficient operation of the farm; this was clearly not his area of specialization. One of the few times he even attempted to influence a farming decision, he, the President of MA(II), lost out to Berry, the President of MW, a supposedly separate corporation. Berry saw to it that the land was merely conveyed back to him, the largest owner of MW. This episode demonstrated that the actual control of decision making at MA(II) was exercised by the parent organization. (N.L.R.B v. Tricolor Products, Inc., supra.)

C. Common Financial Control; Economic Dependence of MWAC/MA(II) upon Its Parent; Lack of Arms Length Transactions

On December 7, 1979, MW paid the Referee in Bankruptcy over 5 million dollars for MA(I). Part of this purchase price was 1/4 of its existing stock. That same day MW sold this asset at no profit to a company it had created two months earlier that had assets of $10 that consisted of stock which it (MW) already owned. MWAC/MA(II) needed no down payment, needed no note, pledge, or loan agreement, needed no maturity date, needed no credit or security, needed no recording, and may not have needed to pay any interest on the loan. 36/ Instead, the payment for the property was a paper

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36. As a witness for the General Counsel, Cashmere testified that MA(II) paid no interest on the note. The following day, as a witness for Respondents, he testified MA(II) did pay interest. In any event, there is no showing from corporate records of whether interest was actually paid or in what amount.

transfer reflected only on the corporate books. In effect, the parent took the proceeds of its purchase loan from the Tulsa banking institution and turned them over to its newly created wholly owned subsidiary virtually free of any security requirements. 37/

Though there is no contention that the purchase price was not at the going rate, the other factors noted make it clear that this was not a normal business arrangement and could not be considered an "arms length tracaction." 38/ Though it may have been corporate practice, as Cashmere testified, to operate in this fashion to take advantage of tax laws, this is not to say that MWAC/MA(II) was financially independent of its parent. It was not; MW controlled its economic future.

Similarly, MA(II)'s dependence on MW is shown in the loan agreement with the Chicago bank, as well. The loan was arranged by the MW Management Team and executed by one of them (Berry in 1980; Cashmere in 1981) on behalf of the entire family. Though each subsidiary's Board must approve the loan, this would seem to be rather a perfunctory task in view of the overlapping directorships and where, in MA(II)'s case, its own President was an owner, the Financial Vice President and member of the Management Team of the parent. Any subsidiary wishing an allocation of funds from the operating loan must have its demands balanced by the overall needs of the entire group. This raises serious questions. For example, when Financial Vice President Cashmere decides how much money is to be allocated from the overall operating loan to MA(II) or if and when same is to be repaid, or how much money is to be transferred to MW to reduce MA(II)'s indebtedness and when the transfer is to take place, is he acting in the interest of MA(II) or in the interest of MW?

Moreover, since the inventories and crops of all subsidiaries are collateral jointly for the loan, a default could cause a creditor to go after any given subsidiary's assets regardless of whether that company was actually in default or for that matter, whether said subsidiary even received any proceeds from the loan.

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37. It could be argued that MW had little to fear from its lack of protection on the loan extended to MWAC/MA(II) since MW and its Management Team so completely controlled all aspects of the economic affairs of its wholly owned creation.

38. Cashmere testified that it was important to handle all transactions on an "arms length" basis; otherwise, there could be tax, loan, or shareholder problems. Bracken testified that to him, "arms length" meant treating all business relationships as unrelated, third parties.

Finally, although MA(II) could, as Cashmere testified, establish its own line of credit with lending institutions, it is hardly surprising that it would rather for "simplistic" reasons piggyback off the credit rating of its parent. Its own corporate ledger books do not even reflect the indebtedness.

In N.L.R.B. v. Big Bear Supermarkets (9th Cir. 1980) 640 F.2d 924, 103 LRRM 3125, a franchisee (alter ego) purchased at least $100,000 of inventory from Big Bear with a down payment of $2,000 and an unsecured note bearing 5% interest with no time limit on repayment. The franchisee was also provided with an "Open Account" (not unlike MA(II)'s arrangement to receive the proceeds of MW's bank loans) in which Big Bear paid the operating expenses for the alter ego out of its own pocket only to be repaid later on after cash from the alter ego's sales was credited to the said Open Account. In effect, the alter ego received an interest free advance of funds for an undetermined amount of time. The Court was concerned with the lack of arms length transactions and found that the financial control proved a single employer status. See also, N.L.R.B. v. Don Burgess Contruction Corp., (9th Cir. 1979) 596 F.2d 378, 101 LRRM 2315, cert denied, (1979) 100 S.Ct. 293; Operating Engineers v. N.L.R.B., supra, 518 F.2d 1040, 90 LRRM 2325; N.L.R.B. v. Scott Printing Corp., supra, 612 F.2d 783, 103 LRRM 2153, 2156 (low down payment and favorable sales agreement found to be evidence of alter ego.)

Neither in its relationship with its parent or in its dealings, assuming arguendo that there were any, with the lending institutions, could it be said that MA(II) was engaged in arms length transactions.

