

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

TEPUSQUET VINEYARDS,)	
)	
Employer,)	Case No. 83-RC-2-OX(SM)
)	
and)	
)	
UNITED FARM WORKERS OF)	10 ALRB No. 29
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
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DECISION AND ORDER
SETTING ASIDE ELECTION

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), a representation election was held on February 11, 1983, among the agricultural employees of Tepusquet Vineyards (Employer or Tepusquet). The Tally of Ballots showed the following results:

UFW.	30
No Union	5
Unresolved Challenged Ballots	<u>5</u>
Total	40

Pursuant to Labor Code section 1156.3 (c) , ^{1/} the Employer timely filed objections to the election, one of which was set for hearing.

The objection set for hearing was whether the Petition for Certification was filed at a time when the Employer was at

^{1/} All section references herein are to the California Labor Code unless otherwise specified.

least at 50% of its peak agricultural employment for 1983, and whether the Regional Director's peak determination was reasonable in light of the information available at the time of the investigation of the Petition for Certification.

An investigative hearing was conducted on May 16, 17, 18 and 19, 1983 before Investigative Hearing Examiner (IHE) Robert S. Dresser. The IHE found that the Regional Director's determination that the Petition for Certification was timely filed was reasonable given the information available to her at that time and recommended that the election results be certified.

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

The Board has considered the objections, the record, and the IHE's Decision and recommended Order of Certification in light of the exceptions and brief filed by the Employer, and has decided to affirm the IHE's rulings, findings,^{2/} and conclusions only to the extent consistent herewith, and to dismiss the Petition for Certification.
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^{2/} There were various discrepancies between the numbers reflected in the payroll records and the numbers referred to by the witnesses, the IHE, or the parties. For example, although the parties stipulated that 111 employees worked during the payroll period ending October 11, 1982, the figure of 110 employees was used by the Regional Director and Board agents. A similar discrepancy exists as to the number of workers employed during the payroll period ending September 27, 1981. We note these discrepancies; however, as they do not affect our analysis or conclusions, we will use the numbers relied upon by the Regional Director and Board agents.

Regional Director's Peak Determination

This is a prospective peak case, which requires the Board to evaluate whether the Petition was filed at a time when the number of employees was at least 50% of the Employer's peak employment period, which would occur later in the year. Payroll records for the last full pay period before the petition was filed (the week ending January 24, 1983) showed a body count of 37 workers and, under the Board's Saikhon formula (Mario Saikhon, Inc. (1976) 2 ALRB No. 2), an average of 14 or 17 daily workers (depending on whether one particular day is excluded as being nonrepresentative). Payroll records for the Employer's peak employment week in 1982 (the week ending October 11, 1982) showed a body count of 110 workers and an daily average number of 61 employees. In 1981, the Employer's peak occurred over two consecutive payroll periods; peak under the Saikhon averaging formula was 53 workers (week ending September 27, 1981) while the peak body count (week ending October 4, 1981) showed 81 employees. However, during the course of the Regional Director's peak investigation, the Employer represented to Board agents that the week ending September 27, 1981 was its peak week for 1981. Payroll records for this week showed a body count of 59 employees. It was not until after the election that the Employer discovered the peak body count week for 1981 showing 81 employees,

During the peak investigation, the Employer argued to the Regional Director that a straight comparison of the 1982 peak figures to the prepetition figures demonstrated that the Petition was untimely. However, the Employer asserted that,

even if the peak question was close, it estimated a 15% increase in its 1983 peak employment over its 1982 employment figures due to production of 56 acres of grafted Muscat Canelli grapes.

Regional Director Judy Weissberg determined that the Petition was timely filed. She decided that the 1982 peak body count of 110 workers was abnormal and would not likely be the Employer's peak employment figure for 1983 because: 1) apart from the payroll period ending October 11, 1982, no other week in 1982 or 1981 contained a body count of more than 59 employees; 2) declarations supplied by Tepusquet workers during the investigation stated that no more than 55 workers were employed in the peak harvest seasons in 1980, 1981 and 1982; and 3) labor contractor Joaquin Gomez told Board agents that he brought in a group of 19 or 20 workers one day during the week of October 11, 1982 "as a favor" to complete work (the harvest of vines at the end of rows being machine harvested) left unfinished when a crew of workers was mistakenly sent home early. Based on the above, the Regional Director concluded that the Employer's "normal" peak body count was between 55 workers, as stated in the Tepusquet workers' declarations, and 59 workers whose names were contained in the payroll records. Assuming the 15% increase in labor needs projected by the Employer due to production from the grafted vines, the Regional Director calculated that the body count would range from 63.25 to 67.85 employees.^{3/} The prepetition body

^{3/} The Regional Director also testified that she developed her own formula for how many workers it would take to harvest a ton of grapes and arrived at essentially the same conclusion, i. e. , it would take an additional eight employees to harvest the 56 acres of Muscat Canelli.

count of 37 workers would thus be more than 50% of either 55, 59, 63.25 or 67.85 workers.

The Regional Director also relied upon the fact that the Employer did not provide requested information concerning the number of worker-days required to harvest the grapes in each year, nor did it provide the number of days (i . e . , harvest schedules) during which the harvest occurred in the years 1978-1982. The Regional Director stated at the hearing that, without this information, she was unable to develop a means to measure how many more work days or employees would be required in 1983 over the number of days or employees who worked in the 1982 harvest.

Relevant Law and Precedent

The statutory language applicable to prospective peak cases is contained in Labor Code section 1156.4:

Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather 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.

The peak requirement insures that the total number of employees eligible to vote is representative of the potential

size of the work force which will be bound by the results of the election. (See Wine World, Inc. (1979) 5 ALRB No. 41, Charles Malovich (1979) 5 ALRB No. 33.) At the same time, however, section 1156.3(c) states that "[u]nless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." The Board has stated that by this section the Legislature established a presumption in favor of certification of the results of an election and that the burden of proof rests upon the party objecting to the election. (See California Lettuce Co. (1979) 5 ALRB No. 24.)

Section 20310(a)(6) of the Board's regulations provides that if the employer contends that the petition is filed at a time when the number of employees is less than 50% of peak, the employer is required to provide evidence sufficient to support that contention. In Charles Malovich, supra, 5 ALRB No. 33, we found that it is more reasonable to require that the party with access to information concerning peak produce it in support of its claim rather than to require a Board agent to frame speculative questions about possibilities which might or might not affect employment at a particular ranch. (See also Domingo Farms (1979) 5 ALRB No. 35.)

The Employer argues that the Board agents, during the peak investigation, and the IHE, at the hearing, improperly placed upon it a burden of persuasion and proof that the peak requirement was not met. The Employer argues that its only burden during the investigation was to provide information to support its contention that the requirement had not been met. We agree with

the Employer.^{4/} The Board's regulation section 20310(a)(6) involves the employer's obligation to provide information concerning its peak contentions; Labor Code section 1156.4., on the other hand, prohibits the Board from holding an election if the peak requirement is not met. While the Board may properly require an employer to provide the necessary peak information most accessible to it, see Charles Malovich, supra, 5 ALRB No. 33, the responsibility still rests with the Regional Director to determine whether the peak requirement has been met. The Regional Director should investigate all relevant data, as our prospective peak cases have noted, including information not provided by or accessible to an employer, if reasonably apparent or accessible to the Board agents. Based upon all the information adduced during the investigation, the Regional Director must still determine if the employer is at least at 50% of its peak employment for that year. Only if an employer fails to provide the necessary information accessible only to it, which failure obstructs or precludes the peak determination, may the Regional Director properly invoke the presumptions of the Board's regulation section 20310(e).

How exactly to determine what an employer's prospective peak will be has been problematic. In Bonita Packing Co., Inc. (1978) 4 ALRB No. 96, we stated that it was incumbent upon the

^{4/} To the extent that a party challenges the timeliness of the filing of a petition through post-election objections, the burden of proving that the petition was untimely is, of course, borne by the objecting party. (See California Lettuce Co., supra, 5 ALRB No. 24.)

Board to develop standards for estimating peak employment which reflect such factors as crop and acreage data applicable on a statewide basis, so that employees and prospective representatives would know with some certainty when they may call for an election at an employer's ranch. Pending accumulation of more information, we stated we would continue to use the body count and Saikhon formulas as reasonable measures of timeliness of petitions even though neither one was wholly satisfactory in all circumstances. We have also stated that the body count formula should be used first, and only if the peak requirement is not met under this formula, should the Saikhon averaging method be applied. (A & D Christopher Ranch (1981) 7 ALRB No. 31.)

In applying the body count and Saikhon methods in prospective-peak cases, we have stated that the employer's payroll records for prior years are usually the most important single factor for estimating peak for the current election year; however, other factors such as changes in the types or varieties of crops planted, an increase or decrease in the acreage, or weather conditions may in any given situation be determinative of the peak question. (See Wine World, Inc., supra, 5 ALRB No. 41.) In Charles Malovich, supra, 5 ALRB No. 33, the Board held that it is reasonable for a Board agent to assume that the peak figure of the year preceding the year of the election is the most relevant to an estimate of peak, taking into consideration the crop and acreage statistics for the year of the election. (See also Kawano, Inc. (1977) 3 ALRB No. 25; Domingo Farms (1979) 5 ALRB No. 35.)

Thus, the first step in the determination of prospective peak is to look at the employer's payroll records for peak periods in prior years, paying particular attention to the previous year's peak figure, and to consider the impact of any changes in crops, acreage, weather, or any other factors from the prior years upon the employment needs in the election year. (See, for example, Kamimoto Farms (1981) 7 ALRB No. 4.5.) However, we also require an examination into the representative character of the prior years' peak figures. In Charles Malovich, supra, 5 ALRB No. 33, we stated that the previous year's peak employment figure was unusually high because of unexpected weather conditions, and the employer failed to show that the high level of employment of the prior year would continue. We noted that, under those circumstances, the peak number of employees hired in a single year may not accurately represent the potential size of the bargaining unit. A close examination of other past years' peak periods, as well as crop and acreage statistics and all other relevant data, will enable the Board to determine whether the most recent prior year is representative of the employer's peak employment needs and whether the number of workers employed during the prepetition payroll period will be representative of the potential size of the peak work force that will be affected by the election results.

Recognizing that there is a limited statutory time period in which elections can be held, and noting the need for speed and finality in deciding the results of an election, we have held that the standard of review in prospective peak cases

is whether the Regional Director's determination of peak was reasonable in light of all the information available to him or her at the time of the decision. (Charles Malovich, supra, 5 ALRB No. 33.) In Malovich, we stated that we would not be limited to a consideration of the methods actually employed by the Regional Director, but would independently examine the information available to him or her and determine whether a finding of timeliness was reasonable.

Analysis and Conclusions

Applying the above principles to the case at hand, we must determine whether the Regional Director's decision that the petition was timely filed was reasonable given the information available to her at the time. We find that it was not. Initially, it must be noted that if we follow the approach stated in Kamimoto Farms, Kawano, Inc. and Charles Malovich of examining the prior year's payroll records and any change in acreage or crops from that year as compared to the year of the election, there would be no question that the peak requirement was not met under either the body count or Saikhon methods. However, as noted in those cases, other factors or relevant data could be determinative of the peak question. We find that the Regional Director reasonably concluded that the hiring of a group of 21 workers in 1982 to pick end-row vines over a two-day period because a crew of workers was mistakenly sent home early was

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unusual and not likely to occur in 1983.^{5/} The Regional Director would have been justified in adjusting the 1982 peak body count figure of 110 by eliminating the 21 workers from the computations.^{6/} Such an adjustment would leave the peak figure for 1982 at 89 employees.

A peak figure of 89 employees for 1982 is, of course, in line with the 1981 peak figure of 81. We must determine whether the Employer's mistaken representation that its 1981 peak occurred during the payroll period ending September 27, 1981 forecloses consideration of the Employer's true 1981 body count peak of 81 workers. Under the facts of this case, we hold it does not. Normally, Board agents must be able to rely on the accuracy of statements or payroll records submitted to them by an employer during a peak investigation. For example, in A & D Christopher Ranch, supra, 7 ALRB No. 31, the employer claimed that the ending date for a particular payroll period was incorrectly marked, and thus a smaller number of employees was used to compute peak. We noted that it is the employer's

^{5/} We do not discount the five employees who worked five hours on the same day the group of 21 first worked. There is no showing of what type of work these employees did or whether their work was uncharacteristic of the Employer's typical labor needs for that day or week.

^{6/} Larry Lucas testified that the end-row vines could be picked by a regular hand harvesting crew or by workers brought in for just that purpose. Although Lucas stated it was not unusual to hire just to pick end-row vines if the regular hand-harvesting pickers were busy, he could not recall which of the two situations occurred in 1980 or 1981. Given labor contractor Gomez' statements that this was an unusual situation, the Regional Director's conclusion that a large group would not likely perform that work in 1983 was reasonable.

burden to keep accurate payroll records, and that Board agents were entitled to rely on the accuracy of the payroll information submitted by the employer. However, in Kamimoto Farms, supra, 7 ALRB No. 45, we upheld the IHE' s ruling that Board agents have a duty to investigate discrepancies in the information provided by the employer. In Kamimoto, the employer contended that it was not at 50% of its peak employment when the petition was filed. Yet, in its response to the petition, the employer stated that its peak would be 70 employees, while the prepetition number of workers was 40. The employer obviously meant to state that it anticipated an increase of 70 workers from its previous peak work force. The Board noted that the discrepancy could have been clarified by inquiries to the employer or attorney, both of whom were available.

