Employer Successorship in California Agriculture

This article suggests a modification of the current NLRB successorship standard for use by the California Agricultural Labor Relations Board. It examines the three major United States Supreme Court decisions on successorship and concludes that the ALRB must derive a new test reflecting the policy behind the ALRA and the realities of California agriculture. The authors propose that a new employer is a successor when it hires substantially the same number of employees with similar skill levels as the predecessor employed.

During the 1976 harvest season, workers at Jones' Vegetable Farm elected Farm Labor Union as their exclusive bargaining representative. Jones and the union negotiated a three-year contract. One year after signing the contract, Jones began having financial difficulties and decided to sell the farm. After the harvest, Jones' 346 temporary workers left. Only four permanent employees stayed on during the off season.

Vegi-Gro, a subsidiary of Amalgamated Products, negotiated to buy Jones' Vegetable Farm. During negotiations, Vegi-Gro discovered the labor contract and demanded that Farmer Jones lower the asking price. Farmer Jones refused, believing that no obligations to the work force would survive the sale. Eventually, the two parties agreed on a compromise price and consummated the agreement.

Farm Labor Union then notified Vegi-Gro of its status as exclusive bargaining representative and of its readiness to negotiate a new labor agreement. Vegi-Gro refused to meet and bargain with the union. Although it had no immediate plans to change the business operation, Vegi-Gro denied any obligation to Farm Labor Union and asserted that it planned to hire only two of Jones' four permanent workers and none of Jones' temporary employees. Threatened by loss of both job security for its members and its status as bargaining representative, Farm Labor Union filed a section 1153(e) charge with the Agricultural Labor Relations Board (ALRB).[1] Farm Labor Union claims that Vegi-

1. Agricultural Labor Relations Act, CAL. LAB. CODE §§ 1140-1166.3 (West Cum. Supp. 1978).

Gro/Amalgamated Products has a continuing obligation as a successor.

The above hypothetical illustrates how successorship problems may arise when there is a change of employer, and the predecessor's employees have elected an exclusive bargaining agent. The crucial issue of successorship is whether a new employer is obligated to its predecessor's workers and their union. The ALRB has not yet faced this issue, but it is certain to arise.[2] In setting a successorship standard, the ALRB must heed its legislative mandate to follow National Labor Relations Board (NLRB)[3] precedent when applicable.[4] Since the mandate is expressly not absolute, however, significant questions remain. The Board must determine to what extent it should follow NLRB precedent and to what extent differences between agriculture and industry render NLRB precedent unsuitable.

The NLRB has developed a successorship doctrine which imposes a duty on successor employers to protect workers from sudden changes in their working conditions.[5] Several problems would arise if the ALRB uncritically applied NLRB precedent in this area. One difficulty is that the NLRB has developed three different and conflicting tests for determining if a new employer is a successor.[6] Thus, the state of successorship law under the NLRB is uncertain. The second and most important problem is that a literal application of any of the NLRB tests

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2. Coachella Ranches, ALRB Case No. 76-R-10-R (Riverside, filed Jan. 30, 1976), a 1976 case, concerned an employer that claimed to have terminated business on the day after the union filed a petition for a representation election. The United Farm Workers Union (UFW) won the election and petitioned the ALRB to substitute the name of the alleged successor, and Coachella Ranches filed objections to the conduct of the election. After a hearing, both sides withdrew their charges and settled. This occurred because the UFW decided to reorganize instead of trying to prove successorship. The other possible successorship case is still pending before the ALRB. In Admiral Packing Co., ALRB Case No. 75-RC-103-M (Salinas, filed Sept. 12, 1975), the UFW petitioned the ALRB for their certification to be amended to include an alleged successor, Far West Marketing Cooperative. The UFW's petition for amendment was accompanied by a charge against Admiral Packing for refusal to bargain on grounds that Far West is a successor. ALRB Case No. 75-CE-30-E (R) (El Centro, filed Sept. 12, 1975).

3. National Labor Relations Act of 1935, ch. 372, § 7, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970 & Supp. V 1975)).

4. "The board shall follow applicable precedents of the National Labor Relations Act, as amended." CAL. LAB. CODE § 1148 (West Cum. Supp. 1978).

5. *See* Golden Gate Bottling Co., Inc. v. NLRB, 414 U.S. 168, 182 (1973); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964); Perma Vinyl, 164 NLRB 968, 969 (1967), *enforced sub nom.*, U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1969). *See generally* Barksdale, *Successor Liability under the National Labor Relations Act and Title VII*, 54 TEX. L. REV. 707 (1976); Gordon, *Legal Questions of Successorship*, 3 GA. L. REV. 280 (1969); Severson & Willcoxon, *Successorship under Howard Johnson: Short Order Justice for Employees*, 64 CALIF. L. REV. 795 (1976); Slicker, *Reconsideration of the Doctrine of Employer Successorship: A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); Note, *Successorship and the Duty to Bargain with the Incumbent Union: A Reexamination of the Concept of Substantial Continuity*, 8 SW. U.L. REV. 138 (1976).

6. *See* text accompanying notes 40-45 *infra*.

is likely to cause inequity in an agricultural setting. Because of the realities of agricultural labor, application of the three NLRB tests would rarely result in a finding of successorship. Thus, the policy behind the ALRA, worker protection, would not be carried out.

The purpose of this article is to explore the alternatives available to the ALRB and to suggest a suitable test for determining successorship.[7] The first section explains the general policy considerations behind successorship. The second section discusses the three major NLRB successorship tests in light of their applicability to agriculture. The third section develops a test for successorship based on NLRB precedent and tailored to the realities of California agriculture. Finally, the article examines the application of the proposed test within the agricultural context.