D. Common Control over Labor Matters [39/]

1. Attorney Robert Bracken Functioned as General or Corporate Counsel to Both Respondents

Bracken functioned like a General or Corporate Counsel [40/] to the entire MW family and frequently gave legal advice to MA(II).

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39. Though centralized control over labor relations is sometimes said to be one of the contorlling criteria, it is not critical, and the NLRB has found a single employer status in the absence of a common labor relations policy. (Canton Carp's Inc. (1959) 125 NLRB 483, 45 LRRM 1147; N.L.R.B. v. Big Bear Supermarkets, supra.)

40. When introduced at the hearing by Fred Morgan, it was as "corporate counsel from Oklahoma." Morgan did not specify which Respondent Bracken was appearing for.

For example, during the time Cashmere was (through Morgan) attempting to reach an agreement with the UFW over the roses, Bracken played a role in reviewing the contract proposals and advising Cashmere accordingly. As the Court said in Royal Typewriter Co. v. N.L.R.B., supra:

> In assessing the appropriateness of single employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling. A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries and whether its course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective...(92 LRRM at 2024) (citations omitted.)

Bracken also testified that since MA(II) had no legal counsel, it was he who would decide how any given problem was to be handled; i.e., farmed out to local attorneys or managed by him from his office at MW's headquarters in Oklahoma. In the instant case, it was Bracken who determined that Morgan should be hired to represent both Respondents at the unfair labor practice hearings herein (evidently determining that there would not be any conflict of interest), and it was Bracken who responded to the discovery requests made upon both Respondents. After reviewing said documents, it was Bracken who would forward them on to Morgan for disposition. It was also Bracken who coordinated the documentation, assisted Morgan during the litigation, and was present at all times during the hearing.

Evidence of alter ego status has been found where documents were subpoenaed of one company in an NLRB hearing and brought to the hearing by the attorney for the other company. (N.L.R.B. v. Scott Printing Corp., supra.

Yet, despite providing services for MA(II), Bracken was only paid by MW. While it is true that MW received some compensation for Bracken's work through an inter-company accounting charge, the change does not represent Bracken's actual time spent on behalf of the subsidiary but is a fixed (apparently insignificant) amount. Alter ego may be present where an attorney fails to bill a subsidiary company for services rendered. (Id.)

2. Attorney Fred Morgan Functioned as Labor Counsel to Both Respondents

After the UFW had written MW in September of 1979 requesting bargaining (Resps' 2) and before MWAC was formed, Morgan was retained by MW (Resps' 1) (Cashmere signed the letter on October 1, 1979 as Vice President and Secretary/Treasurer of MW). From this date on until 1981, Morgan was retained and paid by MW. Yet, on several occasions, he was or should have been acting on behalf of

only MA(II). For example, during the December 5 meeting in Sacramento, Morgan was in frequent contact with Cashmere, as MA(II)'s representative, regarding any settlement and received his authority from Cashmere. (Cashmere testified he regarded Morgan as his agent.) Again, when negotiations took place over a collective bargaining agreement concerning the roses, it was Cashmere that Morgan communicated with. Yet, Morgan only made reference to his new client, MA(II), on January 25, 1980, (Resps' 12; G.C. Ex 22) when he informed the UFW by letter that the labor agreement would be signed by MA(II) 41/ and not MW.

Morgan represented MA(II) in discussions with ALRB personnel in July of 1981 (G.C. Ex 3, Exhibit "A") pursuant to the UFW charge in April of 1981 (G.C. Ex 2) and filed an Answer on MA(II)'s behalf on October 16, 1981 (G.C. Ex 3). When the Complaint was amended on January 13, 1982 to include as a co-respondent for the first time, MW, (G.C. Ex 7), Morgan, an experienced and respected San Francisco labor attorney, saw no potential conflict between the interest of the parent and the subsidiary that would cause him to disassociate himself from the defense of the former. Morgan filed Answers on behalf of both Respondents (G.C. Exs 9 and 10) 42/ and appeared on behalf of both throughout the proceedings herein. It was as if Morgan himself recognized his clients as the same entity. Alter ego has been found where the same law firm represents both the parent and the subsidiary in the same NLRB hearing. Key Coal Co., supra, 240 NLRB 1013, 100 LRRM 1444 (1979).

I also find significant the fact that Morgan's bills for services rendered were not segregated but were all sent for payment to MW. See N.L.R.B. v. Scott Printing Co., supra.

I conclude that an alter ego relationship existed between MW and MA(II), and both functioned, insofar as their California agricultural operation was concerned, as a single employer for purposes of the Act. There were elements of common ownership, common management, common financial control, and common labor policy. In short, MW's transfer to MWAC/MW and the latter's transfer back to MW were "merely a disguised continuance of the old employer." Such transfers involved ". . . a mere technical change in the structure or identity of the employing entity . . . ." John Elmore, et al., supra. The employer's motive can be a probative

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41. This letter references only MW (as does the subsequent one to the UFW of February 15, 1980) (Resps' 11). In neither letter is MA(II) shown copied in.