We hold that the difference between the body count figure of 55 to 59 employees found by the Regional Director to be the "normal" peak figure and the Employer's 1982 peak figure of 110 workers merited further investigation by the Board agents. While the inflated nature of the 110 figure could have been explained in part by an adjustment involving the 21 workers who picked end-row vines, the resulting figure of 89 workers was still substantially higher than the 55 to 59 figure projected by the Regional Director. Although Board agents are not required to ask speculative questions about factors affecting peak, the Employer's initial information (involving a comparison of its prior year work force level and crop and acreage statistics with the corresponding data for the election year) was sufficient

under Board precedent to support its claim that the petition was untimely, and the Board agents therefore should have sought an explanation from the Employer concerning the substantial difference between the peak needs in 1981 and 1982. Instead, the Regional Director, upon realizing the difference between the 1981 peak of 59 employees and the 1982 peak of 110 workers, accepted the figure of 59 workers as the "normal" peak and directed that an election be held.

On the evening before the election, when the Employer's attorney, Ray Kepner, was told by Board agent Ricardo Ornelas that the 1982 peak was being disregarded as unrepresentative, Kepner stated that he believed the Employer had experienced a peak of 80 workers in a year prior to 1981. Kepner wanted to speak to Regional Director Weissberg that evening, but could not reach her. When Kepner spoke to Weissberg the next morning, he repeated his statement concerning the 80 employees. Weissberg told him to give the information to Board agent Carlos Bowker. When Kepner and Larry Lucas, the Employer's managing partner, spoke to Bowker by phone on Friday at noon, Lucas attempted to verify the 1982 peak figure of 110 employees by informing Bowker that twice the amount of tonnage was picked in the peak week as compared to the other harvest weeks. Kepner reiterated that a year prior to 1981 contained a peak of 80 workers. Lucas and Kepner both testified without contradiction that Bowker told them that, because it was the eighth day following the filing of the Petition, he would hold the election that afternoon and continue his peak investigation later. Under these circumstances,

we hold that the Employer did not have a sufficient opportunity to explain the difference between its 1982 peak employment figure and the 1981 figure relied upon by the Regional Director, or to investigate or correct its mistaken reliance on the wrong payroll period for its 1981 peak body count figure.^{7/}

We do not weigh as heavily as did the IHE the Employer's failure to provide such information as worker-days required to pick an acre or ton of grapes or how much tonnage was hand-harvested as compared to machine-harvested. Regional Director Weissberg, on cross-examination, admitted that she requested this information to allow her to devise a formula for determining how many more workers would be required to harvest the 56 acres of grafted Muscat Canelli grapes. This testimony is consistent with the testimony of the Employer's witnesses (Kepner, Lucas and labor consultant David Aquino) as to their understanding of the relevancy of the information requested. At most, the failure to provide all of the information requested would be a proper basis for refusing to credit the Employer's assertion that it would require a 15% increase in its 1983 work force to harvest the 56 acres of grafted Muscat Canelli grapes. It certainly is not a basis for disregarding the 1982 peak figure

^{7/} The IHE ruled that Weissberg advised Kepner during a phone conversation on Thursday at 4:00 p.m. that the unrepresentative nature of the 110 figure was being investigated. However, Weissberg's testimony does not support this finding. She suggested to Kepner only that they were investigating whether there was some fraud as to the 110 figure and whether the group of 21 workers who had picked end-row vines was unusual. Board agents Carlos Bowker and Ricardo Ornelas both testified that the unrepresentativeness of the 110 figure first surfaced late Thursday night.

of 110 altogether.

We evaluate the Employer's alleged failure to provide information in light of the Employer's overall efforts to cooperate with Board agents. Although the IHE found that the Employer failed to provide certain information which was requested, the record is clear that the failure resulted from a misunderstanding or lack of clear communication between Board agents and the Employer about what information was requested. The Employer consistently made itself or its staff available to provide payroll records, documents, and other information or to answer questions. On two occasions, the Employer went from Santa Maria to Paso Robles to provide information in order to accomodate Board agents. In our view, the Employer was most cooperative and was not withholding any information from the Board agents.

We also reject the IHE's analysis of the Employer's testimony concerning weekend work or penalties imposed by wineries for the delivery of overripe grapes. The point of this testimony was not that an unusual amount of work in 1982 necessitated a larger-than-normal work force, but, instead, that each year grapes must be harvested when they become ripe, even if this occurs on a day on which no one usually works. To fail to promptly harvest the grapes results in penalties being imposed. This testimony supports the Employer's contention that there is a one-week to 10-day peak period within the harvest season when the Employer's greatest harvesting activity occurs each year, weekends notwithstanding.

Comparing the prepetition payroll period number of 37 workers to the 1981 body count peak of 81 employees shows that the prepetition work force was 45.6% of peak, or 4.4% short of the required 50%. Comparing 37 to the adjusted peak of 1982 results in a margin of error of over 8%. The Board accepted a margin of error of 2.5% in Bonita Packing Co., Inc., supra, 4 ALRB No. 96, but rejected a margin of error of 7% in Wine World, Inc., supra, 5 ARLB No. 41. We hold that either 8% or 4.4% is too great a margin of error to meet the statutory peak requirement. Given that the Employer's peak employment in the year immediately preceding the election year was higher than the 1981 peak and that it was undisputed that the Employer expected an increase in production from the 56 acres of grafted Muscat Canelli grapes, which would require some increase in labor needs,^{8/} the evidence further supports our finding that the peak requirement was not met.

We do not adopt the dissent's position in Kamimoto Farms, supra, 7 ALRB No. 45, as urged by the IHE in this case. This position advocates the comparison of the number of workers employed during the prepetition payroll period to the Saikhon average number of job slots at peak. The rationale for this

^{8/}The Employer grafted 16 acres of grapes in late February 1983. During the peak investigation, the Employer did not reveal to the Board agents that it intended to do any grafting in 1983 because this decision was not made until shortly before the grafting took place. The IHE felt this indicated a less than candid approach by the Employer to the investigation and should be taken into account by the Board. Even if the Board were to consider this factor, a reduction of 16 acres in production in 1983 would not offset an increase in the Employer's labor needs to handle the production of 56 acres of Muscat Canelli.

argument centers on the fact that the statute (Labor Code section 1156.3(a)(1)) specifically calls for a comparison of the number of workers currently employed during the prepetition period (i.e., a body count) to the peak period of employment, which is more elusively described in Labor Code section 1156.4 as an estimation taking into account prior peak figures and crop and acreage statistics.

The Saikhon averaging method was formulated as a means to take into account turnover in a work force; an inflated body count number caused by employee turnover can be reexamined in terms of the average daily number of job positions to arrive at the work force size. However, the peak requirement exists to insure that the prepetition work force size is representative of the size of the work force at peak. If some turnover is a factor affecting the prepetition number of workers, the prepetition body count number may itself be an inflated figure which, when compared to an inflated body count number of workers caused by even more turnover at peak, may appear small and unrepresentative. In such a case, comparison of the average daily number of job slots during both the prepetition period and the peak period will provide a more meaningful picture of the representative character of the number of eligible voters than would the approach suggested by the dissent in Kamimoto Farms.

ORDER

By authority of Labor Code section 1156.3, the Agricultural Labor Relations Board hereby orders that the election

heretofore conducted in this matter be, and it hereby is, set aside and that the Petition for Certification be, and it hereby is, dismissed.

Dated: June 13, 1984

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

TEPUSQUET VINEYARDS

10 ALRB No. 29
Case No. 83-RC-2-OX(SM)

IHE DECISION

The IHE ruled that the Regional Director reasonably concluded that the UFW's petition for an election was filed at a time when the Employer was at 50% of its peak employment. Although the prepetition body count of 37 employees was less than 50% of the Employer's 1982 body count peak of 110 workers, the IHE approved of the Regional Director's decision that the Employer's 1982 peak was unusual and that its normal body count peak was between 55 and 59 workers, based upon a number of factors: (1) the Employer represented that its 1981 peak body count was 59; (2) the Employer failed to provide requested information necessary for the Regional Director to determine the representativeness nature of the 1982 peak figure; (3) workers' declarations stated that the normal work force was about 55 workers; (4) a group of 21 workers was brought in to complete work after a crew was mistakenly sent home early one day during the 1982 peak week; (5) workers worked Saturday and Sunday during the 1982 peak week, an unusual situation; and (6) the Employer was penalized in 1982 for delivering overripe grapes to wineries, a situation not likely to occur in 1983.

The IHE found that the Regional Director was reasonable in relying on the Employer's representation that its 1981 peak week contained 59 employees, even though the Employer's payroll records demonstrated a different body count peak week of 81 workers. The IHE ruled that even if the Employer's normal peak figure was 81 workers, the margin of error with respect to the peak requirement of 4.. 4% was acceptable. Finally, if the Board were to find the Regional Director's determination of peak was unreasonable, the IHE urged the Board to adopt the dissent's position in Kamimoto Farms (1981) 7 ALRB No. 45 whereby the prepetition body count is compared to the average daily number of workers employed at peak.

BOARD DECISION

The Board ruled that, while the Regional Director may properly require an employer to provide necessary peak information most accessible to it, the responsibility still remains with the Regional Director to investigate all relevant data and make a determination as to whether the peak requirement has been met. The Board found that, while the Regional Director was reasonable in eliminating the 21 workers who replaced a crew mistakenly sent home early from the peak body count figure of 110 employees, the Regional Director was not justified in eliminating the peak figure of 110 altogether. The Regional Director should have further investigated why the Employer's 1982 peak body count

was substantially higher than its purported 1981 peak body count. The Employer's mistaken representation as to its 1981 peak payroll period was held not to preclude the Employer from showing that its correct 1981 body count peak was a different payroll week because the Employer was not given a sufficient opportunity to respond to or investigate the discrepancy between its 1981 and 1982 peak figures. The Board did not place the same weight that the IHE did on the Employer's failure to provide requested information because the Employer was cooperative in providing information and any such failure occurred as a result of misunderstanding or a failure of communication.

The Board held that a margin of error of 4.4% in meeting the peak requirement is too great to accept. The Board refused to adopt the dissent's approach in Kamimoto Farms of comparing the number of eligible voters during the prepetition period with the daily number of workers employed at peak, and instead will continue to compare body count figures or the average daily number of workers during both the prepetition and peak payroll periods.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:

TEPUSQUET VINEYARDS,
Employer,

Case No. 83-RC-2-OX(SM)

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,
Petitioner.

APPEARANCES:

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Representing the Board Agent Witnesses

DECISION

STATEMENT OF THE CASE

ROBERT S. DRESSER, Investigative Hearing Examiner (IHE):

This case was heard before me on May 16, 17, 18 and 19, 1983, in Santa Maria, California, pursuant to a Notice of Hearing issued by the Executive Secretary of the Agricultural Labor Relations Board (hereafter ALRB) on April 8, 1983.

A Petition for Certification was filed by the United Farm Workers of America, AFL-CIO (hereafter "UFW") on February 3, 1983. (BX:1.)^{1/} The Petition was filed in the Oxnard office of the ALRB to certify the UFW as the bargaining representative of the agricultural employees of Tepusquet Vineyards (hereafter "Employer").^{2/}

A Notice and Direction of Election was issued by the Regional Director on February 11 and 12 at two locations (the Employer's Shandon Ranch and the Cinderella Motel in Paso Robles). (See BX:3) . The Tally of Ballots (BX:5) shows the following results:

UFW	30
No Union	5
Unresolved Challenges	<u>5</u>
TOTAL BALLOTS	40

The Employer timely filed a Petition to Set Aside Election, alleging six grounds for setting aside the election. Pursuant to her authority under 8 Cal. Admin. Code Section 20365(d) , the Executive Secretary on April 8 dismissed five of the objections and set one (Employer's Objection Number 1) for

1/Board Exhibits are noted herein as " BX . " The Employer and the Petitioner stipulated to the introduction of twelve Joint Exhibits which are noted herein as " JX . " The Employer's exhibits are noted herein as " EX " , and the Petitioners exhibits are noted herein as " PX . " All dates refer to 1983 unless otherwise indicated.

2/The UFW and the Employer stipulated that the UFW is a labor organization as defined in the Agricultural Labor Relations Act (hereafter ALRA or Act) and the Employer is an employer as defined in the ALRA. This stipulation is found in the Reporter's Transcript of the hearing. See Tr. I:29. (References to the Reporter's Transcript are noted herein as " Tr . " followed by the volume number in Roman numerals and the page numbers.)

hearing (See BX:6). The Employer did not file a Request for Review, and the only objection set for hearing was:

1. Objection No. 1, whether the Petition for Certification was filed at a time when the Employer was at 50% of its peak agricultural employment for 1983, and whether the Regional Director's peak determination was reasonable in light of the information available at the time of the investigation of the Petition for Certification.

Both the Employer and the UFW were represented at the hearing and were given full opportunity to participate in the hearing, including examining witnesses and filing briefs.^{3/}

This case presents a difficult prospective peak question. The bargaining unit involves a 438.2 acre wine grape ranch growing red and white varieties located at Shandon, California. The Employer's Response claimed that the peak of season or 50% of peak had not yet been reached and would not be reached until the fall harvest. The Employer's Response had an attachment which indicated that in 1982 there was a body count^{4/} of 110 employees who worked during the week of October 11 through October 17 during the 1982 harvest. The Employer also

3/During that portion of the hearing when Board agents testified, they were represented by attorneys from the Oxnard Regional Office.

4/The record includes the testimony of five witnesses called by the Employer and three witnesses called by the UFW as well as seven Board Exhibits, twelve Joint Exhibits, six Employer Exhibits and two Petitioner Exhibits admitted into evidence.

asserted that there would be an additional 55 acres put into production in 1983 which would produce a white variety of grape known as Muscat Canelli and would result in approximately a 15 to 20% increase in production and a corresponding increase in peak labor needs over and above the 1982 body count peak.