I. Policy Considerations

A change in ownership opens a Pandora's box of competing considerations. The workers and their bargaining representative, the union, are concerned with protecting job security and maintaining the collective bargaining relationship.[8] The outgoing and incoming employers, on the other hand, are interested in minimizing obligations to the work force in order to diminish the cost of operations.[9] In the hypothetical, for exam-

7. A third area of difficulty is the extent of a successor's obligation. A finding of successorship necessarily includes a duty to bargain. Further obligations depend on the circumstances of each case and are beyond the scope of this article. For cases examining the extent of the obligation, *see, e.g.*, Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973) (successor who acquired company with knowledge of NLRB order against predecessor for discriminatory discharge had to reinstate discriminatee with back pay); Spitzer Akron, Inc., v. NLRB, 540 F.2d 841 (6th Cir. 1976), *cert. denied*, 430 U.S. 1040 (1977) (NLRB ordered successor employer who took over auto sales franchise to cancel unilaterally made changes in employment conditions and bargain with union); Zims Foodliner, Inc. v. NLRB, 495 F.2d 1131 (7th Cir. 1974) (despite changes in operations' character, Board held new employer successor and required to bargain before changing terms of employment); NLRB v. Ozark Hardwood Co., 282 F.2d 1 (8th Cir. 1960) (Board ordered successor to reinstate and make whole illegally discharged employees; successor held responsible on alternate theories of alter ego or instrumentality); Perma Vinyl Corp., 164 NLRB 968 (1967), *enforced sub nom.*, U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968) (successor acquired plant with constructive knowledge of predecessor's unremedied unfair labor practices and continued to operate in a basically unchanged manner; successor required to reinstate discriminatory dischargees and liable for back pay if no reinstatement).

When the underlying dispute involves contract enforcement, the Board will dismiss and recommend arbitration. When the arbitration procedure is repugnant to the policy of the Act, however, the Board will retain jurisdiction. Collyer Insulated Wire, 192 NLRB 837 (1971). Because of the high standards of review for arbitration decisions, Spielberg Mfg. Co., 112 NLRB 1080 (1955), the practical result is that the parties are effectively persuaded to arbitrate.

8. *See* Slicker, *supra* note 5 at 1051-52.

9. The United States Supreme Court has recognized the interests of the outgoing and incoming employers by stating:

ple, Farmer Jones played down the extent of the labor obligations in order to get a higher price for the vegetable farm. Vegi-Gro also wanted no obligation to Farm Labor Union in order to hold down future costs.

The NLRB and the courts have attempted to balance these conflicting considerations in the interest of fairness.[10] For both agricultural and industrial labor, "fairness" means enforcing the rights of employers and union representatives to sit at the bargaining table. The NLRB and the ALRB are thus concerned with promoting collective bargaining, rather than dictating its outcome.[11]

In order to promote collective bargaining, the ALRB should recognize the disparity in bargaining power between agricultural workers and employers and use a successorship test which would not cause the unions to lose their bargaining status every time farm ownership changes. Agricultural labor unions do not share the power base and negotiating strength that the large industrial unions have developed during the forty-three year history of the NLRB.[12] Agricultural unions are relatively new and need the same type of protection that was available to industrial unions in the early days of the NLRB.[13]

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 287-88 (1972).

10. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

11. The NLRA specifically states, "such obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession . . ." 29 U.S.C. § 158(d) (1970 & Supp. V 1975). This exact language can also be found in the ALRA. CAL. LAB. CODE § 1155.2(b) (West Cum. Supp. 1978).

12. As a result of a concession to members of Congress representing the interests of Southern growers, the National Labor Relations Act of 1935 excluded agricultural employees from its coverage. Although there is legislative history indicating that Congress intended to amend the Act to include agricultural employees, this purpose was never effectuated. As a result, agricultural workers never entered the mainstream of American labor relations and did not receive any of the benefits that accrued to industrial labor. *See generally* Champion, *Fair Labor Standards Coverage for Agricultural Employees*, 41 MISS. L.J. 246 (1967); Murphy, *An End to American Serfdom: The Need for Farm Labor Legislation*, 25 LAB. L.J. 85 (1974); Rummel, *Current Developments in Farm Labor Law*, 19 HASTINGS L.J. 371 (1968).

13. Until 1947, the NLRB derived its authority from the Wagner Act of 1935, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970 & Supp. V 1975)). The Wagner Act, hailed as an industrial bill of rights, established three substantive areas of employee rights: (1) organization, (2) collective bargaining, and (3) participation in concerted activities. All were mandatory in balancing employer-employee bargaining power. C. MORRIS, THE DEVELOPING LABOR LAW 28 (1971). The Act re-

In California agriculture, there have been substantial obstacles to collective bargaining. The 1960's and early 1970's were plagued by such wide-spread violence and animosity that both sides of the bargaining table became distrustful.[14] Thus, the recently developed collective bargaining relationships are tenuous.[15] The ALRB must recognize these realities and develop a test for successorship that allows labor unions time to solidify their position. The ALRB will thereby be able to cement harmonious collective bargaining relations, mitigate tensions on both sides of the bargaining table, and reduce obstacles to peaceful collective bargaining.[16]

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ceived criticism since it contained no protection for either employees or employers against potential union abuses. In enforcing the provisions of the Act, the NLRB also received criticism for pro-union bias. M. FAINSOD, L. GORDON & J. PALAMOUNTAIN, JR., GOVERNMENT AND THE AMERICAN ECONOMY 194 (3d ed. 1959).

By the 1940's, public sympathy turned away from the union movement, and Congress sought to curb growing union strength. When Congress passed the Taft-Hartley Act in 1947, Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 1, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-167, 171-197 (1970 & Supp. V 1975)), the number of unionized workers had grown to 14 million from 3.6 million in 1935. A SLOANE & F. WHITNEY, LABOR RELATIONS 115 (3d ed. 1967). The Act controlled possible misuse of union strength with its provisions for union unfair labor practices and guarantees of rights for individual employees, as well as for employers.

Although organized labor criticized the Taft-Hartley Act as a "slave labor act," *id.* at 130, Congress passed further restrictions on union activities in the 1959 Landrum-Griffin Act. Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 2, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1970 & Supp. V 1975)). This act provided for detailed regulation of internal union affairs in order to protect the individual union member and restrain organized labor. By 1959, national labor legislation had completed its evolution. Its early goal of curbing management misuse of power was tempered by its protections against union abuses, as well as its objective of balancing the substantial bargaining power of both sides. The NLRB's underlying goal of promoting collective bargaining remained consistent, however, throughout its historical metamorphosis. *See* R. GORMAM BASIC TEXT ON LABOR LAW 5 (1976); MORRIS, note 13 *supra*, at 25-33 & 27 n.9; Johns, *The Validity of Federal Labor Legislation with Special Emphasis upon the National Labor Relations Act*, 20 MARQ. L. REV. 57, 63 (1936); Keyserling, *The Wagner Act: Its Original and Current Significance*, 29 GEO. WASH. L. REV. 199, 218 (1960); Note, *Wagner Act: Collective Bargaining through Majority Representatives As It Affects Freedom of Contract*, 22 CORNELL L.Q. 151-54 (1936).