42. The Answers are remarkably similar.

factor, although it is not a necessary one. 43/ The determinative factor is whether the new employer is really merely the old one in a new form. Id. In this case it was.

II. The Refusal to Bargain

Because I find that an alter ego relationship existed, each Respondent, parent/subsidiary, had a continuing obligation to bargain with the UFW. Thus, a request to bargain served on MA(II) was also a request of MW likewise to bargain. (MW could hardly claim that the UFW request served on Cashmere, its Financial Vice President and member of its Management Team, was not service on it). Seen from a single employer perspective, Respondents' decisions to lay off the bargaining unit employees, change its crops at the farm from roses to almonds and to hire a labor contractor to perform the work was a unilateral change by the same employer without any notice to or bargaining with the certified union about it. But Respondents not only just refused to bargain; they did so in a manner designed to deceive and confuse the Union.

During late 1979/early 1980 when MW and later MA(II) were pursuing negotiations for a UFW contract covering the roses, Respondents repeatedly informed Union representatives that company plans were to terminate its rose business and cease doing business in California. Relying upon these representations, the UFW concluded a short term agreement (about one year) based in large part upon the old MA(I) contact and accepted an expiration date of March 1, 1981, about the time the roses were expected to be harvested. However, at some point in 1980, and unbeknownst to the UFW, Respondents changed their plans, decided to keep the California farm going, and to plant and cultivate almonds in place of the roses. It also decided to lay off the bargaining unit employees and to hire a labor contractor.

At the same general time that it was decided to hire the labor contractor and lay off MA(II)'s employees, MW's Management Team, led by Berry, prevailed over the Cashmere minority view and determined that almonds should be grown and that the best way to manage the new operation would be to switch the farm back to the

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43. I do not agree that anti-union animus was shown by St. Clair in his conversation with the 4 workers when he is alleged to have told them they were fired because the company didn't want the union. I credit St. Clair's denial. He testified sincerely and believably. In contrast, the General Counsel witnesses were less credible. Mancilla appeared confused about when the conversation supposedly took place and what was said. Alejo testified the conversation took place three weeks after the workers were laid off; Morales testified it occurred while they were still working. Morales also testified that it was a coincidence that all the workers showed up at the same time to converse with St. Clair. Casiano testified it was all planned together.

parent. Thereafter, between February 17 and March 3, 1981, arrangements were made for the purchase and delivery of 37,024 almond trees and a labor contractor was hired to level the ground, plant, prune, and straighten the trees, all before March 26, 1981. 44/

In the meantime, while these plans were being formulated, MA(II) representatives, instead of telling the UFW about this change and the need for a revised collective bargaining agreement to cover the new work, informed the Union (on December 29, 1980) that the company would be concluding its operation in California, that no further agricultural operations were planned, and that "(S)ince Mount Arbor will have no agricultural employees, we do not believe it would serve any purpose for us to meet and confer concerning a new Agreement." (Resps' 7).

This response was insincere enough but nothing compared to what followed. On March 24, 1981, 5 days after MA(II) had conveyed the property back to its parent and during a period when almond trees were already being planted at the farm, Cashmere responded to a request for bargaining by the UFW, which had become aware of continued agricultural operations there, by disingenuously stating that: ". . . we do not know to whom you refer when you state that we now have agricultural employees." (Resps' 9.) By "we", Cashmere was evidently referring to MA(II), since the farm had been sold 5 days earlier back to MW, and it was MW that now had agricultural workers, employed through a labor contractor. Yet, a curious statement is also contained in this same communication which only serves to corroborate the alter ego relationship between these two companies. Cashmere also told the UFW that ". . . our present plans would be for cotton and almonds, both of which are beyond our skill, experience and expertise; both involve minimal labor requirements, which we intend to meet by employing a contractor on an as-needed basis. . . ." (Emphasis added). Here, Cashmere is no longer writing as President of MA(II) (if he ever were) but as a member of the MW Management Team for it was MW that had the plans for almonds, not MA(II). In any event, this letter was the first notice to the UFW of Respondents' "present plans" to grow almonds on land previously utilized for roses. This communication, of course, came after the ground had been levelled, the trees planted, employees hired, and months after the decision had been made.

Respondent MA(II)'s refusal to bargain on the basis that it no longer had any agricultural employees is attributable to MW and will be treated as a refusal to bargain on its part, as well. This is particularly appropriate where the UFW did what it could to re-initiate the bargaining process — contacted the company which it thought, never having been informed otherwise, was still running the

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44. Some of the land levelling may have even taken place while the last roses were being dug up. Berry was not sure one way or the other.

business and with whom it had a labor agreement. Not only was the UFW not told about the re-conveyance of the property to the parent, but Cashmere deliberately mislead it in order to refrain from disclosing this crucial piece of information. Even when the UFW filed its original charge in this case (April, 1981), it was still unaware of the inter-company transfer.