The Acting Regional Director for the Oxnard Region, Judy Weissberg, found after a comprehensive investigation that the Petition was not timely filed under a Saikhon averaging approach.^{5/} She found, however, that there was peak under a body count^{6/} and so found by disregarding as unrepresentative the 1982 peak body count week claimed by the Employer because of certain information which the investigating Board agents had adduced during the investigation. This information included evidence that the labor contractor brought in as a favor to the Employer at least 19 or more employees who otherwise would not have worked during that peak week and declarations obtained by the UFW from farmworkers who indicated that more people than were normally employed in past harvests had worked during the week of October 11 through 17. Weissberg found that the week preceding and the week following the week of October 11 through

5/This method compares the average number of employees working each day during the two relevant payroll periods. Mario Saikhon, Inc., 2 ALRB No. 2 (1976).

6/The body count is simply the conventional count of the number of employees in each of the payroll periods which are being compared. See Donley Farms, Inc., 4. ALRB No. 66 (1978) and A & D Christopher Ranch, 7 ALRB No. 31 (1981).

17, 1982, were reflective of the peak labor needs typically faced by the ranch. These two weeks had a body count peak of about 65 employees.

Weissberg also took into consideration the peak body count for 1981. This number equaled 59 according to Joint Exhibit No. 6 which is the only document which was actually handed over to the Board agents and which purportedly represented the peak week for 1981. It was not until well after the election, according to unrebutted testimony from Louis Lucas, the owner of the Shandon Ranch, that it was found that a subsequent week in fact had a body count peak of 81 employees. In addition, the Employer failed to provide employment levels from past years or explain why so many more workers were needed in 1982 than in past years.

The primary issue presented by this case is where to place the burden of providing information which is reasonably related to a determination of peak labor needs. The Employer's posture throughout the hearing and apparently throughout the investigation was that under recognized theories and computations of peak either by body count or by averaging, there was no theory by which Weissberg could find that this petition was timely filed regarding peak. The UFW on the other hand, contended that the 110 body count peak week was abnormal and could not be used to predict the Employer's peak labor need for 1983.

Weissberg found that the Employer failed to meet its burden of showing that the peak requirement was not met. For example, she contended that the Employer did not provide

information regarding the number of workers required to pick a ton or an acre of any of the varieties of grapes grown on the ranch. Nor did the Employer provide the Board agents conducting the investigation with the total number of tons harvested per variety (except for Zinfandel) or information indicating whether the tons were picked by hand or machine and the number of workers required to hand harvest or machine harvest the different varieties of grapes.

The following discussion sets forth my findings and analysis of the information available to the Acting Regional Director at the time of her investigation and decision on the peak question.

Throughout this Decision I have noted the specific transcript references, and have quoted specific passages of testimony, upon which I have relied in making my findings. Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of all the evidence and the parties' post-hearing briefs, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Background

Mr. Louis Lucas testified that he has been the managing partner for Tepusquet Vineyards from its inception in 1971 and he considers himself its founder. As managing partner, he is responsible for taking care of the "financials" and everything that goes with the business and farming aspects of the operation. Tepusquet Vineyards is headquartered approximately 12 miles east

of Santa Maria and its Shandon Ranch (the subject of this election) has been in existence since 1973. (Tr. I:32-33.)

According to Lucas, the Shandon Ranch (also referred to as Shandon Vineyard) is located approximately 18 miles east of Paso Robles and approximately 75 to 80 miles from the Tepusquet headquarters office in Santa Maria. He grows only wine grapes at the Shandon Vineyard. The red varieties include Cabernet Sauvignon and Zinfandel and the white varieties include Chenin Blanc, Sauvignon Blanc, Pinot Chardonnay and Muscat Canelli.^{7/}

The various operations involved in growing the wine grapes at Shandon are pruning, tying, suckering, general care and maintenance of the vineyard and harvesting. The pruning operation, which requires manual hand labor, lasts from six to eight weeks usually during the months January, February and March. Lucas testified that during the pre-election period there was pruning, tying and tightening wires with some flood control. He said that tightening the wires is something that is done once every three to six years, depending on need. Pruning and tying are normal operations at that time of the year. Approximately 20 to 30 people are ordinarily involved in the pruning and tying operation (this does not include tightening the wires or flood control). Suckering occurs usually sometime in May and takes around 20 people. The suckering operation lasts four to five weeks.

7/Tr. I:32-33. The ranch originally consisted entirely of red grapes. The varieties which have been removed by grafting have, therefore, been red. Tr. 111:60. Five acres of Chardonnay (a white variety) were grafted in 1978 for the first time.

The next seasonal operation requiring a substantial employee complement is the harvesting operation which occurs in the fall of the year (the middle of September until the middle of October). (Tr. I:33-35.) Lucas testified that the harvesting operation usually takes about four weeks. During the harvesting operation, he does not engage the same amount of labor during each of the four weeks. He testified that a few varieties of the wine grapes overlap. They usually start picking the grapes and build up to a peak and then subside in their activity. This is all "quite dependent upon weather and the ripeness of the grapes." (Tr. I:36.) Lucas testified that the 1982 peak lasted approximately 10 days. (Tr. I:38.) Yet, Lucas later testified that "you start off picking a few grapes and suddenly everything is ripe. And then for three or four weeks its a day-and-night operation." (Tr. II:26.) This would indicate the difficulty the Employer has in anticipating when the harvest will commence, how long it will last and how many workers will be needed. The difficulty in predicting peak labor needs for the wine grape harvest are further illustrated by Lucas' testimony in response to a question of how he builds up to a peak during a harvest season:

That's something that's determined again by Mother Nature as well as the sugar and acid of the grapes. Of course, the other thing is where the grapes are going, what wineries are--what the wineries' hours are. There's lots of things that go into when the grapes are picked. Tr. I:38.

Though harvesting at Shandon is done both by machine and by hand, most of the tonnage is machine harvested.

(Tr. II:25.) The mechanically harvested portion of grapes goes to one winery, but Lucas did not clearly identify that winery nor did the Employer introduce evidence indicating any specific requirements or criteria utilized by that unidentified winery in accepting or rejecting the machine harvested wine grapes from Shandon.

Lucas testified that they operate the machines at night, but also testified that:

we also run machines during the day when weather permits. At the same time we harvest by hand during the day. Some days we might pick two or three different varieties. The big question is when the grapes are ready to pick and where the grapes have to go. Some grapes are required to pick in two-ton gondolas; some grapes are required to pick in one-ton gondolas, as in the case of the Concannon Winery. Other wineries we have to pick in 4-by-4 bins. (Tr. 11:25.)

Again, he did not indicate whether the Concannon Winery is purchasing the grapes from the Shandon ranch or from his Santa Maria ranch.

For the acres harvested by machine, Lucas has crews pick the end rows by hand. Each morning he assigns the hand crews to pick those grapes that had been set up the previous day to go to whichever winery. (Tr. II:25.)

Lucas testified that at harvest time at the Shandon Ranch the first variety normally picked has been the Chenin Blanc. The next variety picked is Sauvignon Blanc, and at about the same time the Zinfandel is picked. The last variety picked is the Cabernet. Five acres of Chardonay would be picked " in

the middle of things." Some years the Chenin Blanc is light and the Sauvignon Blanc is heavy. (Tr. III:72.)

During the harvest season, Lucas testified that it is not unusual for his employees also to be harvesting for other employers in the area. (Tr. II:30.) Shandon Ranch draws from a single labor contractor who is not only the labor contractor for Tepusquet but is also the labor contractor for several other growers. In addition, the harvest season of the other growers would be about the same time as the harvest season at Tepusquet. In fact, the labor contractor is providing labor to other employers at the same time that he is providing labor to Tepusquet. Lucas further testified that the labor contractor moves his employees around. He testified that if Tepusquet needs employees on a certain day, usually Tepusquet will notify the contractor on the day before. There have been occasions where neighboring employers have had to pick their grapes quickly and the labor contractor "may be at noon pulling employees away from us and taking them somewhere else to help out that grower in getting his grapes picked." (Tr. II:29.)

When asked how he pays his employees, Lucas testified that during harvest the hand crews are paid on a piece-rate basis, so much per pound or so much per gondola which approximates certain tonnage. He said that they were not paid an hourly rate. (Tr. II:28.) The record is unclear as to the method of payment for the machine crews.

Ms. Rowina Bunch, the clerical employee who prepares the payroll for the Employer, testified that the Employer's

pay week runs from Monday through Sunday. The labor contractor, Mr. Gomez, submitted crew sheets as he got them. In addition to the labor contractor employees, the Employer also has "direct labor employees" who work at or in connection with the Shandon Ranch. (See JX:1 and 2 .)

In the Response to the Petition for Certification, (BX : 2) , the Employer asserted that for the calendar year 1983 the Employer's peak labor force would be 15% higher than the 1982 peak figure. This increase was due to the grafting of vines in 1982 which would result in 1983 in a 15% increase over 1982 in the approximate acreage to be harvested. The Employer's Response alleged that the average daily number of employees in the pre-petition payroll period (January 24 through January 30 , 1983) was either 14 or 17 (depending upon whether one day was deemed nonrepresentative) whereas the average daily number of employees for the alleged 1982 peak week of October 11 through 17 was 61 . The Response also indicates that 37 different employees worked during the pre-petition payroll period. Though the Response does not indicate the number of different employees who worked during the 1982 peak week, the Employer submitted Joint Exhibit 2 with its Response which does list the workers employed during that week.

Lucas described the process of grafting whereby the variety of wine grape is changed. Vines are sawed down, a piece of wood of the new variety is inserted into the vine that was sawed down and then when the new vine begins growing, they have the new variety. They are thereby able to change one variety

to another variety without pulling up the entire vineyard and replanting it. The first year when the grafting occurs, there is no production from the grafted acres. During the second year following the grafting procedure, there would be from 60 to 80% of normal production from that vine. By the third year following the grafting the vine will usually be back to full production. There is no warranty, however, that the graft will take. It may take the first time or it might be necessary to regraft or graft it again. It takes three to four years to get the vines back to full production. (Tr. I:52-53.)

In his testimony regarding the effect of grafting, Lucas indicated that the grapes are picked by hand during the first two years after grafting. Machine harvesting would shake the vine and break the root. Lucas testified that he could not use the machine in the vineyard for a couple of years. He went on to testify in reference to grafting from Zinfandel to Muscat Canelli, a white wine grape, that most wineries are suspicious of harvesting white grapes by machine because of oxidation and some other unsepecified things that can happen. He testified that the Muscat Canelli grape lends itself more readily to hand harvesting. However, Lucas did not testify that the Muscat Canelli would necessarily be hand harvested in 1983. He merely indicated that generally speaking this is what most wineries might require. (Tr. I:54.)

B. Employer's Response

Lucas hired labor relations consultant David Aquino and attorney Raymond Kepner to assist him during the period

between the filing of the election petition and the conduct of the election. Aquino testified that he was involved in representing Tepusquet Vineyards in the election proceeding. It was Aquino who delivered the Employer's Response to Board agent Harry Martin and met with Martin to explain the contents of the Response.^{8/} At the same time he was involved in representing Tepusquet, he was representing French Camp Vineyard and Continental Vintners where the UFW had also filed election petitions on the same day. (Tr. II:163.)

Lucas testified that from Monday on, Aquino acted in a limited capacity and only as a labor consultant and was not involved in decision making or communicating with the Board. He served as a messenger, and he relayed messages from Board agent to Lucas or his other agents.

Attorney Raymond Kepner testified that he began his representation of Lucas with respect to this election proceeding on Friday, February 4, 1983, and his initial responsibilities included assisting the Employer in preparing the Employer's Response. Kepner testified, "We discovered a problem with the peak issue. I focused, I guess, my counseling during the first day or two after the petition was filed, on that issue. We discussed that at some length." (Tr. II:71-72.) Kepner assisted the Employer by telephone until he arrived in Santa Maria on

^{8/}Tr. II:162-165. I note that the Employer never called Board agent Martin as a witness despite Employer suggestions that Martin allegedly recommended that the petition be dismissed on the basis that the peak requirement was not met under any test. (See testimony of Kepner at Tr. II:74.)

February 8, 1983. He continued representing the Employer throughout the peak investigation, the conduct of the election, and thereafter in all proceedings involving this election. I note that Kepner testified that he talked to Aquino throughout the week of the election. (Tr. II:77.)

Lucas testified that he directed the preparation of the Employer's Response to the Petition for Certification. He also testified that he was served on Thursday, February 3, with the Petition for Certification by UFW representative Peter Cohen. When Lucas was served with the Petition, he asked for help from his office staff in preparing the Employer's Response. His staff obtained and secured the requested information from company records. His office manager, Janice Shouwn, and Rowina Bunch assisted in the preparation of the Response. Lucas testified that he consulted with his attorney Kepner and Aquino with respect to the preparation of the Employer's Response. They both assisted Lucas in the preparation of the Response. (Tr. I:39-41.)

Kepner testified that as he went through the preparation of the Response which he was doing by telephone with Lucas, they discovered a problem with the peak issue. He further testified that he reviewed the Employer's Response form by telephone with Lucas' staff to make sure there were no questions or problems in answering or handling the questions. He spent most of his time in connection with preparing the attachment to the Response which lays out in a summary fashion the peak issue. He received information from the office staff, researched the issue and presented a brief statement to the Board so that they would be

able to grasp the nature of the peak issue. The parties stipulated that Joint Exhibits 1 and 2 were turned over to the Board agents on February 5, 1983.