14. For the strife-ridden history of farm labor organizing, *see generally* J. DUNNE, DELANO: THE STORY OF THE CALIFORNIA GRAPE STRIKE (1967); C. MCWILLIAMS, FACTORIES IN THE FIELD (1971); R. TAYLOR, CHAVEZ AND THE FARM WORKERS (1974).

15. Lecture by John Sloan, Institute of Industrial Relations, University of California, Berkeley, Cal. (July 22, 1977) (seminar on collective bargaining given to ALRB staff, July 18-22, 1977).

16. These objectives are consistent with the policy of the state of California, as expressed in the ALRA:

> It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining

II. THE NLRB SUCCESSORSHIP DOCTRINE

Although the NLRB decided its first successorship case as early as 1939,[17] the first time the United States Supreme Court examined the successorship problem was twenty-five years later, in *John Wiley & Sons, Inc. v. Livingston*.[18] The case concerned the enforcement of an arbitration clause in a collective bargaining contract entered into by the predecessor employer, Interscience, and forty of its eighty employees.[19] The contract was not expressly binding on successor employers. Interscience had merged with John Wiley and ceased to exist as a separate entity.[20] Although all eighty Interscience workers continued to work for John Wiley after the merger, they did not constitute a majority of John Wiley's three hundred person work force.[21] The United States Supreme Court found John Wiley to be a successor, bound by the arbitration clause in the predecessor's contract.[22]

The Court used "substantial continuity of the employing industry" as the test for finding John Wiley a successor.[23] This test embodies the criteria the NLRB had used during the previous twenty-five years. In determining that there was substantial continuity, the NLRB considered whether the new employer continued (1) the same business operation; (2) the same plant; (3) the same jobs under the same working conditions; (4) substantially the same work force; (5) the same supervisors; (6) the same machinery, equipment and methods of production; and (7) the same product or services.[24] While not all of these factors need be pres-

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or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

CAL. LAB. CODE § 1140.2 (West Cum. Supp. 1978). *See generally* Levy, *The Agricultural Labor Relations Act of 1975: La Esperanza de California Para El Futuro*, 15 SANTA CLARA LAW. 783 (1975); Note, *California's Attempt to End Farmworker Voicelessness: A Survey of the Agricultural Labor Relations Act of 1975*, 7 PAC. L.J. 197 (1976).

17. *E.g.*, Weinberger Banana Co., Inc., 18 NLRB 786 (1939) (successor responsible to remedy predecessor's unfair labor practices); Charles Cushman Co., 15 NLRB 90 (1939) (successor obligated to bargain with the union certified under predecessor).

18. 376 U.S. 543 (1964).

19. *Id.* at 544-45 (1964). The case arose in the context of a § 301 suit. "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States . . ." Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, Title III, § 301, 61 Stat. 156 (1947) (current version at 29 U.S.C. § 185(a) (1970 & Supp. V 1975)).

20. 376 U.S. at 545.

21. *Id.*

22. *Id.* at 548.

23. *Id.* at 551.

24. Generally, the classical Wiley-type situation would have reached us at the Board in the following manner. Following a merger, consolidation, sale, transfer, or plant removal, the representative of a group of employees affected by the business rearrangement contends that the employer's business remains essentially the same and argues therefrom that there has been no change in the employees' representative. Thus, it contends, inasmuch as it is the exclusive bargaining representative, the employer may refuse to deal

ent to find a successor, they all emphasize the similarity of the business operation before and after a change in ownership. The *Wiley* test reaffirmed the flexibility that the NLRB had developed in making successorship determinations. Indeed, subsequent cases have interpreted the *Wiley* test broadly, applying it to different kinds of factual situations.[25]

The second United States Supreme Court case on successorship is *NLRB v. Burns International Security Service, Inc.*[26] Burns, a guard company, had been hired by Lockheed to replace a competitor guard company, Wackenhut. Burns offered employment to twenty-seven of Wackenhut's forty-two employees, under terms and conditions different from those specified in the Wackenhut collective bargaining agreement. The test used by the *Burns* Court was whether a majority of employees hired by the new employer were represented by a recently certified bargaining agent.[27] Since the same employees were doing the same work in

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with it only at the risk of committing an unfair labor practice. In such a situation, the Board has for many years—and still does today—relied upon a set of criteria to determine whether the 'employing industry' remains substantially the same. The questions asked by the Board are: (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services.

As some commentators appraise the Supreme Court's Wiley decision, the Court addressed itself to essentially the same considerations as would the Board. To be sure, the Court did not expressly so state but there seems to be a substantial opinion that it was the Board's successorship criteria that were involved by the Wiley court.

Address by NLRB Member John H. Fanning, Texas State Bar Annual Convention, Labor Law Section (July 7, 1967), published in 1967 LABOR RELATIONS Y.B. 284, 286 (1968).

25. *See, e.g.*, Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973) (successor ordered to reinstate wrongfully discharged employee of predecessor); Teamsters, Chauffeurs & Helpers, Local 249 v. Bills Trucking, Inc., 493 F.2d 958, 960 n.20 (3d Cir. 1974) (successor held to have breached bargaining agreement by terminating predecessor's employees); Overnite Transp. Co. v. NLRB, 372 F.2d 765, 768 (4th Cir. 1967) (court held successor committed unfair labor practice by unilaterally changing terms of employment on day of changeover). Typical of the cases following *Wiley* are United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964), and Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964). In *Reliance*, the court referred to the bargaining agreement as "an embodiment of the law of the shop." 335 F.2d at 895. The court held, in *Reliance*, that the new employer could not impose terms and conditions of employment in disregard of the existing labor contract. *Id.* In *Wackenhut*, the Ninth Circuit held that a corporation which purchased assets of a partnership and hired most of its employees was bound by the collective bargaining agreement of its predecessor. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

26. 406 U.S. 272 (1972).