In short, Cashmere's letter was intentionally devious and insincere. Concealing from its employees the discontinuance of a future business operation is evidence of bad faith. Architectural Fibreglass, 165 NLRB 238, 240, 65 LRRM 1331 (1967); Royal Plating & Polishing Co. (1966) 160 NLRB 990, 994, 63 LRRM 1045. As stated in Ozark Trailers, Inc. 161 NLRB 561, 564, 63 LRRM 1264 (1966): "After concealing its intention from the Union, Respondents cannot now persuasively argue that it was not required to bargain with the Union because the Union did not request such bargaining."

However, Respondents argue that its obligation to bargain expired with the completion of the rose harvest. Thus Respondents' position is that it was required to bargain only so long as the contract for the roses ran or was extended by mutual agreement. And Respondents go on to suggest that the UFW should be estopped from now claiming they were denied the right to bargain when in fact, they negotiated away such a right by agreeing to the December 5, 1979 Sacramento settlement in anticipation of Respondents' later closure of the rose business. Morgan testified that the fact that the UFW sought severance pay in the settlement negotiations but failed to get it proved that the Union had had its day in court already.

Initially, it should be noted that there is nothing contained in the Settlement Agreement (Resps' 3A and 3B) to support Respondents' view of waiver, and that is because that agreement addressed only the past UFW claims against MA(I). But even if there were some pertinent language in that settlement, it is clear that the waiver of bargaining rights by a union will not be lightly inferred and must be clearly and unequivocally conveyed. (Masaji Eto d.b.a. Eto Farms, et al., (1980) 6 ALRB No. 20, enf'd in relevant part in Masaji Eto, et al. v. A.L.R.B. by Ct. App., 5th Dist., July 27, 1981, hg. den., November 16, 1981.) There is no such clear waiver here. This is not surprising since the Union was not aware of Respondents' plans to grow almonds (they had not been formulated yet) at the time of the signing of the Sacramento settlement (or at the time of the execution of the collective bargaining agreement).

In addition, Respondents seem to confuse contracts of limited duration with the general duty to bargain. A union may agree to a contract for a limited time period covering a specific crop or crops or a union may consent to waive bargaining over other crops of subjects during the contract period, but in neither case does this in and of itself signify that a union has waived its right to bargain after the current contract has expired. For Respondents' position to be accepted, I would have to find that the UFW agreed to

waive its right to bargain over any prospective operation of Respondents at the McFarland property after the expiration of the then existing labor agreement even though at the time the agreement was signed the understanding of the parties was that at the completion of the rose harvest, MA(II) was going to close its business and leave California. In effect, Respondents ask that I find that the UFW gave up rights in February of 1980 on fundamental subject matters, the basis for which it did not discover even existed until around March of 1981, at the earliest. A union must receive sufficient notice in advance of any change in order to allow reasonable scope for bargaining. (I.L.G.W.U. v. N.L.R.B. (D.C. Cir. 1972) 463 F.2d 907.) Here, it was merely presented with a fait accompli. Even if the Union did not reply immediately to Whitehill's devious December 19, 1980 letter (Resps' 7), it cannot be said to have waived any right to bargain, when any inaction on its part was due to a deception committed by the parties now claiming waiver.

Finally, Respondents argue that the implementation of the decisions to grow almonds and to hire a labor contractor to do the work was permitted by the subcontracting clause (G.C. Ex 14, Article 30) of the labor agreement. Whether it is or not is debatable 45/ but in fact this contract had expired, the roses having finished around January 9, by the time Respondents gave notice of "our present plans" for almonds. How could the UFW have consented to a subcontracting of work under an expired contract about a subject matter it had no knowledge of?

It is clear than that the UFW should have been given the opportunity to bargain about the change to almonds which had a direct impact upon jobs of members of the bargaining unit despite Berry's contention that MA(II) workers were laid off on January 9, 1981 because there was no more work of any kind for them to perform on the McFarland property. A review of labor contractor Renteria's 1981 invoices to MW (G.C. Exs 17C and 17D) reveal there was all kinds of work available from February - October, 1981, in a wide variety of job classifications; e.g., "digging and putting trees on ground", "straightening trees", "irrigation", "various jobs", "hoeing", "weeding", "cotton", "spraying fertilizers and chemicals", "working for the ranch" and "labor". Among some of the workers that testified at the hearing, two (Alejo and Morales) had worked in almonds as an irrigator and tractor driver, respectively. Alejo had also irrigated cotton, as had Casiano. Casiano had also done the hoeing and thinning of cotton; Alejo had experience in weeding. Mancilla drove a tractor and did hand planing; he had also used the sprayer. All were laid off on January 9, 1981, at the conclusion of the roses; none was recalled.

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45. The contract also provides that ". . . the Company shall not subcontract to the detriment of the Union or bargaining unit workers' (Article 30) and that in the event of a sale of the business, "(t)he Union will be notified of who the potential purchaser will be." (Article 35.)