Lucas testified that Joint Exhibit No. 2 contained time cards for the peak harvest period from October 11 to October 17, 1982, with the first portion including the timecards of those directly employed and the second portion constituting the daily crew sheets of the contract labor. (Tr. I:51.) It should be noted that the UFW does not dispute the fact that there were approximately 110 different persons employed during this week in October 1982, nor the number of hours or the number of days shown in the particular documents which comprise Joint Exhibit No. 2.

For the 1982 peak week Lucas did include one clerical and he did not include the ranch superintendent. The employees included both in the 1983 eligibility week and the 1982 peak week include employees employed by labor contractor Joaquin Gomez

Upon cross examination, Kepner conceded that page 5 of the Employer's Response was the only information provided at that time regarding the grafting issue.

C. Information Requested by the Board Agents (including the Acting Regional Director) During the Peak Investigation

Acting Regional Director Weissberg concluded that the Employer's Response did not provide the type of information she needed to determine whether the Petition was timely filed as to peak. Weissberg asked Board agent Bowker to contact Aquino on Monday evening (February 7, 1983) and request certain

information including payroll data concerning levels of the workforce in 1981, acreage production and workforce levels in past harvests at Tepusquet. (Tr. IV:107.) She also directed him to obtain harvesting and grafting schedules for past years and acreage production and workforce levels relating to the grafting of vines in past years. She also asked Bowker to get work days required per acre harvested and proof of grafting. (Tr. III:135-140.)

Bowker complied with Weissberg's directive and called Aquino at 8:00 or 9:00 Monday evening and asked him to provide the information the following morning. Aquino indicated that it was late and he would do his best to obtain the information by the following morning and be at the Santa Maria office of the ALRB. Bowker denied that he told Aquino that he would call him back later that evening. (Tr. III:135-139, 145.)

Bowker testified that he was at the Santa Maria ALRB office at 7:30 a.m. to review the peak question. Aquino did not arrive at the office. He talked to Aquino later that morning and then he talked to Kepner. Bowker testified that Aquino said he didn't have the information ready and asked him to call Kepner about this issue.

When he spoke with Kepner at 11 a.m. on Tuesday, February 8, Bowker went over the same items that he had requested from Aquino. Kepner told Bowker that, based on the Employer's Response, the issue of peak was not in question and that the Board agents had enough information. Bowker testified that during this conversation with Kepner, Kepner was "kind of" loud and

very persistent. He did not allow very much time for a response and it was a lengthy conversation. Kepner became "kind of mad and kind of angry" when advised by Bowker that Bowker was going to go ahead and hold the pre-election conference that evening. Bowker testified that he told Kepner during this conversation that he needed information on the manpower hours per acre and harvesting, the grafting of the vines, and the history of the grafting. Kepner kept saying that this information was not necessary. Kepner told Bowker that Kepner needed time to get this information ready for the pre-election conference and they'd discuss it later. (Tr. III:141-146.) • Bowker testified that he did not refuse to accept any information. (Tr. III:145.)

Kepner did not attempt to present any information prior to the pre-election conference held early Tuesday evening, February 8. After the pre-election conference, Bowker met with Kepner, Lucas and Aquino for about 30 to 45 minutes. Bowker testified that he received information (see Joint Exhibits 3 through 11) from the Employer during this meeting. After the meeting concluded, Bowker told the Employer and his agents (including Kepner and Aquino) that he would attempt to review the information and make a peak determination by 10 o'clock the next morning. Bowker testified that the Employer failed to provide him at this meeting or at any other time with the requested information indicating the "manpower used per acre for harvesting." (Tr. III:148.)

Subsequent to the February 8 meeting Bowker went to the motel room where three Board agents were interviewing

Tepusquet workers. According to Bowker, these workers claimed that some kind of fraud had been taking place. The workers said that they had not seen as high a number as 110 workers during the 1982 peak week. After this meeting, Bowker and the Board agents traveled back to Santa Maria, arriving at approximately 1 a.m. on Wednesday morning, and briefly went over some records that had been provided by the Company. They commenced their work again at around 8 a.m. at the Santa Maria ALRB office. From 7:30 that morning, they went through information the Employer provided the previous evening. (Tr. III:149-151.)

Bowker testified that he had requested on Tuesday evening that the parties meet at the Paso Robles Inn the following morning at 10 a.m., but that he did not attend the meeting. Instead, he and the other Board agents reviewed declarations brought in by some workers as well as lists of names that the workers claimed worked during the peak week in previous years. According to Bowker, the workers' allegations required a continuation of the peak investigation. At around 10:30 a.m. Wednesday, Aquino called and wanted to know why Bowker was not at the Paso Robles Inn. Bowker advised him that something else occurred, and it would take more time to make a decision and that he would call him later. (Tr. III:151-152.)

Shortly after Aquino's call around 10:30 a.m. on Wednesday, Kepner called. At this point Bowker asked Ricardo Ornelas, another Board agent, to carry on the conversation with Kepner and to continue the investigation regarding the additional information requested. Bowker instructed Ornelas to check the

allegations made by the workers on Tuesday night. Ornelas then arranged with Kepner to meet at the Tepusquet office later that day.

Bowker testified that he instructed Ornelas to go to the Tepusquet office for the purpose of verifying the numbers presented in Joint Exhibit Nos. 5 and 6 (received from the Employer on Tuesday night following the pre-election conference) which pertain to the employee body count summary for the 1982 peak (Joint Exhibit No. 5) and the employee body count summary for the 1981 peak week of September 21 thru 27, 1981 (Joint Exhibit No. 6). (Tr. III:152-155.)

Bowker testified that on Wednesday evening he went to the labor contractor's home in Paso Robles and asked him to provide payroll records for the years in question. He did this sometime between 7 and 8 in the evening. He met with and talked to the labor contractor for Tepusquet, Joaquin Gomez. Bowker was accompanied by Board agent Gastelum and they both informed Gomez of the need to go over the payroll records of Tepusquet Vineyards for 1983, 1982 and 1981. Gomez said that the bookkeeper would not be able to have the information ready that evening, but that he would have it ready the following morning. Therefore, Bowker agreed to go by the house around 11 or 11:30 the next morning.

During the Wednesday evening meeting with Gomez, Bowker asked Gomez regarding the week in 1982 where 110 workers were on the payroll. According to Bowker, Gomez said that this was an unusual situation because he had forgotten to harvest the

ends of the vines one particular morning, so he had gotten people from other ranches that were working for him to come as a favor and clean up the ends of the vines for that particular day. He had extra workers for that day to help him out. According to Bowker, Gomez said that it was a mistake that those grapes were not picked by the crew in the morning. He, therefore, had to bring the extra help to catch up with the work that was not done by the original crew. Bowker testified that Gomez told him this happened two days during the October 11-17, 1982 peak week. (Tr. III:157-158.)

Bowker testified he showed Gomez Joint Exhibit No. 5. With respect to the employees who only worked two hours or five hours, Gomez stated that they were there only to catch up with the work that was incomplete and was not completed by the earlier crew. They were extra help. The morning crew had already left, so they had to bring in some extra help. After speaking with Gomez, Bowker went back to the motel and again Kepner called that night and Bowker told him that they had not made a determination and that more investigation was needed. (Tr. III:159.)

According to Bowker, Gomez did not come Thursday morning, February 10 as promised. He had directed his bookkeeper to provide all the information that had been requested the previous night, but the bookkeeper was tied up so they did not get the information until about 3 o'clock Thursday afternoon.

By Thursday evening, Weissberg had concluded that the October 11-17, 1982 peak week was highly unusual and unrepresentative of the normal peak harvest needs at Shandon Ranch. In

essence, Weissberg decided not to use that week to predict the Employer's peak labor needs at the Shandon Ranch for 1983. When Bowker was speaking by telephone to Kepner and Lucas on Friday morning, Bowker testified that he told them to provide him with any information they possessed which would indicate higher peak weeks in 1982 or prior years and which would overcome Weissberg's finding that the peak requirement was met. Bowker advised them that he would consider any such information and that the decision to hold the election could be reconsidered. Bowker then testified that Kepner did not provide any such information. Bowker testified that Lucas was on the line during this telephone conversation. (Tr. III:308.)

Acting Regional Director Weissberg testified that she had directed Bowker on Monday evening, February 7, to call Aquino. She made out a list of specific information that she wanted Bowker to communicate to Aquino that the Employer would have to turn over. She believes that he made this telephone call that evening while they were still at the Oxnard Regional Office, though she does not recall if she actually heard the conversation. (Tr. IV:102-103,)

Weissberg testified that she first spoke with Kepner on Tuesday morning and it was her impression that he had already received from Aquino the list of the specific information that had been requested by Bowker the previous evening. In her mind what Kepner was doing was looking at that list of information and questioning the need for Board agents to receive that information. Weissberg further testified that she did not tell Kepner

that she would not give him the specific type of information needed by the Board agents. In fact, she was under the impression that Kepner already had the list of information. (Tr. IV:106.)

During the Tuesday morning conversation, Kepner asked Weissberg about the information that the Regional Office had requested from the Employer and asked why she needed that information. She told Kepner she needed categories of information regarding workforce levels in past peak periods, specifically 1981, in order to determine the pattern of workforce levels during past peak periods. She also told him she was asking for information on the effect of grafting on the 1983 prospective peak period. She was trying to derive a formula for determining how many additional employees would reasonably be necessary due to an increase in acreage related to production of the grafted vines in 1983. She testified that she went into a fairly detailed discussion regarding the different kinds of information that she requested. Regarding the grafting issue, she believes that she told Kepner during the Tuesday conversation exactly what each of the categories of information were including the past history of the Company of yield per acre per type of vine and the harvesting schedules. She wanted to know and, she so conveyed to Kepner, how long it had taken to harvest the particular acreage of vines in the past as well as if there was any information which would show past grafting of the Company and the effect on the workforce when the grafting acreage came back into production. (Tr. IV:102.)

She further told Kepner she wanted verification of

how much acreage had been grafted in 1982, how much was coming out of grafting in 1982 and how much could be reasonably expected to be back into production and the yield for 1983. She told him she needed a method of deriving a formula for workers, whether it was workers per ton, workers per acres, or workers per day, and she explained she needed the harvesting schedules for past years to determine how many days it had taken in the past to harvest a particular acreage. (Tr. IV:103-108.)

She pointed out that the Employer's Response had only asserted an increase in 1983 of a percentage of acreage. It did not indicate the number of acres that would be put back into production. She indicated that she needed information regarding the number of acres that would be put back into production in 1983 because of the grafting.

Kepner replied that the Employer's Response indicated that there was no way that peak could be found, and the Regional Office should be content with the information already provided. (Tr. IV:104.)

Lucas testified that a Board agent told the Employer that further information was necessary in addition to the information provided in the Employer's Response. In fact, Lucas testified that his office staff was instructed to go ahead and prepare additional information. (Tr. II:36-37.) Lucas does not recall whether he or his agents were asked for information or documentation which shows the number of workers required to produce a certain number of tons of grapes. He also stated that he did not know what was meant by worker days per acre harvest.

To the question of whether he provided documentation to the Board agents related to how many workers would be needed for a specific amount of production, he replied, "I don't think that that question was asked. If it was asked, it would have been answered." (Tr. II:38.)

Rowina Bunch testified that she was involved in preparing the Employer's Response. After the Response was filed on Saturday, she participated on Wednesday and Thursday in making documents available to Board agents. (Tr. III:4.)

Aquino testified that after his conversation Monday morning with Board agent Harry Martin, his next contact with a Board agent was a telephone call that he received from Board agent Carlos Bowker on Monday evening. Bowker advised Aquino that he was now in charge of the Tepusquet petition as well as the other two petitions (Continental and French Camp). Bowker asked Aquino, regarding Tepusquet, for additional information related to acres that had been grafted and acres in production. Bowker also requested winery contracts and grafting schedules for past years. Aquino questioned Bowker about the need for winery contracts, and Bowker answered that this was necessary and that Bowker had been requested to get that information.^{9/} Aquino told Bowker that though the Employer would provide the information, "it would take time to compile it. It wasn't something that I had on my fingertips to give to him over the phone at that time; that I would have to contact the principals of each one of these companies and convey to them the need for

9/Tr. II:208 for Aquino's concession that Bowker requested grafting schedules for past years.

additional information." (Tr. II:181-182.) Aquino testified that Bowker wanted the number of acres that were in production and out of production and how many acres would be coming into production. (Tr. II:183.)

Aquino testified that Bowker did not get back to him later that Monday night as promised to advise Aquino where they would meet the next day so Aquino could provide the requested information. Weissberg did call Aquino subsequent to the conversation that Aquino had with Bowker. Weissberg informed Aquino that the Board agents were already on route to Paso Robles and that Bowker was the agent in charge of the elections. (Tr. II:184-186.)

Later on Monday evening Aquino called Lucas and informed him of the need to provide the additional requested information. Lucas advised Aquino that Kepner was going to come down to handle the matter with Lucas. Aquino then called Kepner that Monday evening and related to him the additional requested information. (Tr. II:188.)

In light of Aquino's testimony that he discussed body count with Board agent Martin on Saturday February 5 and that he advised Kepner on February 6 of his conversation with Martin, I find that Kepner was therefore put on notice that the body count was one of the two methods being considered by the Board regarding the determination of peak.

I find that Aquino was acting as an agent of the Employer, that Bowker requested certain information from Aquino as agent of the Employer, and that Aquino agreed to attempt to gather this information. In fact, Aquino did relate these

requests for information later Monday evening to both Lucas and then to Kepner. Furthermore, Aquino testified that he was employed by Lucas to represent Tepusquet or for purposes of assisting Lucas with regard to the election in Tepusquet from Friday through Wednesday.