27. *Id.* at 281.

the same place, the Court held Burns to be a successor.[28] The extent of a labor board's inquiry under *Burns* is unclear for two reasons. First, the Court confined its holding to the unusual facts of the case.[29] *Burns* involved two competitor guard companies, rather than an outgoing and an incoming owner. Second, the opinion focuses on the extent of a successor's obligation and only secondarily addresses the definition of a successor. Yet, even though the Court expressly limited *Burns* to its facts, *Burns* is a current test for successorship. The *Burns* test for measuring whether a new employer had hired a controlling majority of the predecessor's employees continues to be cited.[30]

The most recent United States Supreme Court successorship case, *Howard Johnson Co., Inc. v. Hotel & Restaurant Employees Detroit Local Joint Executive Board*,[31] left the successorship doctrine in a state of flux because the Court neither overruled *Wiley* nor resolved potential conflict between *Burns* and *Wiley*.[32] In *Johnson*, a national restaurant and hotel chain bought out Grissom, its franchise owner.[33] Although the business remained the same,[34] Howard Johnson retained only nine of the fifty-three former Grissom employees.[35] Despite the similarity in business operation before and after the changeover,[36] the Court held that Johnson was not a successor because there was no substantial continuity of the work force.[37] Thus, Johnson was under no obligation to observe the arbitration clause in its predecessor's contract.[38]

Both *Burns* and *Johnson* differ from *Wiley* in relying on continued majority of the work force as the test for determining successorship, rather than similarity of operations.[39] *Burns* and *Johnson* both employ a strictly numerical formula: if there is fifty percent plus one, there is a successor. The two cases differ, however, in their point of reference when measuring the majority. Under *Johnson*, the NLRB looks at the predecessor's work force. If the new employer retains a majority of the

28. *Id.* at 278.
29. *Id.* at 274.
30. Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 611-12 (9th Cir. 1977), *rev'g* 225 NLRB 1029 (1976).
31. 417 U.S. 249 (1974).
32. SECTION OF LABOR RELATIONS LAW, ABA, THE DEVELOPING LABOR LAW 204 (Cum. Supp. 1971-75) [hereinafter LABOR RELATIONS LAW].
33. 417 U.S. 249, 251 (1974).
34. *Id.* at 267 (Douglas, J., dissenting).
35. *Id.* at 252.
36. *Id.* at 267 (Douglas, J., dissenting).
37. *Id.* at 263.
38. *Id.* at 264-65.
39. While the leading decisions on successorship disagree as to what is necessary before a new employer is a successor, all of the standards require some degree of continuity before and after a change in ownership. LABOR RELATIONS LAW, *supra* note 32, at 205-06.

old work force, the new employer is a successor.[40] On the other hand, under *Burns*, the NLRB examines the *new employer's* work force. If the retained employees constitute more than half of the new work force, the new employer is a successor.[41] The consequence of the *Burns* and *Johnson* tests is a loophole which an employer can use to avoid union obligations by refusing to hire a majority of the predecessor's work force.[42] As a result, application of these tests defeats the reasonable expectations of the work force that similar conditions will continue.

The *Burns* and *Johnson* tests also are less flexible and involve fewer considerations than *Wiley*. The NLRB and the courts are no longer free to weigh the competing interests of employers and employees. As Mr. Justice Douglas noted in the *Johnson* dissent, "[t]he effect [of the *Johnson* test] is to allow any new employer to determine for himself whether he will be bound, by the simple expedient of arranging for the termination of all of the prior employer's personnel."[43]

If the Court applied each of the three tests to the same factual situation, each test could produce a different result. *Wiley*, the most flexible test, would be most likely to impose successor responsibility on a new employer.[44] The later tests of *Burns* and *Johnson*, while potentially producing different results, are similar in that each would less readily find a new employer to be a successor.[45]

Comparison of the earlier and later Supreme Court successorship decisions shows a relationship between the strength of labor unions and the weight the Court gives to the workers' concerns. In *Wiley*, the

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40. *Id.*

41. 406 U.S. 272, 281 (1972). *See generally*, LABOR RELATIONS LAW, *supra* note 32, at 205-06. Although *Johnson* is the most recent United States Supreme Court successorship case, the NLRB seems to favor *Burns*. *See, e.g.*, Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609 (9th Cir. 1977), *rev'g* 225 NLRB 1029 (1976); NLRB v. Band-Age, Inc., 534 F.2d 1 (1st Cir. 1976), *enf'g* 217 NLRB 449 (1975).

42. Legal writers have levied much criticism at the *Burns* and *Johnson* tests as they operate in an industrial context. *See, e.g.*, Note, *supra* note 5 at 159-61.

43. 417 U.S. 249, 269 (1974).

44. If the ALRB applied the *Wiley* test for successorship to the case of Jones' Vegetable Farm, the Board would most likely hold the new employer, Vegi-Gro, to be a successor. Under the *Wiley* analysis, the ALRB would look to the overall business operation to see if it is substantially the same both before and after the change in ownership. Vegi-Gro plans to operate the same type of business, grow the same crop on the same land, and use the same methods of production as did Jones. Since there is "substantial continuity of the employing enterprise," 376 U.S. 543, 551 (1964), the parties will reasonably expect Vegi-Gro to be a successor.

45. An agricultural employer can exploit the loophole provided by *Burns* and *Johnson* far more easily than an industrial employer. *See* text accompanying note 42 *supra*. Under the *Johnson* test, for example, Vegi-Gro would not be a successor because it hired less than a numerical majority of the work force present at the time of transaction, and only a fraction of the predecessor's peak season work force. If Vegi-Gro hires two new employees to fill out the four person permanent work force, it escapes successor responsibility under the *Burns* test as well.

Court reflected earlier successorship doctrine when it gave considerable weight to the workers' interests and protected the labor unions' bargaining status. When the Court decided *Johnson* in 1974, labor unions had amassed considerable economic strength, and hence the Court was more concerned about the economic interests of employers.

III. A Proposed Test for Agricultural Successorship

In fulfilling the ALRA's mandate to follow NLRB precedent when applicable, the ALRB must analyze each of the NLRB successorship tests in light of the realities of California agriculture. Because such analysis will reveal important defects in each test, it is incumbent upon the Board to develop a new test for agriculture.