This evidence supports the General Counsel's theory that there was work available that could have gove to bargaining unit employees who were capable of performing it. Instead, this work was assigned, without notice to or bargaining with the UFW, to a labor contractor. And while it may be true that labor contractors have in the past planted and harvested cotton, its ongoing cultivation and maintenance — irrigation, hoeing and thinning — was work that belonged to the bargaining unit. 46/

C. Bargaining Over the Decision to Subcontract

The decision to grow almonds in place of roses and to have the work in effect subcontracted out to a labor contractor was a refusal to bargain over a mandatory subject of bargaining. In Fibreboard Paper Products Corp. v. N.L.R.B. (1964) 379 U.S. 203, 57 LRRM 2609, the employer had, for economic reasons, replaced employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment. The company also refused to bargain with the union over the issue. The U.S. Supreme Court held that the employer had refused to bargain over a mandatory subject, and in so doing, had violated section 8(a)(5) of the National Labor Relations Act (equivalent to section 1153(e) of the ALRA). The Court held there was an obligation to bargain not only over the effects of the subcontracting decision but over the decision itself. The Court said:

> To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace. (57 LRRM at 2612.)

In Westinghouse Electric Corp. (1965) 150 NLRB 1574, the NLRB noted that an employer's duty to bargain normally arose when:

> . . . the employer proposes to take action which will effect some change in existing employment terms or conditions within the range of mandatory bargaining. In the Fibreboard line of cases, where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and (1), it has invariably appeared that the contracting out involved a departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant

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46. In the past, MA(I) workers had also done hoeing, thinning, and the irrigation of cotton.

impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit. (150 NLRB at 1576.)

The Fibreboard reasoning is actually applicable to a broad range of managerial decisions. The NLRB, consistently and with fairly uniform support from the Courts of Appeal, has viewed Fibreboard as mandating bargaining over any business decision that can be characterized as subcontracting. (O.P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37. 47/

For example, a duty to bargain was found where a company, without informing the union, decided for economic reasons to discontinue its cheese cutting and prepackaging operation, to commission an outside company (off its premises) to do it, and to layoff six of its own employees. (N.L.R.B. v. Winn Dixie, (5th Cir. 1966), 361 F.2d 512, 62 LRRM 2218, enforcing in relevant part, (1964) 147 NLRB 788, cert denied, 385 U.S. 935. And a refusal to bargain was found where a company, without notice to the union, moved its wiring and electronic assembly work of one of its plants to another one, 3 miles away. (Weltronic Co. v. N.L.R.B. (6th Cir. 1969) 419 F.2d 1120, 73 LRRM 2014, cert. denied, 398 U.S. 939.)

The facts in this case make it clear that Respondents decision to discontinue roses and its contemporaneous arrangements to hire a labor contractor to grow almonds fit comfortably within the concept of subcontracting. Though it could be argued that the termination of the roses was more like a plant closing or the going out of business, 48/ I find it much more akin to a subcontracting situation. This case is not unlike an industrial manufacturer whose plant discontinues one of its product lines and contracts with another, separate company to supply him with a replacement product, according to his specifications and under his brand name, thus continuing the business but having eliminated his own employees from the manufacturing process. (See, N.L.R.B. v. Winn-Dixie Stores, supra.

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47. The Court in Fibreboard noted that "subcontracting" or "contracting out" had no precise meaning and could be used to describe a variety of business arrangements, including some that were factually different from that case.

48. Even if this situation were to be defined as an employer decision to go out of business, Respondents were still obligated to notify the UFW of its decision and bargain over the effects, and limited backpay awards are appropriate. (Highland Ranch v. A.L.R.B. (1981) 29 Cal.3d 848, 176 Cal.Rptr. 753; John V. Borchard, et al. (1982) 8 ALRB No. 52; P & P Farms (1979) 5 ALRB No. 59. Likewise, effect bargaining is required for partial closures, as well. (N.L.R.B. v. Royal Plating and Polishing Co., supra, (3rd Cir. 1965) 350 F.2d 191, 196; 60 LRRM 2033, 2036; Ozark Trailers, Inc., supra, (1966) 161 NLRB 564; 63 LRRM 1264.

I also find it significant that the agricultural operation did not cease. Instead, MA(II) merely grew a new crop in place of another, laid off its bargaining unit employees, and hired a labor contractor. Thus, as in Fibreboard, supra, it merely substituted one group of employees that could have done the work for another. The change to almonds did not alter the company's basic operation; thus, requiring bargaining regarding the decision would not significantly abridge its freedom to manage the business.

This is not to say that the UFW had to be consulted before a tentative decision on the almonds was made. But once made, Respondents were under a duty to notify the Union and, upon request, to bargain over it. (O.P. Murphy Produce Co., Inc., supra.)

As stated in Ozark Trailers, Inc., supra:

> [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interest of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.

III. Respondents are Successors to MA(I)

In any event, I shall address the question of MA(II)'s successorship, assuming arguendo that it is at issue in the case. 49/

In Case No. 75-RC-128-F, the UFW was certified as the collective bargaining representative of agricultural workers of MA(I) on December 3, 1975 (G.C. Exs 9 and 10). Obviously aware of this certification, Morgan, representing MW which was attempting to purchase MA(I)'s assets, wrote Huerta of the UFW on October 29, 1979 that MW wanted to become the "full legal owner" of the MA(I) property and to negotiate a labor contract with the UFW but that before he could do this, ". . . as attorney for the company, I need to be satisfied that we are legally in a succesor relationship so we can lawfully bargain. Bargaining without these conditions would be unlawful." (Resps' 13.)