Kepner testified that during his 6:30 or 7:00 p.m. conversation of February 7 with Aquino, Kepner learned that Aquino had been asked for additional information regarding the grafting issue. Kepner testified that the Employer raised the grafting issue in its Response and now the Board wanted certain additional information about this grafting question. (Tr. II:79-80.)

Kepner then called the Oxnard Regional office and reached Weissberg. Kepner testified that in general terms Weissberg said that what they wanted was some documentation to support the allegation that there was acreage that had been grafted and in general terms they wanted some documentation as to what impact that might have on the 1982 production. She requested that some documentation be provided on the grafting issue but referred him to Bowker for specifics. In response to a question as to whether Weissberg had made any specific request for any specific information from the Company, Kepner testified, "I don't recall if she made any specific request." (Tr. II:81-82.)

Kepner testified that he advised Weissberg that the grafting issue would become relevant only if the Saikhon formula or body count test presented a close question. He advised Weissberg during this conversation that under either calculation

the Employer had presented evidence which suggested that only about 30 or 35% of the workforce was employed at the time the Petition was filed. He then questioned why she needed the grafting information. He continued that her response was very general. She advised him that prospective peak cases are very complicated and that she had to get a lot of information.

(Tr. II:82.)

When Kepner was asked whether Weissberg requested information concerning the 1981 workforce level, he responded, "No. I don't believe she did." Kepner indicated that Weissberg "alluded to the fact that acreage and production statistics might be a factor in assessing the grafting issue. . . ." For the specifics, he was supposed to talk to Bowker. (Tr. 11:83.)

He denied that she specifically requested harvesting schedules or grafting schedules for past years. He denied that she specifically asked for acreage production and workforce levels related to the effect of the grafting of vines in the past years. He testified, "Absolutely not" to the question, "Did she ask specifically for worker's days required per acre to harvest." Kepner indicated that Weissberg was alluding to a need for some more information but she was not telling what specific information the Board wanted. (Tr. II:83-84.)

He spoke with Weissberg again on Tuesday, February 8, at around 10:30 in the morning. She told him that she still had not had a chance to talk with Bowker at any great length about his assessment of the information the Employer had provided earlier and that he was in Santa Maria and Paso Robles working

on all three elections. He again indicated that he is sure that he and Weissberg discussed in general terms that Bowker would be requesting information on the grafting issue. (Tr. II:86.)

Kepner testified that he spoke with Bowker Tuesday afternoon about 2:30 p.m. During this conversation, Bowker requested documentation on what acreage had been grafted and the effect on production of the grafted acreage. Kepner believes that Bowker "may have requested information, also, at that time going back to 1981, requesting some information as to what our peak was in 1981." (Tr. II:88.) He believes that Bowker asked for numbers for the peak period of 1981. Bowker was most interested at looking closely at the averaging formula for 1982 and going back a year to take a look at 1981 as far as the averaging formula is concerned. He said Bowker did not request or give any indication that the Board was thinking in terms of a body count.

Kepner does concede, however, that Bowker in this conversation did ask for acreage figures for the past few years. Kepner thinks that Bowker suggested going back "to the production figures, acreage figures back to 1980." He thinks that 1980 was Bowker's cutoff date. Bowker asked for documents that would show the history of the grafting, but he did not ask for harvesting schedules. (Tr. II:89.)

Kepner also indicated that when he spoke with Bowker he got the impression that Bowker wanted to find out if the grafting was something that had affected last year or if the Employer grafted every year.

Kepner answered no to the question whether Bowker specifically asked for the worker days required per acre harvested. He testified that Bowker asked how many acres would be harvested in 1983 and for the Employer to provide some information about the acreage that would be harvested in 1983 compared with the acreage harvested last year since the Employer had raised this in his Response.

According to Kepner, Bowker did indirectly raise a question as to the accuracy of the 110 or 111 peak number for the 1982 harvest by asking to take a look at the peak numbers for the prior year of 1981. (Tr. II:91.) But Bowker did not suggest there was any problem with the records that had been presented and he didn't explain why the grafting issue had become important.

During examination by the IHE, Kepner testified that he was involved in the preparation of the data for the 1981 peak season. He testified, "I'm sure I explained to them that we had received this request for information about the 1981 season. Mr. Lucas and his staff prepared the information. I didn't review it until we met before the pre-election conference." (Tr. II:156.)

In response to a question by the IHE, Kepner testified that he doesn't recall Bowker asking him during the investigation for information about how much one worker could produce.

When the IHE asked Kepner whether he had information available indicating how much one worker could produce, Kepner testified that he supposed that "if somebody wanted to sit down and go through all the records we had supplied, we could calculate

that." (Tr. II:159.) Kepner then went on to testify that "I suspect it could have been calculated or estimated perhaps from the records we provided." (Tr. II:159.)

I credit Weissberg's and Bowker's testimony, and I find that they did request the information set forth in their testimony. During the entire time she was testifying, Weissberg impressed me with her good memory, straightforward and direct method of responding to questions, both on direct and cross-examination, and her earnest effort to fully answer questions. She was very credible. Bowker was also a credible witness. He generally displayed a good memory and he gave direct, non-evasive answers to questions. He maintained eye-contact with the questioner, and he appeared to be telling the truth. Also, it makes sense that they would want this type of information.

I note that Aquino testified that Bowker asked him for winery contracts, grafting schedules and data on acres in production. Though at one point Kepner denied that Weissberg had "specifically" requested from him certain information, he earlier had testified he did not recall if she had made any specific requests for information. Kepner also acknowledged that Bowker may have asked him for information regarding the 1981 peak, and testified that Bowker did ask him for acreage and production figures. Though Kepner testified he did not "recall" Bowker asking him for information about what one worker could produce. Kepner's response was not a strong denial of the factual situation presented by Bowker and Weissberg, and I credit Bowker's and Weissberg's testimony that they requested

that Aquino and Kepner provide them with information related to numbers of workers required to pick acres and/or tons of wine grapes.

D. Information Provided by Employer In Response to Board Agent Requests

I. General

Submitted with the Employer's Response (BX 2) were time cards for workers employed directly by Tepusquet and Daily Crew Sheets prepared by the labor contractor covering the eligibility period and the 1982 peak. (See JX:1 and 2 .)

The parties stipulated that there were 37 different employees on the eligibility list , which reflects the payroll period from January 24 to January 30 , and that there were 111 different employees on the payroll during the alleged peak week of October 11 to October 17 , 1982. This is a body count number and not a Saikhon average. (Tr. I : 6 .)

Pursuant to the requests for additional information made by Bowker and Weissberg, the Employer submitted to Bowker on the evening of February 8, 1983 the materials contained in Joint Exhibits 3 through 11. The parties stipulated that Bowker received on February 8 copies of Joint Exhibits 3 through 11 .

Lucas testified that Joint Exhibit No. 3 is a list of names of those persons employed for the week of January 24 to January 30 including the hours worked each day for each person. (Tr. I : 65 .)

Lucas testified that Joint Exhibit Mo. 4 (the workforce summary for October 11-17) was prepared at his direction by his office staff in order to enable the Board agent to see , by

comparing the number of hours worked with the number of people employed, that these workers put in a full day. I note, however, that on October 13, 21 people worked only two hours and five people worked only four hours; and on October 14, 37 people worked for five hours and one person worked for six hours. (Tr. I:71-72.) Joint Exhibit No. 4 is merely a summary of the information previously provided to the Board agents in the Employer's Response. In addition, Lucas testified that he explained Joint Exhibits Nos. 3 and 4 to Bowker, and Bowker did not have any questions about Lucas' explanation nor did Bowker request any further documentation to explain these documents. (Tr. I:73.)

Lucas testified that Joint Exhibit No. 5 was prepared by taking information from the payroll records for the peak harvest week, and shows each individual employee and how long and when each worked. Lucas testified that a total of 101 contract employees plus an additional 10 direct employees worked during that week for a grand total of 111 employees. He further testified that after he provided this document to Bowker, Bowker did not have any questions about it. (Tr. I:74-76.)

Lucas answered yes to the question whether, when he directed his staff to select the week during harvest which was the peak week, he directed his staff to look for the highest number of actual employees in that week. He did this for 1982 and 1981. (Tr. II:38-52.)

During his testimony related to Joint Exhibit No. 5, Lucas explained that the circled figures at the top of page 3

(e . g . 55 for the week of 10/4 through 10/10/82, 101 for the week of 10/11 -17/82, and 55 for the week following that) reflected the numbers of workers who worked during the peak weeks of the 1982 harvest. Lucas stated that these figures of 55 , 101 and 55 do not include the ten regular employees. According to Lucas , therefore , the 55 should be 65 , and 101 should be 111 and the second 55 should be 65 . These are the direct employees reflected on the first page. It should be noted that the second 55 figure reflects the number of workers who worked on two individual days i . e . October 18 and October 21 . The 55 workers who worked on October 18 and October 21 do not include direct employees because , according to this Joint Exhibit and to Lucas ' testimony the ten direct employees did not work that week . (Tr . II :44-45 .)

The parties stipulated to accept into evidence Joint Exhibit No . 6 , which was described as the employee body count summary for the week of September 21 through September 27 , 1981 . A review of this document indicates that only approximately 59 employees worked during this payroll period . This is the document which the Employer mistakenly thought represented the peak body count for 1981 . It was not until after the election that the Employer discovered that Joint Exhibit No . 6 did not reflect the peak body count for 1981 . (Tr . II :55 .)

Lucas testified that after the pre-election conference in Paso Robles on February 8 , 1983 , he provided to Bowker information regarding grafting in response to Bowker 's request for more information on grafting "like acres and production ." The information contained in Joint Exhibits 7A , B and C reflect grafting and harvest statistics per acres of each variety for

the years 1980, 1981 and 1982. These exhibits, however, fail to reflect which of these acres were hand harvested and which were machine harvested. Nor do they indicate tons per acre. Joint Exhibits 7A, B and C were, according to Lucas, taken from harvest statistics records kept by the Employer for each of the years 1980, 1981 and 1982. In fact, each of the pages is page three from harvest statistics records for those particular years. The pages give information including the varieties, the particular block of acres and the number of acres that were harvested for those years. These particular exhibits do not give the tonnage of grapes harvested from each individual block nor do they include the sugar, acid, PH or dates of the particular harvest of the particular block. The Employer did provide to Bowker the same pages "three" with the addition of the tons harvested for the Zinfandel grapes only on blocks Nos. C-2, C-3 and D for 1980 and 1981. For 1982 the tons harvested were provided for a new block of Zinfandel C-3A as well as for D. It appears from these exhibits, and from Joint Exhibit No. 8, that in 1982 Blocks C-2 and C-3 were deleted from Zinfandel and Block C-3A was added. I find, however, that tons harvested for the other varieties of grapes (other than Zinfandel) were not provided to the Board agent in Joint Exhibit 7, Joint Exhibit No. 8, or in any other format. (Tr. I:79-80.)

The parties stipulated to the introduction of 1980 harvest statistics (JX 7 and 8) which show a total of 438.2 acres of grapes harvested during that year. There were a total of 142.7 acres of Cabernet Sauvignon and 110.5 acres of Zinfandel (both the Cabernet Sauvignon and Zinfandel are red wine grapes).

There were 115.1 acres of Sauvignon Blanc and 69.9 acres of Chenin Blanc. The 1981 harvest statistics show the very same acres of each of these varieties were harvested in 1981 as were harvested in 1980. (Tr. I:10; See JXs:7a, b, c and 8a, b, c.)

These two years (1980 and 1981) must be compared with the 1982 harvest statistics which are also a part of Joint Exhibit 7, part C. 1982 harvest statistics show many similarities and some differences from those of 1980 and 1981. For example, the total acres of Cabernet Sauvignon in 1982 are 142.7 which is the same as for 1980 and 1981. The total number of Zinfandel grapes in 1982 equal 54.8 which is substantially less than the 110.5 harvested in 1981 and 1980. There were five acres less in 1982 of the Sauvignon Blanc grapes compared with 1981 and 1980. There were the same number of acres (69.9) of Chenin Blanc as were harvested in 1981 and 1980.

An important conclusion to be noted is that despite the fact that there were approximately 56 fewer acres of Zinfandel planted or harvested in 1982 than in 1981 or 1980, there were similar amounts of acres of Sauvignon Blanc and Chenin Blanc. There were five acres of Chardonnay in 1982 and no Chardonnay harvested in 1980 or 1981. In summary, there were 185 acres of white grapes (allegedly requiring more hand labor) in 1982 and there were 185 acres of white grapes in 1981 and in 1980. The real difference between 1982 and the prior two years is that there were approximately 50 fewer acres of red grapes (Zinfandel) harvested in 1982 than in 1981 and 1980. Therefore, in terms of the numbers of acres of vines harvested, there is no apparent

reason why more harvest workers were needed during the 1982 peak than during the 1981 or 1980 peak.

The only possible explanation for the difference in the numbers of workers might be in the numbers of tons harvested from the different varieties of grapes in each year though the Employer introduced no specific evidence to prove that he advised the Board agents how many tons for each of these years were hand harvested, how many tons were machine harvested and how many workers he needed per ton or per acre. Another explanation, as set forth in the alleged statements of Gomez, the labor contractor for the Employer, is that a substantial number of workers came to Tepusquet Vineyards during the 1982 peak week as a favor to perform some work which was not done by the regular harvesting crews. This phenomenon did not occur in 1981 or 1980.

Joint Exhibit 9 is a document showing when grapes were planted and grafted. It indicates the total number of vines, the total number of acres, the years when they were grafted and the different varieties and the spacing between vines. The purpose of providing this information to Bowker was to point out that the Employer had previously grafted grapes since, in the market place, red grapes were difficult to sell. (Tr. I:88-89.)