This article proposes that a new agricultural employer should be a successor when it hires substantially the same number of peak season employees with similar skill levels as did its predecessor. The ALRB can compute the number of peak season employees on the basis of the employer's payroll or statistical information.[46] If the change in ownership occurs between peak seasons, the ALRB should adopt a rebuttable presumption that the operations will remain substantially similar and allow the union to retain its bargaining representative status. Proof that the new employer will change its operations so as to affect the size or nature of its work force will rebut this presumption. Thus, the ALRB would hold a new employer obligated to the predecessor's work force unless it substantially changes its labor requirements.

In the hypothetical, Vegi-Gro would be a successor under the proposed test because it continued basically the same business operation. While Vegi-Gro retained only two of Jones' former employees, it also made no changes in the business operation. Unless Vegi-Gro can prove that it will not need a comparable number of peak season workers as did Jones, because it plans to mechanize or change from a labor-intensive crop to a non-labor-intensive crop,[47] it would be a successor. If

46. Sources of statistical information include the following: Employment Development Department, Employment Data and Research Division, Farm Labor Report and U.S. Department of Commerce, Bureau of the Census, 1974 Census of Agriculture, Preliminary Report (Oct., 1976). The ALRA expressly authorizes the use of statistical information in estimating peak employment. Cal. Lab. Code § 1156.4 (West Cum. Supp. 1978) states, "the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the state of California and upon all other relevant data."

47. Mechanization affects the work force requirements acutely. For example, raisin grapes require 45-90 people per hour per acre to harvest. J. Mamer & S. Hayes, Man-Hour Requirements in Selected California Crops (1976). Only one raisin harvesting machine is needed, however, to harvest the same acre in the same period of time. R. Curley, Status of Harvest Mechanization in California Tree Fruit and Grapes, (Agricultural Extension, U.C.D., July 1, 1976). The effect on the work force can be drastic; the cotton picking machine used in California beginning in the 1950's

Vegi-Gro maintains a labor-intensive operation but hires none of the predecessor's workers, it is a successor nevertheless.

The value of the proposed test can best be judged by comparison with all three NLRB tests. Although the *Johnson* decision seems to jeopardize the continued vitality of the earlier successorship cases, all three cases are still cited. Even though the Court expressly limited *Burns*, and the opinion emphasizes the extent of a successor's obligation, *Burns* continues to receive wide acceptance as a successorship test.[48] Further, although the numerical majority of the work force as measured by *Burns* or *Johnson* remains determinative, the NLRB continues to cite the *Wiley* factors.[49] For this reason it is necessary to analyze all three tests rather than just the most recent. Application of each test to five important characteristics of California agriculture shows the benefits of the proposed test.

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eliminated over one million manual labor jobs. R. TAYLOR, *supra* note 14, at 39. Further, mechanization affects skill levels in that "mechanization on the farm has created a greater need for semi-skilled labor to perform the more demanding tasks, including the operation and maintenance of harvesting equipment." Comment, *Farm Labor Housing in California*, 2 U.C.D. L. REV. 71, 76 (1970). Fruits and vegetables require more human labor per cultivated acre than grain and cotton. C. MCWILLIAMS, *supra* note 14, at 64-65. These crops are thus called labor-intensive. For example, the non-labor-intensive crop of cotton grown in Kern County, California (July-October, 1976) required only 1.2-2.2 person hours of labor per acre to harvest. In contrast, lettuce, a labor-intensive crop, required 38-76 person hours per acre. Onions, an extremely labor-intensive crop, required 180-336.7 person hours per acre. J. MAMER & S. HAYES, *supra* this note.

The ALRB has officially recognized the effect of a change from a labor-intensive crop to a non-labor-intensive crop in Albert C. Hansen, 2 ALRB No. 61 (1976) (Hansen Farms). In *Hansen Farms*, a supervisor told workers before an election that if the union won, the employers "'would not plant any more lettuce; they would plant alfalfa.'" *Id.* at 8. The Board noted that "alfalfa and barley require little if any work by farmworkers. Thus, the result of planting these crops, instead of lettuce, would be to put the lettuce crews out of work." *Id.* at 9. Further, in Arnaudo Bros., Inc., 3 ALRB No. 78 (1977), the ALRB held that an employer's statements about planting alfalfa rather than tomatoes meant that there was a threat of eliminating a sizeable portion of the work force.

48. *See* text accompanying note 30 *supra*.

49. In the recent case of C.M.E., Inc., 225 NLRB 514 (1976), the NLRB based its finding of successorship on the fact that "a majority of the employees after the change in ownership or management were employed by the preceding employer." *Id.* at 520. The Board then proceeded to examine whether the changeover affected the "essential nature" of the employing enterprise. *Id.* at 521. In so doing, the Board evaluated the product, plant managers, key workers, hiring patterns, supervision and production operations. All of these factors are reminiscent of those the Court enumerated in *Wiley*. *See* note 24 *supra*.

Additionally, a recent United States Supreme Court case, Nolde Bros., Inc. v. Bakery Workers, Local 358, 430 U.S. 243, 249 (1977), reinforces the possibility of *Wiley's* continued validity as precedent. The Court held that an employer who terminated operations after the labor contract had expired has a duty to arbitrate over severance pay. Although the case involved a cessation of business rather than successorship, the Court quoted *Wiley* extensively as authority for the survival of an arbitration clause after the expiration of a contract. The Court found that labor contract obligations survived the termination of the employer's operations and required the employer to pay accrued benefits.

A. The Powerlessness of Farm Workers

One aspect of agricultural labor relations that creates problems in a successorship context is the general powerlessness of agricultural workers.[50] Unlike industry, historically agriculture has been unorganized.[51] Unprotected by the NLRA and under the control of growers,[52] California farm laborers have always worked under poor conditions.[53] Recognizing the farm labor unionization effort and the need for certainty and fairness in agricultural labor relations, the California legislature enacted the ALRA.[54]

Agricultural workers are largely unaware, however, of their newly created rights. This lack of awareness is partly because the ALRB is young and has suffered financial difficulties.[55] Moreover, the high incidence of illiteracy and semiliteracy among farm workers, many of whom do not speak English, keeps them from receiving information about their rights.[56] Thus, agricultural employers can more easily intimidate their employees than can their industrial counterparts.[57]

Until agricultural workers can organize and bargain effectively, they will be unable to protect themselves from abuse and to improve their working conditions. In order to help the workers fulfill these legitimate goals, the ALRB should adopt a successorship policy that reinforces, rather than disrupts, collective bargaining. The Board must protect the bargaining relationship during a change in ownership. It must allow this relationship to dissolve only when the reasonable expectations of the parties would not thereby be defeated. Compensation for farm worker powerlessness equalizes the strengths of the parties only in order to promote collective bargaining. Once the parties are at the bargaining table, they will be free to further their legitimate economic interests.