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49. In that I have found, supra, that an alter ego relationship existed between MA(II) and MW obligating them at all times to bargain with the UFW, I do not find it necessary to consider as a separate issue MW's claim that it was not a successor to MA(II) as a result of MA(II)'s reconveying the property. As the essence of alter ego is that the successor entity is merely a disguished continuance of the old employer, John Elmore, et al., supra, then if MA(II) is a lawful successor, so too is MW.

On November 26, 1979, Morgan, still claiming to represent MW, notified Huerta by telegram of MW's continuing desire to purchase the MA(I) property and solicited the UFW's cooperation in reaching a settlement agreement over the pending unfair labor practice charges against MA(I), as well as holding out the prospect of negotiating a labor contract thereafter with respect to the rose operation. In this telegram, Morgan told Huerta, inter alia: "Mid Western intends immediately upon completion of the asset purchase to operate as a successor company under the ALRA to Mount Arbor with respect to the California rose operations." (Resps' 10).

After the agreement over the pending unfair labor practice allegations against MA(I) was worked out in Sacramento, MW/MWAC/MA(II) purchased the MA(I) property. They bought all of MA(I)'s McFarland, California land, inventories, farm and office equipment, as well as its name and good will. The purchasers also continued to farm and harvest the same crops — roses and cotton — and use the same workers as MA(I) had. The bargaining unit's size remained basically the same until its dissolution in January, 1981. In addition, MA(I)'s ranch manager, Robert St. Clair, was employed by the new entity.

In San Clemente Ranch, Ltd., (1979) 5 ALRB No. 54, enf'd in San Clemente v. A.L.R.B. (1981) 29 Cal 3d 874, 176 Cal.Rptr. 768, the Board listed several factors as indicia of a successorship relationship, in addition to the continuity of the work force; e.g., are the same land and crops being farmed?; is there a significant alteration in the nature of the bargaining unit or has it remained the same size?; do bargaining unit employees perform the same jobs as the predecessor employees?; has the successor acquired the same machinery?

In my view, the evidence in the case at bar suggests that "meaningful principles of successorship can be given effect" only by a finding that MA(II) is MA(I)'s successor. (Id.) This transfer of ownership, seen from the totality of circumstances, was a change that did not affect the essential nature of the enterprise. Babbit Engineering and Machinery Inc., et al., (1982) 8 ALRB No. 10.

But Respondent, MA(II), suggests that even if it were the successor employer to MA(I), this successorship was solely limited to the rose production and did not include any other crop. Once the roses were removed so too was the successorship. To support this view, Respondent would argue that its telegram and letters made it clear to the UFW that MA(II) intended to operate as a successor only until the end of the rose harvest and that the Union agreed to it.

This position cannot be sustained. The burden was on Respondent to show that the Union understood it was agreeing to waive any claims it might have against Respondent as a successor employer once the roses terminated, which it did not carry. As has been shown, at the time the UFW was being informed of the company's need for a labor contract just to cover the roses so it could then leave California, it was not being told that almonds would be grown

in place of roses.

I also note that Respondent cites no authority for its legal theory that the cessation of one crop and the growing of another would in and of itself result in the dissolution of the successorship relationship.

I conclude that MA(II) succeeded to the interest of MA(I) and said successorship has remained unabated to the present. In that MA(II) and MW and the same employer, both have occupied jointly the position of lawful successor employer to MA(I).

E. Conclusion

Under the totality of circumstances I find that both Respondents are in violation of sections 1153(e) and (a) of the Act and shall so recommend to the Board. I do not find that the closing down of the roses, the subcontracting out of the almonds, and the layoff of the bargaining unit employees was because of anti-union animus on the part of Respondents, although Whitehill's devious letter (supplemented later by Cashmere's) makes this a closer question. In any event, I do not find this allegation supported by convincing evidence in the record. Therefore, I shall not recommend that Respondents be found in violation of section 1153(c) of the Act.

IV. The Remedy

Having found that Respondents failed to fulfill their statutory obligations within the meaning of section 1153(e) and (a) of the Act, 50/ when they decided to plant almonds, to hire a labor contractor, and to lay off bargaining unit employees without prior notice to, or consultation with, the UFW, the question next presented is what type of remedial action is required for this violation. In fashioning a remedy, it should be borne in mind that restoring the situation as nearly as possible to that which existed before the commission of the unfair labor practice should be the ultimate goal. Winn-Dixie Stores, Inc., supra. Therefore, some might argue that it would be appropriate here to require Respondents to reinstitute their rose operation, and this type of remedy has found judicial support. Fibreboard Paper Products, supra.

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50. As previously alluded to, improper motivation is not a prerequisite to a finding of a refusal to bargain in violation of section 1153(e) of the Act. Fibreboard Paper Products Corporation, supra. Remedies are imposed even where a company's actions were solely the result of economic considerations because the effect of the decision impacts upon employees, and the law demands a joint bargaining responsibility to explore the means of dissipating, at least to the extent possible, the adverse effect of a change in operations.