Lucas testified that he provided Joint Exhibit 10 which is a map of Shandon Ranch. Lucas also testified that he provided Bowker with Joint Exhibit No. 11 which was prepared by Lucas' office staff at his direction. His staff reviewed the production records for the Shandon Ranch for 1978 through 1982. Lucas

testified that the acreage reflected in Joint Exhibit No. 11 varied because of grafting. For example, in 1978 he grafted out almost 100 acres and then in 1982 he grafted out 56 acres. It should be noted that the tons per acre figure at the far right hand side of Joint Exhibit No. 11 was not on the document when he provided it to Bowker. (Tr. I:91-93.)

According to Joint Exhibit No. 11, the following figures represent acres harvested and tons of grapes produced for the years 1978 through 1982:

<u>Years</u>	<u>Acres</u>	<u>Tons</u>
1978	341.4	1,418.03
1979	438.2	3,097.27
1980	438.2	1,845.30
1981	438.2	2,487.44
1982	382.5	3,683.59

No explanation was offered to the Board agents or at the hearing regarding this significant variation in tons harvested.

It should be noted that Joint Exhibit 11 does not break down which varieties of grapes resulted in how many tons. In fact, the Employer failed to provide the Board agents with any information (except for the Zinfandel Variety) showing how many tons were produced of each variety for any year. Lucas testified that he could have shown all the other production from all the other blocks in both Joint Exhibits 7 and 8, but he didn't because he wasn't requested to do so. He testified that "the request was on these individual blocks pertaining to the grafting." He testified that he offered to make available to Bowker the originals of these documents and that Bowker did not wish to

see them. (Tr. I:87.) Nor did the Employer provide the Board agents with any information (except for the Muscat Canelli acreage to be harvested in 1983) indicating how many acres or tons are hand harvested or machine harvested for any year.

I find that the Employer should have provided this production information in response to prior requests made by Bowker and Weissberg to Aquino and Kepner. Certainly the Employer should have realized that this information (together with information as to how many tons were hand harvested and how many machine harvested) was essential to carry its burden that peak was not met.

Lucas on cross-examination stated and I find that neither he nor any of his agents ever advised a Board agent that the five employees who were tying wires on the vines during the pre-petition period were doing unusual work. (Tr. III:102.)

II. Hand Harvested vs. Machine Harvested

Though hand harvesting requires more workers than machine harvesting (see Tr. III:66; II:28 and I:55), Lucas conceded on cross-examination that in the information provided by the Employer to the Board agents there was no information as to which acreage was hand harvested or which was mechanically harvested. (Tr. II:38.)

Upon re-direct examination of Lucas, Kepner asked Lucas if he had explained to Bowker that certain types of grapes were hand harvested and certain kinds by machinery. Lucas answered yes. Lucas indicated that red grapes were more likely to be machine harvested and white grapes more likely to be hand

harvested. When asked if this was an invariable rule or whether it depended on circumstances, Lucas stated that it depended on other circumstances. In fact, it depended on several other circumstances such as winery requests. Some wineries will accept machine picked whereas some will accept hand picked. Some types of Cabernet Sauvignon are very easy to pick by machine whereas Sauvignon Blanc is very difficult to pick by machine. At the time of maturity if someone wants to make a Rose wine then the grape might be picked by hand so as to avoid skin contact. "There are many things that go into determining what is picked by hand and what is picked by machine." (Tr. II:69.) The decision as to whether to pick a particular acreage or type of grape by hand or machine is made in two ways. For budgeting purposes, Lucas estimates what he thinks might happen "for practical purposes." When it comes time to harvest the grapes "We make a decision within a few weeks of harvest, knowing what wineries the grapes are going to; what sugar they might want them at; how they want them picked; and what container. Those decisions are made closer to harvest." (Tr. II:70.)

Lucas testified that it would be a grave mistake to pick a Muscat Canelli with a machine the year after the grafting occurred because of the risk that there would be a break of the new graft. He then says, "Out of all of the grapes that we have in the Shandon Ranch, those (Muscat Canelli) are the grapes that you would have to say this year must be hand picked." (Tr. II:70.) It is unclear to what extent this information was imparted to Bowker or any other Board agent during the investigation.

Upon redirect examination, Kepner asked Lucas if he recalled whether he told Bowker if the Muscat Canelli "would likely be mechanically or hand harvested". Lucas said yes, that he had told Bowker that it would be hand harvested for at least two years. This is the only evidence indicating what Board agents were told about which varieties had been or would be hand harvested. (Tr. II:59-60.)

Lucas testified that in 1982 there were approximately 1000 tons of grapes harvested by hand and 2000 tons harvested by machine. (Tr. III:51-52.) It should be noted that this would total approximately 3000 acres which is more than Joint Exhibit No. 11 would indicate (2,683.59 tons). Nevertheless, this testimony by Lucas is helpful in that it is the first evidence in the record as to how many, or as to the ratio of, hand harvested tons to machine harvested tons. However, I find that neither Lucas nor any of his agents advised the investigating Board agents of this ratio. This testimony also established that the Employer had records available from which the Employer was able to calculate tons hand harvested and tons machine harvested.

Though red grapes can be hand harvested according to Lucas, he testified that in 1980 he did not know if any red grapes were hand harvested. He further testified that in 1981 a few red grapes were picked by hand but none of the Cabernet was picked by hand. He said of the large acreage, "occasionally" and of the Zinfandel or select wine, "maybe a load by hand." When whether reds were hand picked in 1982, he answered, "Possibly

a load of Zinfandel and, again, it was very little, very small amount." When the IHE asked Lucas whether he or his agents told the Board agents that, in fact, most of the reds in the three years of 1980, 1981 and 1982 were harvested by machine, he answered, "I was never asked the question about machine harvest." He also indicated that this information, to his knowledge, was not volunteered by himself or his agents. (Tr. III:70-71.)

Lucas testified that the white varieties can be picked by machine. In response to the IHE's question of whether all the whites are always picked by hand, he answered, "No. Not always." He continued, "All varieties can be picked by machine." For 1980 he testified that some of the white grapes were picked by machine, "but not very much." He made similar estimates for 1981. He said with reference to the white grapes "Most were probably picked by hand." He testified that in 1982 approximately 80 to 90% of his white wine grapes were harvested by machine. He also said that close to 100% of the red variety in 1982 were harvested by machine, maybe 95% by machine.^{10/}

In response to a question by the IHE asking how many acres are typically harvested by each employee by hand and whether or not there is some standard regarding hand harvesting per acre, Lucas answered, "I would have to say it can be just about anything

^{10/}Tr. III:75-76. I find that Lucas intended to say that 80% to 90% of his white wine grapes harvested in 1982 were harvested by hand. This would be consistent with his prior testimony indicating about a 2 to 1 ratio of machine harvest to hand harvest of all his tonnage for 1981 and 1982. More significant, however, is the failure of the Employer to communicate this ratio to the investigating Board agents.

and that is dictated by how we make delivery." He went on to explain that much depends on the winery's request and how many tons the winery allows the Employer to pick during a particular day. Though the Employer tries to average out the number of tons picked, there is variation. Workers work a half day where others may work a full day. He has occasion where a winery doesn't want anything on Friday, so they don't pick Fridays. (Tr. III:65-66.)

Lucas was asked by Kepner whether during his conversation of February 8 with Bowker, Lucas ever made reference to hand harvesting as opposed to machine harvesting. Lucas responded, "Only in the case I was explaining the Zinfandel and the Muscat Canelli. I explained to him that we harvested the Zinfandel by machine and we were now going to Muscat Canelli. And because of the grafting and white variety, that we would now be hand picking the Muscat Canelli." (Tr. III:92-93.)

Kepner then asked Lucas whether a review of Joint Exhibit No. 9 (grafting history) and Joint Exhibit No. 10 (map of Shandon Ranch) would indicate what percentage of the wine varieties were red grapes verses white grapes, and assuming that reds are typically harvested by machine and whites are typically harvested by hand, whether one could get a rough picture for each year as to the percentage that was hand and machine harvested. Lucas answered "I would disagree with you. No." Lucas went on to testify that what is hand harvested and what is machine harvested varies for many, many reasons from year to year. (Tr. III:97-98.)

Kepner asked Lucas whether or not, based upon Lucas' explanation of the records to Bowker, Bowker would have at a minimum been able to ascertain which acres had been done by hand based upon which acres were white. Lucas answered, "No." Lucas then speculated that, Mr. Bowker could have very easily taken the payroll records for the years he was given and calculate out the number of tons hand harvested each year." (Tr. III:99.)

Weissberg testified that the list of information she had provided to Bowker is reflected in the Petitioner's Exhibit No. 1 at page 3 in the first full paragraph which includes items a-h. (Tr. IV:108.) I note that the answer to item g (Worker-days required per acre harvested) should have included information related to acres or tons hand harvested and acres or tons machine harvested. Otherwise it would not be possible to derive a reasonable estimate of the number of worker-days required per acre harvested.

Kepner testified that when he spoke to Aquino during the evening of February 7, 1983, it was Aquino's impression that the Board was playing games with the Employer and that Martin's alleged belief that the petition was untimely with regard to peak had not been favorably considered from someone at the Regional office and the region would try a new agent to see if they could get a new evaluation. (Tr. II:77.) Kepner testified that he agreed with Aquino's assessment that games were being played in the investigation. (Tr. II:78.)

Kepner testified that he made available to Board agents Ornelas and Diaz on February 9 Employer's Exhibits Mos. 1 and 2

which are payroll records for two peak weeks in 1981. The record is devoid of any information regarding the type of explanation, if any, given by Kepner to the Board agents regarding the contents of these two exhibits. For example, there is no testimony about the lower left hand corner of the daily crew sheets which is entitled Crew Production Record. It is not explained whether the figures there represent the number of gondolas or the number of vines in pounds or what the word "extension" means. In addition the right hand side of these daily crew sheets for these two weeks contain headings related to the number of rows, vines in row, number of pieces, piece rate and total wages. None of those five columns are filled out. (Tr. II:115-116.) I find that Kepner failed to indicate to Ornelas or Diaz which acres or tons were hand harvested and which were machine harvested.

Kepner testified that "somebody" could have calculated how much a worker could produce by reviewing all the records the Employer had supplied. (Tr. II:159.) I find that the Employer had the burden of calculating "how much a worker could produce" and informing the Board agents of the calculations. Absent this information, the Acting Regional Director could not reasonably assess the Employer's labor needs for the 1983 peak.

I find that the Employer, not the Board agents, had the obligation to calculate the number of tons hand harvested and machine harvested for each year. I further find that the Employer had an obligation as part of its burden of demonstrating that the peak requirement was not met to provide this information to the Board agents even if the Board agents had not requested such information. I also find that Bowker and Weissberg did

ask the Employer for this type of information when they requested that the Employer provide them with information indicating how many workers are needed to harvest a ton or an acre of wine grapes. I find that the Employer failed to provide this information to the Board agents.

I find that the Employer, whether or not requested by the Board agents, did not provide any information which would permit the Board agents or Acting Regional Director to estimate how many workers it would take to hand pick an acre or ton of each of the varieties of wine grapes. Lucas testified that it can be "just about anything" and that's "dictated by how we make delivery".

I further find that the Employer did not provide the type of information available to him with respect to the number of workers required to harvest a ton of grapes when machines are used. In response to a question by the Investigative Hearing Examiner asking the number of workers per ton when machines are used and whether there was a rough figure which could be used to estimate the number of workers required, Lucas answered that it depends on how many machines you have running and whether you are doing machines just at night or both night and day. He further related that his practice at Shandon is to have two machines there. When the grapes are ripening easily, he only runs one shift which would require approximately eight people, which is four people to a machine. He needs a man driving the gondola next to the machine. He needs a man on the machine. He needs an inspector who sits on the seat of the machine and

selects the grapes as they come off the belt. There is also a man back in the receiving area, and sometimes he keeps an extra man on to help out with the trucks. (Tr. III:66.) He testified that on the average a machine can harvest one acre per hour (Tr. III:67). The number of tons per acre, of course, would depend upon the yield. If you have four tons per acre, then you get four tons per hour. There is no record evidence, however, that the Employer or his agents provided this kind of information to the Board agents.

I find wholly unconvincing Lucas' contention that a determination of the number of tons that each employee was capable of harvesting and the number of employee days necessary to harvest a particular variety could be calculated from the records that he provided. (Tr. III:100.) This contention was not substantiated at hearing and I find that the Employer failed to provide this information to the Board agents during the investigation.

The record does not show how many tons of any particular variety an employee was actually harvesting. For one thing, it is not clear which employees worked on machines and which worked at hand harvesting. As this information is not clearly set forth in the record evidence, there is really no evidence to indicate that it was ever set forth with sufficient clarity to the investigating Board agents.

I further find that the Employer failed to provide data, including the following, which could have assisted the Board agents in estimating the number of workers required either on a per ton or per acre basis: (1) The number of workers who

worked during peak weeks in 1980, 1981 and 1982 harvesting each of the different varieties; (2) the number of tons produced by each variety during the peak weeks of 1980, 1981 and 1982; (3) how many acres or tons of each variety during the peak week were harvested by hand compared to how many were harvested by machine.

III. 1981 Body Count

Lucas testified that Joint Exhibit No. 6 which sets forth the peak season of September 21 through September 27, 1981, shows the number of people and the number of hours worked on each day mentioned during that week. In response to a question from Kepner if Lucas knew if there were other weeks during the 1981 peak season that had a higher number of workers, Lucas responded that this particular week had the highest average but did not have the highest total number of individuals who worked during a week during that harvest. Lucas testified that there was another week in 1981 that had a higher body count and that for that particular week the body count was 81 different people. (Tr. I:77.)