The simple numerical formulas offered by the *Burns* and *Johnson* tests protect only the employer's bargaining strength. If applied to agri-

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50. *See generally Hearings on H.R. 881 (Title I), H.R. 4007, H.R. 4011, H.R. 4408 and H.R. 7513 Before the Subcomm. on Agric. Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 107-112 (1973) (statement by Dolores Huerta, Vice-Pres., United Farm Workers) [hereinafter *1973 Hearings*].

51. Martin & Rochin, *Emerging Issues in Agricultural Labor Relations*, 59 AM. J. AGRIC. ECON. 1045, 1048, 1050 (1977); Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1946 (1966).

52. *See* note 12 *supra*.

53. *Hearings on H.R. 5010 and Related Bills, Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. (1971) (paper presented by Gary Goodpaster, Associate Counsel, Subcomm. on Agric. Labor) [hereinafter *1971 Hearings*].

54. 1975 Cal. Stats. 4013.

55. Grodin, *California Agricultural Labor Act: Early Experience*, 15 INDUS. REL. 275, 275 (1976); Martin & Rochin, *supra* note 51, at 1049.

56. ALRB v. Superior Court, 16 Cal. 3d 392, 415, 546 P.2d 687, 702, 128 Cal. Rptr. 183, 198 (1976).

57. Guimarra Vineyards Corp., 3 ALRB No. 21, 8 (1977).

culture, these tests would allow the employer to take advantage of the large, unskilled work force and compel the union to start organizing anew with each change in ownership. Union growth and effectiveness would be seriously hampered, and negotiations would be delayed.

If the ALRB sanctioned such a result, it would favor one party to collective bargaining at the expense of the other. This would be contrary to the express goals and purpose of the ALRA,[58] fairness to all parties.[59]

The *Wiley* test, although more equitable to the union, fails to provide certainty. Because *Wiley* involves consideration of many factors, a party contemplating a change in ownership would be unable to determine if the new employer would be a successor. When the outgoing and incoming employers cannot be certain whether the new employer will be a successor, they cannot adjust the terms of the transaction fairly to allocate the cost of labor obligations.

Wiley's lack of predictability also harms the union. Agricultural unions presently are small and underfinanced.[60] The *Wiley* test would provide insufficient notice to an incumbent union of a new employer's status and would require the union to expend its limited resources to litigate the successorship issue more often than if a more predictable test were used to measure a successor.

Since agricultural unions and employers are new to collective bargaining, the parameters of labor obligations must be clear. The proposed standard strikes a balance between the highly predictable but unfair *Burns* and *Johnson* tests and the more unpredictable but equitable *Wiley* test. The proposed test finds a successor when the new employer needs the same number of workers with similar skill levels, when measured at peak season, as did the former employer. Under the proposed test, the determinative factors, size and nature of the peak season work force, are entirely within the control of the new employer. The new employer will know whether it will mechanize and what crop it will plant. Incoming and outgoing employers will, therefore, be able to negotiate their transaction with certainty of the labor obligations involved.

Employees have protection under the proposed test because they continue to be represented by their union if the business operation of a farm remains substantially unchanged. If the business mechanizes or becomes non-labor-intensive so that the operation is drastically altered, the workers would not reasonably expect their relationship with the em-

58. *See* note 16 *supra*.

59. *See* note 54 *supra*.

60. In Hemet Wholesale, 2 ALRB No. 24, 6-7 (1976), the ALRB found that in 1973 the United Farm Workers Union received cash receipts of $187,754. The Board further found that the UFW consistently did not collect initiation fees and assessed only two percent of workers' monthly earnings as union dues. *See* Comment *The Unionization of Farm Labor*, 2 U.C.D. L. REV. 11 (1970).

ployer to remain unchanged, and the new employer would not be a successor.

B. The Replaceable Nature of the Farm Labor Force

The ability to easily replace the work force, more than any other aspect of California agriculture, makes the *Burns* and *Johnson* formulations unsuitable. Agricultural work requires little skill or training,[61] and California has a large surplus of agricultural laborers.[62] Therefore, an agricultural employer can change its entire work force without hardship. Under *Burns* and *Johnson*, a new employer who hires all new workers is not a successor. Because an employer can change its entire work force with little hardship, no agricultural employer need ever be a successor.

The replaceable work force poses less of a problem under the *Wiley* test for successorship than under either the *Burns* or the *Johnson* test. Under *Wiley*, the identity of the work force is only one of several factors considered in deciding whether to hold the new employer to the obligations of a successor.[63] Under *Wiley*, however, if the employer retains less than a majority of the work force of its predecessor, the other factors of the test comprising continuity of the employing enterprise must be stronger for the NLRB to find the employer a successor. Thus, while it is possible to fix successor status on an employer who hires all new personnel, it is unlikely that the NLRB would do so.

The proposed test for successorship takes into account the high turnover of the work force. This test would measure the work force at peak season to determine if there are substantially the same number of workers with similar skill levels as there were under the predecessor. Under the suggested test, a new employer could hire a totally new work force and still be a successor because the number of workers, rather than their identity is considered. Thus, the new employer could avoid its labor obligations only by making major changes in the business operation.

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61. Lewin, *Representatives of Their Own Choosing: Practical Considerations in the Selection of Bargaining Representatives for Seasonal Farmworkers*, 64 CALIF. L. REV. 732, 739 (1976); *1973 Hearings supra* note 50 at 37 (remarks of Hon. Burt L. Talcott, member of Congress).

62. 116 CONG. REC. 7976, 7977 (1970) [hereinafter CONG. REC.]; Moberly, *Collective Bargaining Laws and Agricultural Employees: Some Necessary Changes*, 1976 UNIV. ILL. L.F. 469, 469 n.1 (1976).

63. Although the Court in *Wiley* did not specifically enumerate the factors which comprise substantial continuity of the employing enterprise, the NLRB and the courts, when applying the *Wiley* test, have considered (1) use of the same plant, machinery, equipment and methods of production and (2) substantially the same work force doing the same jobs under the same conditions with the same supervisors. *See* note 24 *supra*.