But attempts to restore the status quo ante must be tempered by the practicalities of running a farm. And, in addition, I note that often requiring the resumption of a previous operation is reserved for those cases where their is direct evidence that the subcontracting and discharge/layoff was the result, at least in part, of a company's determination to rid itself of the union. Town & Country Mfg. Co., Inc., and Town & Country Sales Co., Inc. v. N.L.R.B., 136 NLRB 1022 (1962), enf'd in 316 F.2d 846 (5th Cir. 1963).

I do not believe it essential in order to effectuate the policies of the Act that Respondents be ordered to reestablish their former rose operation. Reviewing the nature of Respondents' California farming business, the likelihood that the affected employees are suitable for employment elsewhere in Respondents' present organization, and that it would be unfair and excessive to order the discontinued rose operation to be reinstituted, I am disinclined to order such a remedy here. However, I shall order that Respondents undo the specific violations found here by compensating the laid off employees for lost back wages and ordering bargaining with the UFW, not only about the effects on the employees of the discontinued operation but also about the resumption of such operation.

It is clear to me that if the Respondents had honored their statutory bargaining obligation, the employees affected by the discontinued operation would not have been terminated without the protections afforded them through collective bargaining about the proposed actions. Certainly, there was plenty of work around. Renteria's 1981 invoices (G.C. Ex 17) demonstrate there was available work from February through November, 1981 and that the laid off employees could have performed it just as well as the employees of the labor contractor. Thus, the evidence suggests a readily identifiable loss of employment during that period 51/ and a denied opportunity to the employees' representative to attempt to affect the saving of jobs through collective bargaining. As a result of the processes of bargaining, the employees might not have been terminated at all. In any event, it must be presumed they would have retained their jobs at least until Respondents had fulfilled their bargaining obligation by negotiating to a bona fide impasse. Effectuation of the Act's policies therefore requires that the employees, whose statutory rights were invaded by reason of the Respondents' unlawful unilateral action and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place.

There is a question of when the obligation to bargain with the Union arose. This question is answered by determining when the

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51. The payroll records show that MW paid the labor contractor close to $60,000 for services rendered during 1981 (G.C. Ex 17A).

decision to subcontract occurred. In order to establish a section 1153(e) violation, the General Counsel must prove that an obligation existed at the time the changes were decided on or made. Part of that proof is to show the date of the decision or changes. P & P Farms, (1979) 5 ALRB No. 59. Once that decision was made, Respondents had a duty to notify the UFW and, upon request, bargain about it. O. P. Murphy Produce Co., Inc., supra.

The General Counsel amended the Complaint to reflect that Respondents' decision to plant almonds affected employees as of May 9, 1980 because that was the date MW's Board of Directors minutes showed that such a decision had been made. All the employee witnesses who testified indicated that they had been laid off on January 9, 1981 so the record does not clearly reflect whether any employees were laid off between May 9, 1980 and January 9, 1981 as a direct result of Respondents' decision to grow an almond orchard. And the May 9 Board of Directors minutes throws no light on the question of when the decision to hire the labor contractor was actually made. In fact, the record is uncertain as to any date certain when the subcontracting decision was made.

I am unwilling to accept the May 9 date as the date when the decision to subcontract (as opposed to the date when the decision to plant almonds) was made. Since the actual arrangements for a labor contractor to perform the land levelling was apparent not entered into until around December of 1980 (and not commenced until after Christmas), this period seems to me to be a much more realistic approximation of when the subcontracting was decided upon. I shall set December 1, 1980, as the date of the subcontracting decision. Accordingly, I shall order that the Respondents pay back pay and other lost benefits to the employees employed as of December 1, 1980 who were subsequently laid off for any loss of pay they may have suffered as a result of Respondents' unfair labor practices and this pay period shall continue until March 1, 1981, the expiration date of the labor agreement between these parties.

Therefore, I find that make whole would be an appropriate remedy. There is no question but that MA(II) had a duty to meet and bargain in good faith with the UFW at its request. (John V. Borchard, et al. (1982) 8 ALRB No. 52, citing Highland Ranch and San Clemente Ranch, Ltd. (August 16, 1979) 5 ALRB No. 54, enf'd sub nom., Highland Ranch v. A.L.R.B. (1981) 29 Cal.3d 848.) In this case a request was made by the UFW on December 5, 1980, 52/ to MA(II) to bargain over a new contract only to be turned down by Whitehill on the grounds that the company was concluding its McFarland farming business and did not plan any further agricultural

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52. The December 5, 1980 letter was not entered into evidence. But a letter of this nature around that time frame is acknowledged by Whitehill in his December 29, 1980 communciation to the UFW (Resps' 7) and is referred to by UFW representative Miller in her March 19, 1981 letter. (Resps' 8.) There does not appear to be any dispute about the date, and I accept it as accurate.