Lucas claimed that he made information available to the Board concerning this high body count week for 1981. He testified that all of the information on the previous couple of harvest seasons was made available to two Board agents who came to his office seeking certain information. These two agents were at the Tepusquet offices on Wednesday, February 9, 1983. (Tr. III:54.)

During questioning by the Investigative Hearing Examiner, Lucas testified that according to the information he

originally gave to the Board, there were between 55 or 65 workers who were employed during the peak week of 1981. He agreed that Joint Exhibit No. 6 shows that there was a peak high in 1981 of 59 employees which includes the direct employees as well as the contracted employees.

Lucas testified that when the Board agents met with Bunch and Kepner on Wednesday, February 9, 1983 to review the records of the 1981 harvest, no Employer agent told the Board agents that the real body count peak occurred in the week following the September 21-27, 1981 peak week which was provided to the Board agents as Joint Exhibit No. 6 on February 8, 1983. Though Lucas was not present at the February 9 meeting, he did testify that according to his knowledge none of his agents pointed a finger to those records on February 9 to say that the real body count week was 81. (Tr. III:55.) Lucas further testified that after he first learned, subsequent to the election, of the employee body count of 81 for the 1981 peak season, this information was never communicated to the Board at any time. (Tr. II:57; See also Tr. II:55 and Tr. III:55.)

After several efforts during cross-examination by the UFW, Lucas agreed that his instructions to his staff for reviewing the 1981 records in order to pull out the peak week was that they were to look through all the harvest weeks in 1981 and come out with peak week which reflected the most employees in one week. Lucas further agreed that as a result of his staff's work, his staff came up with Joint Exhibit No. 6 for the 1981 peak season. It should be noted that when Camacho asked whether the same directions were given by Lucas to his staff to determine

the peak season for 1981 as were given for 1982, Lucas first said no. He began to qualify his answers, and finally agreed that he did instruct his staff to review all the harvest weeks of 1981 to come out with the peak week which reflected the most employees in that week and that Joint Exhibit No. 6 reflects the work product of his staff. (Tr. II:48-52.) Lucas conceded that his staff gave him for 1981 the week with the highest average rather than the week with the highest body count. (Tr. II:53.)

Kepner testified that during a telephone conversation with Weissberg on Wednesday, February 9, he was advised by Weissberg that Bowker would be contacting him later in the day for further information. In fact, later that Wednesday, Bowker did ask if he could have a couple of Board agents come down to the ranch and review certain records.

They wanted to verify, according to Mr. Bowker, that the records we had submitted the previous Saturday were accurate records. They wanted to look at the originals to make sure that there had been an accurate photocopying and they wanted to question us as to whether we'd submitted legitimate records with our employer's response. (Tr. II:110.)

Kepner further testified that the Employer invited Bowker to send whoever he wanted to review the records. This was the genesis of the Wednesday afternoon meeting when Board agents Ornelas and Diaz came to review the records.

Kepner testified that when Board agents Ornelas and Diaz visited the Employer's office on Wednesday, February 9, both he and Bunch were present. Kepner said that he took responsibility for dealing with the Board agents. He further testified

that Ornelas had called before arriving and asked that certain records be made available. Ornelas specified records for the 1983 pruning season and indicated that the Board agents wished to confirm that the records submitted earlier by the Employer were accurate by looking at the originals. He also said that he wished to look at the records for the 1982 harvest season and the 1981 harvest season and that he wished to see the originals of these records. (Tr. II:110-111.)

Kepner testified that he advised Ornelas during the February 9 meeting at the Employer's office that the petition was a "slam-dunk" as far as the Employer was concerned and the Petition had to be dismissed. The numbers were clear and under either formula were in the 30 to 35% range of peak. He again stated that the Petition should be dismissed. (Tr. II:113.)

Bunch testified that it was her understanding that the focus of the Board agents' concern was to verify whether there were actually 110 people working one week in 1982. Bunch testified that she was asked by Kepner to pull records for the 1982 harvest. In addition, Kepner advised her to pull similar records for 1981. (Tr. III:6-7;27.)

Very importantly, Bunch testified that when the Board agents left on Wednesday, they seemed to think, "The records were very straightforward and that they substantiated our body count." (Tr. III:13.) Bunch's testimony appears to corroborate that of Ornelas who testified that the purpose of the Wednesday meeting was to confirm the accuracy of the number of workers employed during the eligibility period, the 1982 peak week and the 1981 peak week.

Bunch testified that she was advised on Thursday that there was a request for further records for the purpose of substantiating that the Employer had actually paid these people. (Tr. III:15.) She and Kepner took originals plus copies of checks to the labor contractor and the cancelled checks of the people paid directly by the Employer. They also took records that stated the gross pay and the deductions made for the contracted labor. When she and Kepner arrived at the Cinderella Motel on Thursday, Ornelas, Bowker and Mr. Aruiz, a representative from the labor contractor, were present and people were going through records. She further testified that at the conclusion of the Thursday evening meeting her understanding was that Ornelas and Bowker were going to call Weissberg to get something from her.

Bunch also believed that they took with them on Thursday records from the 1981 harvest and possibly the 1980 harvest. However, it does not appear that any copies for the 1981 or the 1980 harvest were left with the Board agents. (Tr. III:23.)

I find that Kepner's request to Bunch to pull the 1981 records indicates that Kepner was aware that the 1981 peak was going to be used by the Regional Office in making its determination as to whether the peak requirement for 1983 was met.

On Thursday, Bunch and Kepner made available to the Board agents copies of the original checks reimbursed to the labor contractor in order to corroborate or substantiate the records that the Board agents reviewed on Wednesday.

Bowker testified that Board agents Ornelas and Diaz went to the Employer's office on Wednesday merely to review the

three weeks (one each in 1981, 1982 and 1983) and not to review other harvest season records. Subsequent to Ornelas' review of the records at the Employer's office, Bowker testified that Ornelas advised Bowker in Paso Robles that "everything seemed to be in order." Bowker further testified that it was his understanding that Ornelas on Wednesday when reviewing the records was focusing on the body count not Saikhon. Bowker testified that he was directed to work on the body count and that's what he was concentrating on doing. It was Weissberg who gave this directive on Tuesday or Wednesday.

Prior to calling Kepner for an appointment to review Employer records at the Employer's office, Ornelas testified that he had reviewed the Employer's Response and the attachments thereto and had done some calculations involving body count comparing the 1983 eligibility week to the 1982 peak week and also the averaging method for the same two periods of time. Ornelas also used Joint Exhibits Nos. 5 and 6 to make his calculations .

Ornelas testified that when he called Kepner on Wednesday morning to set up the appointment at the Employer's office, he told Kepner he wanted to look at any and all company records which corroborated or verified the 1981 peak week and the 1982 peak week. He further testified that he wanted to corroborate or verify the 1981 peak week which is contained in Joint Exhibit No. 6. Similarly he also wanted to verify Joint Exhibit No. 5 (the peak week for 1982). (Tr. IV:3.)

When questioned whether he ever asked Kepner during the Wednesday meeting as to what the peak week was for 1981, Ornelas replied, "Yes. I asked him if the 9/21-27 was the peak week for 1981, and he acknowledged that it was." Ornelas testified that in light of this information from Kepner, he had no reason to doubt that this week was the peak week for 1981. (Tr. IV:6.)

Ornelas may have requested copies of underlying checks to verify that 110 people worked that 1982 peak week. He asked that they be provided during that morning, but they were not provided so he asked that they be provided as soon as possible.

When Ornelas was asked on cross if he went through all the files that were made available or just certain files, he responded that he selected certain weeks. He testified that he selected files based upon his object to verify a couple of weeks in question. "That's why I went there, to just look at a couple of specific periods." (Tr. IV:31.)

The Employer introduced Employer Exhibits Nos. 1 and 2. Employer Exhibit No. 1 represents the business records for the 1981 peak week of September 21 - September 27, 1981. Employer Exhibit No. 2 represents 1981 peak week for September 28 - October 4, 1981 (I admitted Employer Exhibit No. 1, and I admitted Employer Exhibit No. 2 except for two sheets which contained dates subsequent to October 4, 1981). Lucas testified that he instructed his office staff to make available the payroll records that are reflected as Employer's Exhibits Nos. 1 and 2 to the Board agents (Ornelas and Diaz) on February 9 when they came to his headquarters office. Lucas, however, did not know.

whether or not those materials were turned over to the Board agents at any time on Wednesday, February 9, or at any other day during that week. Lucas, was not at the office at the time the Board agents were there. (Tr. I:107-111.) I find that although these records were made available, neither Kepner nor Bunch indicated that they contained a peak for 1981 higher than that reflected by Joint Exhibit 6.

The Employer introduced Employer Exhibit No. 3, which is a document that was prepared as an exhibit solely for the hearing and was never turned over to any Board agent at any time. This document lists all of the different employees who worked during the payroll week of September 28 through October 4, 1981. There appear to be 81 such individuals and the Employer is contending that this represents the body count peak week for 1981. The Employer further contends that the payroll records to support this high body count peak week were made available to Board agents Ornelas and Diaz on February 9 when they visited the Employer's headquarters office. Nevertheless, I find that a different week, that is the week of September 21-27, 1981, was represented to Board agent Bowker on February 8 to be the body count peak week for 1981. The testimony of Board agents Ornelas and Bowker established that the purpose for Ornelas and Diaz to have visited the Employer's headquarters office on February 9 was not to see whether there was a different body count peak week than the week of September 21 through September 27, 1981. Rather, Ornelas and Diaz-were at the Employer's office to substantiate that there were payroll records

to support the peak weeks that had been given to Bowker the night before. Board agents Ornelas and Diaz were never alerted by the Employer or by anyone else that the high body count peak for 1981 was September 28 through October 4. Instead, Ornelas and Diaz were under the assumption, based upon the Employer's information provided to Bowker on February 8, that the high peak week for body count for 1981 was the week of September 21 through September 27.

I find that the Board agents reasonably relied on Joint Exhibit No. 6 as reflecting the peak body count week for 1981 and that this document indicates that 59 is the peak body count week for 1981.

IV. 1982 Body Count

Lucas testified that during the 1982 peak week there were 111 different people working. He also testified that the average during that week was 61 positions. Regarding Joint Exhibit No. 5 (Body Count Summary for 1982), he testified that a number of workers employed during the peak week of October 11-18 worked for only two hours on October 13. He was not sure as to the type of work they were performing and he testified:

They were working by the hour which would indicate that they were not working on the piece rate which would have been for those employees that were picking under regular conditions. (Tr. II:2.)

Though Lucas was uncertain as to the type of work assigned to those employees who worked two hours on October 13, he speculated that they may have performed hand labor connected with mechanical harvesting or been engaged in regular picking.

Lucas testified that, where grapes are mechanically harvested there is some hand labor. The workers will pick the end vines by hand when the machine is in the field because the machine does not get started quickly and may miss half a vine or a full vine. This is typically hourly work. Lucas testified that these individuals who worked only two hours on the 13th of October 1982 went on to work five hours the following day and were provided by the same labor contractor. They were part of the same labor pool that his company relies on throughout the year. He testified that Tepusquet has had occasion in the course of each harvest season to have some employees pick the end rows that had been mechanically harvested. He said this was a standard practice on the Shandon Ranch for several years and that he anticipates doing this in the future. (Tr. II:3-4.)

On cross-examination, Lucas was asked whether the group of workers brought in on October 13, 1982 to work the two hours picked end vines in preparation for the machines and whether it was correct to assume that that's not the usual practice and that usually employees who pick end vines also do other work. Lucas answered "No. That's not--that doesn't have to be the case." Tr. II:43.) This is a speculative answer and does not address the October 13, 1982 situation.

Upon further cross-examination the UFW asked,

Q. Do you bring in specifically, people just to work on the end vines?

A. We can, yes.

Q. But that's not your practice?

A. That's a yes no question. (Tr. IV:43.)

Lucas supports his contention that it would not necessarily be more efficient to have the people who are harvesting the grapes also do the picking of the end vines by saying that it costs the same to pick the grapes whether the grapes are picked by people specifically brought in to pick the end rows or by the regular workers who are picking other vines. The cost per ton is still the same. Whoever picks the grapes are going to be paid for the grapes they pick.

An indication of the uniqueness of the 1982 peak week is Lucas' testimony that, "if you look at the peak week of 82 you'll see that we so pushed at grapes, we were picking Saturday and Sunday. Normally we don't do that." (Tr. III:50.) Lucas had earlier explained during his testimony the increase in numbers of workers and an increase in number of grapes that were picked the peak week. It does not appear when or to whom he gave information regarding the increase in the tons or acres of grapes picked during the peak week. (Tr. II:26.)

Lucas testified that the reason his workers worked Saturday and Sunday during the peak week in 1982 was that he was being penalized for delivering grapes that were over ripe. It does not appear from his testimony that he was penalized during other weeks during the 1982 harvest.^{11/} Assuming that this is accurate, it is apparent that that week of October 11 - 17 of 1982 was a unique week and might not be duplicated in 1983. This will result in fewer workers being required during the peak week in 1983.

11/Tr. 111:77-78. See also Tr. 111:73 where Lucas testified that in 1982 he was penalized for letting the grapes get too much sugar. "I had to jump in and pick as fast as I can because that is what happens."

In 1981 Lucas was penalized by one winery for not enough sugar, but when asked whether it was in the peak period he answered, "Well, during the harvest." When asked the same question for 1980, his answer was not responsive.

Based on Lucas' testimony, I find that he was penalized during the peak week of 1982 but he was not penalized during the peak weeks of 1981 and 1980. This is yet another factor indicating that the 1982 peak week was a unique one and not likely to be duplicated. I further find that this information regarding penalties was not provided to the Board agents though it should have been provided in order to give a full picture of peak labor needs.