C. The Seasonal Nature of Farm Labor

Employment in California agriculture is seasonal.[64] Consideration of this fact is necessary in evaluating a successorship test. The California agricultural work force includes both permanent and temporary employees, with the latter outnumbering the former.[65] Although all agricultural workers have a sufficient community of interest to comprise a single bargaining unit, significant differences between regular and seasonal employees exist.[66] For example, permanent employees are more concerned with higher hourly wages. Seasonal workers, on the other hand, consider harvest piecework rates to be of primary importance. Furthermore, the ALRB's test for successorship must be consistent with the ALRA's purpose in meeting the needs of seasonal workers.[67] A change in ownership should not divest seasonal workers, absent at the time of the changeover, of their right to be represented by a certified collective bargaining representative.

The seasonal nature of agriculture renders both the *Burns* and *Johnson* tests inappropriate for the ALRB. Both tests are based on the size and identity of the work force employed by the outgoing employer at the time of the change in ownership. In *Burns*, the determinative factor is the number of the predecessor's employees that the new employer retains in comparison to the new employer's total work force.[68] The *Johnson* test, on the other hand, determines how much of the outgoing employer's work force the incoming employer retains.[69] Under *Burns* and *Johnson*, the employer can decide unilaterally whether to be a successor by hiring or refusing to hire the predecessor's work force. If the ALRB applied these tests to an agricultural changeover occurring during off-season, the employer could make this decision without regard to the seasonal workers. Because harvest seasons are so short,[70] even if

64. For an excellent discussion of how the seasonal nature of agriculture contributes to farm labor problems, *see generally* CONG. REC., *supra* note 62.

65. ALRB v. Superior Court, 16 Cal. 3d 392, 399, 546 P.2d 687, 691, 128 Cal. Rptr. 183, 187 (1976); CAL. LAB. CODE § 1156.4 (West Cum. Supp. 1978).

66. Lewin, *supra* note 61, at 756-57.

67. The ALRA contains provisions framed to ensure that the Act covers workers not present at a farm for most of the year and who may not be reemployed at the same farm in succeeding years. The legislature's solicitude for the needs of seasonal workers is primarily evidenced by the ALRA's provisions for short election periods, during which at least 50% of the employer's peak season work force must be present. CAL. LAB. CODE §§ 1156.3, 1156.4, 1156.7 (West Cum. Supp. 1978). *See generally* Martin & Rochin, *supra* note 51, at 1048; Lewin, *supra* note 61, at 745.

68. The Supreme Court stated that "a majority of the employees hired by the new employer" was determinative of successorship. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 281 (1972).

69. 417 U.S. 249, 263 (1974).

70. Most harvests are four to six weeks long, although a two-week harvest is not uncommon. *1973 Hearings*, *supra* note 50, at 120 (statement of Dolores Huerta, Vice-Pres., United Farm Workers). *E.g.*, melons and cherries are harvested in a short, one-

the outgoing and incoming employers transact a change in ownership during peak season, it is unlikely that the changeover would be completed before the temporary workers left the farm.

The *Wiley* test would be as unsuitable as *Burns* and *Johnson* for agriculture. The seasonal nature of agriculture causes changes in the size and composition of the work force,[71] and in the character of the employing enterprise. Because changes occurring as a result of a transfer of ownership cannot be distinguished from those occurring in response to a different growing season, a successorship test which only measures changes in the employing operation before and after a transfer of ownership is not suitable for agriculture.

The suggested test, which focuses on number rather than identity of peak season workers, encompasses both permanent and temporary workers. It is thus consistent with the goal of the ALRA, to bring collective bargaining to all agricultural workers.

D. Difficulty in Identifying Agricultural Workers

Another distinguishing aspect of agricultural labor is the difficulty of identifying the workers. Many agricultural employers rely primarily on labor contractors to supply workers.[72] The employer, under the labor contractor system, employs a contractor who hires the workers, transports them between the labor camp and the field, supervises them, and, in many cases, distributes their wages. The workers often have no contact with any representative of the employer other than the labor contractor.[73] This minimal personal contact between agricultural employers and the workers causes difficulty in identifying the workers.

Another factor contributing to worker anonymity is the seasonal nature and rapid turnover of the work force.[74] Workers are rarely at a farm more than six weeks. Additionally, a single employer will some-

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week period, while avocado and fig harvests are only five days long. Lewin, *supra* note 61, at 742.

71. Many agricultural workers arrive in a town at harvest, stay only until the crop is picked, and move on. ALRB v. Superior Court, 15 Cal. 3d 392, 414-15, 546 P.2d 687, 702, 128 Cal. Rptr. 183, 198 (1976). Labor requirements vary from an offseason national low of 688,000 in January to a July peak of 1,745,000. Lewin, *supra* note 61, at 742. *See Hearings on H.R. 5010 and Related Bills, Subcomm. on Agric. Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 59 (1972) (statement by Hon. James G. O'Hara, member of Congress).

72. "A labor contractor is one who collects his fees and makes his profits from the laborers actually doing the work." Napa Valley Vineyards Co., 3 ALRB No. 22, 4-5 (1977), *citing* Johns v. Ward, 170 Cal. App. 2d 780, 786, 339 Pl2d 926, 929 (4th Dist. 1959). *See generally* Lewin, *supra* note 61, at 741; CONG. REC., *supra* note 62, at 7977.

73. CAL. SENATE FACT-FINDING COMM. ON LABOR AND WELFARE, CAL. FARM LABOR PROBLEMS, PT. 1, 177-84 (1961); R. TAYLOR, *supra* note 14, at 164. *See generally* Lewin, *supra* note 61, at 741; Comment, *Farm Labor Contractors and Low Farm Wages*, 2 U.C.D. L. REV. 39 (1970).

74. *See* ALRB v. Superior Court, 16 Cal. 3d 392, 414-15, 546 P.2d 687, 702, 128 Cal.

times own more than one ranch site, transferring workers between locations.[75] The significant number of undocumented immigrants in California further complicates the problem.[76] Identification problems are, therefore, important considerations.

A successorship test which, like *Burns* and *Johnson*, depends on the personal identity of the work force is inappropriate to agriculture. The *Burns* and *Johnson* tests both depend on retaining a majority of the predecessor's individual workers. Since the identity of agricultural workers is difficult to ascertain, the *Burns* and *Johnson* tests are impossible to apply accurately in an agricultural context.