operations in California. Make whole is appropriate affirmative relief for employer violations of section 1153(e) whenever employees have suffered a loss of pay as a result, and, under Perry Farms (1975) 4 ALRB No. 25, such a loss of pay must be presumed. (John V. Borchard, et al., supra, ALOD, pp. 46-47.) Having found that Respondents had an obligation to bargain with the UFW, I shall recommend that they be ordered to make whole their employees for their losses of pay resulting from their refusal to bargain. The beginning date for this make whole period is March 2, 1982, the day following the date of the expiration of the labor contract between the parties, extended to March 16, 1982, the date the hearing commenced, and continuing thereafter until Respondents commence good faith bargaining with the UFW which results in either a contract or a bona fide impasse. (Id.; John Elmore Farms, supra.) The reason I have selected the March 2 date is to avoid an overlapping of remedies. Ordinarily, a refusal to bargain over a new contract in a case such as this would have called for the imposition of a make whole remedy beginning on December 5, 1980, the date of the UFW's original request. Here, however, the entire bargaining unit was laid off around one month later, January 9, 1981. I have found this layoff illegal and have ordered back pay from December 1, 1980, to March 1, 1981. It seems appropriate to commence the imposition of the make whole remedy as of March 2, 1981 to rectify the situation created by Respondents failure to meet and bargain with the UFW over a new contract.

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, Respondents, Mid-Western Nurseries, Inc., and Mount Arbor Nurseries, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of their McFarland, California, agricultural employees:

(b) Unilaterally subcontracting or discontinuing unit work, or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without prior notice to and bargaining with the United Farm Workers concerning such decision and the effects thereof.

(c) In any like 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; and if an understanding is reached, embody such

understanding in a signed agreement.

(b) Upon request, bargain collectively with the United Farm Workers concerning the decision to subcontract the almond work and its effects, including the possibility of resuming its rose operation; or about the resumption and performance by unit employees of an equivalent amount of present almond work;

(c) Make whole all agricultural employees employed by Respondents in the appropriate bargaining unit at any time between March 2, 1980 to the date Respondents commence to bargain in good faith and thereafter bargain to a contract or a bona fide impasse or where the UFW fails to commence negotiations within five days of the receipt of Respondents' notice of its desire to bargain or where the Union fails to bargain in good faith for loss of pay and other economic losses, together with interest thereon, sustained by them as a result of Respondents' refusal to bargain.

(d) Pay backpay and other lost benefits to Luis Alejo, Tomas Mancilla, Ignacio Morales, Jaime Casiano, Andy Orque, and all other employees employed by Respondents as of December 1, 1980, who were subsequently laid off, together with interest thereon, incurred by them from December 1, 1980 to March 1, 1981, as a result of said layoff.

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

(f) 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.

(g) Post at its McFarland, California, premises copies of the attached Notice for 60 consecutive days, the times 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.

(h) Provide a copy of the attached Notice to each employee hired by Respondents at their McFarland, California, premises during the 12-month period following the date of the issuance of this Order.

(i) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of any Order, to all agricultural employees employed by Respondents at their McFarland, California, premises at any time from December 1, 1980, to the present.

(j) Arrange for a representative of Respondents or a Board agent to read the attached Notice in appropriate languages to the

McFarland, California, 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 non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(k) 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 McFarland, California, agricultural employees of Respondent, Mount Arbor Nurseries, Inc., successor in interest to the original Mount Arbor Nurseries, Inc., as identified in Case No. 75-RC-182-F, be amended to also name Mid-Western Nurseries, Inc., as the employer and that said certification be extended for one year from the date on which Respondents commence to bargain in good faith with the United Farm Workers.

IT IS FURTHER ORDERED that the allegations of the Complaint with respect to which no violation of the Act was proved are dismissed.

DATED: September 30, 1982

AGRICULTURAL LABOR RELATIONS BOARD

Marvin J. Brenner

MARVIN J. BRENNER
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano 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 NOT refuse to bargain collectively with the United Farm Workers of America, AFL-CIO, as the exclusive representative of all our agricultural employees.

WE WILL NOT unilaterally subcontract or discontinue our agricultural operations, including any rose operation, or otherwise unilaterally make changes in the wages, hours, and other terms and conditions of employment for our employees without prior notice to and bargaining with the UFW

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the UFW or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL, upon request, bargain collectively with the United Farm Workers of America, AFL-CIO, as the exclusive representative of all our McFarland, California agricultural employees with respect to

wages, hours and working conditions and also with respect to our decision to discontinue our rose operation, to grow almonds instead, and to utilize a labor contractor for this work. Failing to reach agreement thereon,

WE WILL bargain collectively as to the effects of said discontinuance.

WE WILL make whole Luis Alejo, Tomas Mancilla, Ignacio Morales, Jaime Casiano, Andy Orque and all others similarly situated who were employed by us as of December 1, 1980 for any loss of pay suffered by them as a result of our failure and refusal to bargain with the United Farm Workers from the date of their layoff until the date we begin to bargain in good faith.

DATED:

Mid-Western Nurseries, Inc.

By: _____
(Representative) Title

Mount Arbor Nurseries, Inc.

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 627 Main Street, Delano, California 93215; the telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.