Insofar as it depends on identity of the work force as one of its several variables, the *Wiley* test suffers from the same defect as *Burns* and *Johnson*. The *Wiley* test, however, is less objectionable than the *Burns* or *Johnson* tests for agriculture because identity of the work force is only one of several factors.

Since the proposed test does not depend on personal identity of the workers, the difficulty of identification presents no problem. This article suggests that objective factors, such as peak season number of workers and skill levels, be used to gauge whether the business enterprise remains substantially the same before and after the changeover. By substituting an easily measurable and constant factor, the test responds to the problems of rapid turnover and lack of identity.

E. Difficulty in Identifying Agricultural Employers

Only the actual employer or its agent can participate in collective bargaining. The ALRB must, therefore, place the duty to bargain on the true employer. Difficulties in identifying the new employer complicate this task. Large non-farm corporations and limited partnerships own many California farms.[77] One commentator reports that "the large com-

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Rptr. 183, 198 (1976); CAL. LAB. CODE § 1156.4 (West Cum. Supp. 1978). *See generally* CONG. REC., *supra* note 62.

75. *See, e.g.*, Louis Delfino Co., 3 ALRB No. 2, 3 (1977); Tenneco West, Inc., 3 ALRB No. 92, 16-17 (1977).

76. *1971 Hearings*, *supra* note 53, at 108, 110 (statement by Richard J. Beyla, Interstate Research Associates). This problem is often concealed by inadequate record-keeping by labor contractors and agricultural employers, especially regarding the identity of workers and reemployment of workers from season to season or farm to farm. *See, e.g.*, Tenneco West, Inc., 3 ALRB No. 92, 13 (1977). *See also* Lewin, *supra* note 61, at 755.

77. Large non-farm corporate investors are gradually taking over, radically altering the structure of our agricultural sector. Family farmers simply cannot compete financially with large non-farm investors who have great reserves of capital at their disposal. Thus, farms have become fewer in number, larger in size, more specialized in the commodities they produce, and more energy intensive. . . .

Statement by Hon. Leon Panetta, member of the Assembly, before Cal. Assembly Comm. on Agric. (July 27, 1977). For a good discussion of the complex problems in-

panies are rapidly becoming 'the agricultural giants who control super farms' . . . ."[78] Corporations, such as Superior Oil, Purex, International Telephone and Telegraph, and Tenneco, employ two-thirds of California's farm laborers and produce two-thirds of all agricultural products in the state.[79] Large corporations that own farms seldom make their ownership public knowledge. Thus, identifying the employer becomes difficult.

Another complication is that large corporations may not have the expertise necessary to operate a farm. They, therefore, enter into complicated lease-back and managerial arrangements with the former owner of a farm.[80] Thus, the workers are confused as to who the owner is, who the employer is, and who has the obligations to the labor force. Complicated patterns of ownership create a potential for employer abuse. Any agricultural successorship test must protect the workers from the effects of the difficulty of identifying the employer.[81]

Because patterns of agricultural ownership and control are complex, and employers are not easy to identify, the test the ALRB adopts must be based on objective criteria which are easily measured and readily identifiable regardless of the organization of the enterprise.

The *Wiley* test for finding a successor only compounds the complexity and confusion surrounding California agricultural ownership. *Wiley* requires the union to show, through multiple factors, that the employing industry is substantially the same before and after the change in ownership. The difficulty of *Wiley* is that because agricultural ownership is complex, the union has limited access to information about the *Wiley* factors. Further, since agriculture is largely seasonal, many of the *Wiley* factors will be at the planning stage at any given time. While the employer has knowledge of these unimplemented characteristics of its operation, the union does not.

By using the work force as the sole factor determining a successor, the *Burns* and *Johnson* tests avoid all reliance on characteristics of the employing enterprise. The ALRB should adopt a successorship test which similarly avoids the confusion of complex ownership patterns, but

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volved in speculative investments in agriculture, *see* Taylor, *The Tax Shelter Farmers*, 224 NATION 590 (1977). *See generally*, Tenneco West, Inc., 3 ALRB No. 92, ALO Report, 4-5 (1977); How Limited Partnerships May Affect Agriculture, Background Paper for Hearing Before Cal. Assembly Comm. on Agric. (July 27, 1977).

78. Lionel Steinberg, president of the State Board of Food and Agriculture, Los Angeles Times, Nov. 12, 1976, § 2, at 2, col. 1.

79. *Id.*

80. For example, when Ranier Industries bought the Robert Mondavi Winery, it agreed that Robert Mondavi and his heirs would retain complete supervision of the winery. Cannon, *Wine Feud Ends, Mondavi House No Longer Divided*, Los Angeles Times, June 12, 1977, § 4, at 1, col. 1.

81. This is particularly true where complicated ownership patterns are coupled with widespread anti-union animus. Martin & Rochin, *supra* note 51, at 1050.

which does not incorporate the inequities of the *Burns* and *Johnson* tests.

The test proposed herein creates a rebuttable presumption of successorship. When a farm changes hands, the new employer is a successor unless it demonstrates that it will not hire substantially the same number of peak season employees with similar skills as did its predecessor. This test eliminates the problem of identification by putting the burden of proof on the employer. When a union claims that the new employer is a successor, the new employer must come forward with proof that it intends to change its operation in a manner that will affect the size and nature of the work force, and is therefore not a successor. In this way, a certified union can retain its bargaining status without having to untangle the complicated and often invisible corporate structure of a farm.

IV. Conclusion

In developing a doctrine of successorship, the ALRB must balance two considerations which are often in conflict: the mandate of the ALRA to follow NLRB precedent when applicable and the necessity of creating a standard appropriate to agricultural labor. In considering the applicability of existing NLRB precedent, the Board must analyze each of the three United States Supreme Court tests for successorship in light of the problem areas in agricultural labor. Such analysis reveals serious defects in these tests, which an agricultural successorship test must correct to be practical and fair.

The authors propose a test for agriculture that is both equitable and workable: a new employer is a successor if it hires substantially the same number of peak season employees with similar skill levels as did its predecessor. By adopting the proposed test, which contains elements of all three tests used by the NLRB and allows for the unique realities of agriculture, the ALRB will have an equitable and appropriate standard.

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