In further reference to the 1982 peak week, Lucas testified that he estimated approximately 25 employees picked the end vines for just a couple of hours for two days. (Tr. 111:57.) I find that the Employer did not provide this explanation to the Board agents.

Lucas testified that he was not sure whether or not he brought in 20 or 25 workers specifically to pick end vines during 1980 and 1981 as he did in 1982. He testified, "It is possible. I'm not sure." (Tr. 111:84.) His uncertainty, a lack of evidence that this phenomenon occurred in prior years and testimony from Board agents that Tepusquet workers claimed this peak week was highly unusual lead me to conclude that the bringing in of a substantial number of workers to pick end vines did not occur in past years and is not likely to be repeated in future peak weeks and the Acting Regional Director was reasonable in considering this factor in finding the 1982 peak week to be unrepresentative and not useful for predicting 1983 peak labor needs.

Lucas testified that during the Friday, February 11 telephone conversation with Bowker and Kepner, Bowker said that there was a question whether or not the peak of 1982 was in some way abnormal or non-representative compared with other peak weeks in 1982. Lucas denied, however, that during this telephone conversation Bowker at any time stated that the determination of peak had been made by the Regional Director and that Lucas had the opportunity to provide information to refute that determination. It should be pointed out, however, that testimony of the Board agents indicates that such a communication was made to Kepner the prior evening, i. e. Thursday evening, February 10. In addition, Weissberg testified that she and Board agents Ornelas and Bowker advised Kepner on Thursday and Friday morning that the 1982 alleged peak week was abnormal or non-representative and that the Employer could provide information to rebut this conclusion. The Employer failed to provide the requested information.

According to Kepner's testimony, he spoke with Weissberg by telephone on Thursday morning, February 10. Kepner was not sure whether Weissberg "specifically requested us to provide more information." He did testify that she agreed with the Employer as far as the Saikhon formula and its application to this case was concerned; i. e. she did not think that the numbers in this case made a showing of peak under the Saikhon averaging theory. She went on to say, according to Kepner, that she was having more trouble figuring out if there was peak under a body count theory and that there was a dispute as to how many different employees worked during the harvest season in 1982. She indicated

that she had corroboration from individual workers from those crews that they could not recall having more than 60 people present.

In response to Weissberg's request for information, the Employer gathered some earnings reports as opposed to just time records and advised Weissberg that the Employer would provide those records. Kepner said Weissberg's position was that if such documents were provided corroborating that 110 people worked during the week of October 11-17 she would dismiss the Petition.

Arrangements were then made for Kepner and Bunch to go to Paso Robles to provide this additional documentation. He estimated that he and Bunch arrived in Paso Robles at about 7:30 p.m. on Thursday evening. Kepner testified that the information he brought to Paso Robles was contained in Joint Exhibit 12A - 12D. (Tr. 11:123.) When Kepner arrived at the room at the Cinderella Motel in Paso Robles, there were four or five different Board agents reviewing a number of documents including stacks of cancelled checks. He and Bunch sat down with Ornelas and started going through the records that they brought with them (Joint Exhibit 12A - 12D).

During cross-examination, Kepner testified that on Thursday, February 10, he spoke with Ornelas sometime between 9:00 and 9:30 in the evening. Ornelas advised him that the Petition had not been dismissed that evening. According to Ornelas, Weissberg was inclined to find a question concerning representation. Kepner then asked Ornelas on what basis was there a question of representation. Ornelas indicated that one thing they were looking at was whether the alleged peak week

in 1982 was a representative week in relation to other weeks in the 1982 harvest season. This was the first time that Kepner recalls the issue ever coming up. Ornelas said that though the Board agents were convinced now that there were in fact 110 at Shandon during the 1982 peak week, they thought this peak week was not a representative week. Ornelas told Kepner that this was really Weissberg's decision. Ornelas suggested that Kepner call Weissberg in the morning.

Kepner then testified that he spoke with Weissberg Friday morning sometime around 9:30 or 10:30. According to Kepner, Weissberg said that if he had more information he could provide it, and that the investigation is still continuing. She indicated Bowker was going to make the determination and that she had not signed the Notice and Direction of Election at that point in time. Weissberg explained to him that she disregarded the peak week and looked at the next highest peak during that 1982 peak season. She found that the numbers in those weeks were in the range of 60. She found that there were 37 people on the eligibility list so therefore the peak requirement was met. According to Kepner, this was the first time that Weissberg had advised him of her view on this matter of unrepresentativeness of the peak week in 1982. Kepner said that he told her that this was a brand new theory being presented on Friday or late Thursday night for the very first time.

Kepner testified that he did have a conversation with Weissberg on Friday when he pointed out to her that he thought that peak weeks in prior years probably would be larger than

the numbers she was pointing to in 1982 for the nonpeak weeks. Kepner further testified that he may have mentioned a number like a body count of 79 or 80. He then said that it turns out the number was 81 and those records had been made available to the Board two days earlier. (Tr. 11:142-14.3.) Of course, the records made available to the Board agents were those made available to Board agents Ornelas and Diaz and I find there never was any indication by the Employer that these records reflected a peak for 1981 different than contained in Joint Exhibit No. 6. Kepner further testified that he doesn't know whether he and Weissberg talked about it specifically, i. e. which week it was that he was referring to as having a body count as high as 79 or 80.

Kepner testified that he did not know what the purpose of Ornelas and Diaz was when they came to the office to look at the records. (Tr. II:145.) I find, however, that Bunch knew. Kepner knew what they asked to look at and what he provided them but he didn't know what their purpose was. This appears to be inconsistent with his prior testimony when he related that either Bowker or Ornelas called him to arrange to come to the Employer's office to review records for the purpose of corroborating information which had previously been given either in the Employer's Response or in Joint Exhibits 3-11. This inconsistency weakens some of Kepner's testimony. In response to a question of whether at the Wednesday meeting Ornelas asked him about or showed him Joint Exhibit No. 6 and indicated to him that this was the 1981 peak season and whether Kepner confirmed this, Kepner testified that:

I don't specifically recall going over this document with him. I'm sure that we talked about 1981 peak season because we had laid out the records for the 1981 peak season. I'm sure that we had in that stack of documents that we provided Mr. Ornelas--I'm sure that we had the week in 1981 that had the highest average and, also, the following week that happened to have a higher body count. Mr. Ornelas' focus in that meeting, as I understood it, was simply to look at--he was not really looking at body count calculations as I understood it, he was just out there to verify that the records had been provided were accurate and to review other records during that season. (Tr. II:145-146.)

Kepner testified that he and Lucas spoke by telephone with Bowker early Friday afternoon. Kepner and Lucas gave Bowker some statistics about the amount of tons harvested during that peak week and how those compared with other weeks. (Tr. II:131-132.) Kepner did not specify which weeks or the numbers of tons involved.

A review of Joint Exhibits 2 and 12 indicates that six workers left at 1 p.m. on October 13, 1982 and that for the 101 labor contractor workers employed during the week of October 11-17, 1982, Wednesday, October 13, was the first day of work for 29 of the 101. Of the 29, 21 worked only for two hours (from 3 p.m. to 5 p.m.) and five worked only four hours (from noon to 4 p.m.). Of the 21 who worked only two hours on Wednesday, two worked no other day that week, 12 worked the following day only, and seven worked the following day and Saturday. Of the five who worked only four hours on Wednesday, none of them worked any other day that week. I note that eight other workers began work on Thursday, October 14, and worked no other day that week. I find that this data supports the conclusion of the Acting Regional Director that the 1982 peak

week was not necessarily representative of 1983 peak labor needs.

Bowker testified that at this meeting where the Joint Exhibits were provided to him, the Employer failed to provide him with the acreage or the manpower used per acre per harvesting. Bowker testified that he asked for these figures and that the Company said they had no records or figures of that. (Tr. III:148.)

Bowker testified that after he received the information from the Employer and his agents regarding grafting and other matters after the pre-election conference on Tuesday evening, he took the information down and then he consulted with "the experts." By experts he testified that he meant Judy Wiessberg and Ricardo Ornelas. He thought that she was "an expert" because she had substantial background in the area. He also believed that Ornelas was knowledgeable about the wine industry and the grape industry. (Tr. III:221-222.)

After receiving Joint Exhibits 3 through 11 at the motel, Bowker went to his motel, called Weissberg and explained to her what had taken place at the pre-election conference and described to her what documents had been provided to him by the Employer. (Tr. III:224.)

Though Bowker testified he never Xeroxed the information contained in Joint Exhibits 3 through 11, and Weissberg did not actually read the documents themselves prior to the election, Bowker testified and I find that he read each document to Weissberg. He said it was his impression he was actually dictating the information to her over the phone. (Tr. III:229.)

I find that Bowker provided to Weissberg all of the

information that was provided to Bowker by the Employer and his agents following the pre-election conference. Bowker went over this information in detail with Weissberg. I find that Bowker read to Weissberg on Tuesday evening each document contained in Joint Exhibits 3 through 11. I also find that Weissberg made notes and asked questions to Bowker about the exhibits he was reading to her. Based upon the un rebutted testimony of Bowker and Weissberg, I find that she was familiar with the contents of the documents.

Bowker testified that he first learned of allegations of fraud regarding the October 11-17, 1982 peak week Tuesday night following the pre-election conference. Tepusquet workers made those allegations in a meeting Tuesday evening with Board agents Ornelas, Diaz and Gastelum. The workers claimed that there never were 110 employees during the peak week in 1982. When Bowker joined the meeting, he indicated that he needed more specific proof including declarations if he was going to act on the allegations made by the workers.

The following morning workers brought in declarations to the Santa Maria Field Office to substantiate their claims of fraud. According to Bowker, this "shifted the whole situation' regarding the peak question. He directed the Board agents to investigate the allegations of fraud and to seek confirmation that the Employer records were accurate. Bowker told Ornelas to set up an appointment that day to review the Employer's records. After receiving information from Ornelas regarding the Wednesday inspection of documents at the Employer's office, Bowker testified that the only information that he then needed

were the payroll records from the labor contractor to match against information that Ornelas had obtained from the Employer. (Tr. III:262.) When Bowker met with Tepusquet workers Wednesday night at the Paso Robles Community Theater, he confirmed by communications with some of those workers that the declarations had in fact been provided by Tepusquet workers. The purpose of the Wednesday meeting was to follow up on the investigation of the issue of fraud. (Tr. III:253.)

Bowker testified that he visited the labor contractor (Joaquin Gomez) that evening (see discussion of this meeting supra at pages 18-19). Gomez told Bowker that 19 or 20 workers were brought in to complete some of the work that was left unfinished one day during the peak week. Furthermore, Gomez told Bowker that this was an unusual day in that the work was not finished and the workers were not around. This required that additional workers be brought in.

Bowker testified that a crew of 19 workers was brought in on October 13 for the first time and they worked on the end vines. (Tr. III:280-281). In reviewing Joint Exhibit No. 4 during cross-examination, Bowker testified that on October 13 there were six employees who only worked six hours and five employees who worked only four hours. This indicates that some workers did leave early and then Gomez brought in the 19 employees that worked two hours to finish whatever work wasn't completed by the workers who left early. Gomez then explained that on October 14 he brought in extra workers. There were 37 workers who worked only five hours on October 14 which is less than a typical workday.

I find based on Bowker's unrebutted testimony and my review of Joint Exhibits 2 and 12 that Gomez told Bowker that he had brought in a crew of some 21 workers on October 13, 1982 to finish work that had been left unfinished by workers that very same day.

According to Bowker's testimony, when he and the Board agents were reviewing the labor contractor's payroll records to check for fraud for the one week each in 1981, 1982 and 1983 they found out that the 110 peak week was really not representative. There never before had been such a high number of workers during any week during those three years. Bowker testified that though they cleared up the issue of fraud and had decided that 110 employees had worked during the week of October 11-17, 1982, the issue was raised as to the representativeness of this peak week in 1982. This came up on Thursday late afternoon when several Board agents were reviewing the labor contractor's records at the Cinderella Motel in Paso Robles.

Bowker testified that on Thursday he communicated with Weissberg two or three times in the afternoon. (Tr. III:160-161.) The Board agents would always communicate new developments in the investigation to Weissberg during the week. In fact, they communicated with her almost every day. The first telephone conversation between Bowker and Weissberg on Thursday was around 3:30. During this conversation, Bowker informed her what the labor contractor had told him when they were going over the records. He told her that the peak week of 1982 was a very unusual week. He further advised her that by checking the records for the previous year, they didn't see any week approaching the

peak week's high number of workers. Bowker said that they went through each year for the particular three years involved. The records they reviewed were the labor contractor's records which had been provided that Thursday afternoon. The highest body count figure that he got was in the range of 59 or 63, "somewhere around there." This was for 1981 and 1982.

During cross-examination of Bowker, Kepner repeatedly asked whether Bowker or any other Board agent had communicated to the Employer the information provided by Gomez to the effect that a number of workers had to be brought in on a special basis to complete work that had been left unfinished. Bowker responded that when this information was provided on Wednesday night, the Board agents were still investigating the issue of fraud as to whether 110 people actually worked. It wasn't until late Thursday afternoon or early Thursday evening that the Board agents decided that there was no fraud but that there was a basis to find that the peak week in 1982 was unrepresentative. Bowker further testified that Ornelas advised Kepner on Thursday evening that that particular week was unrepresentative. Bowker testified that Ornelas was assigned the task of calling Kepner in the evening and that Ornelas advised Kepner of their determination and asked whether Kepner had any evidence that would refute the finding and if so, to provide it and that it would be considered. (Tr. III:272.)

Bowker further testified that he called Kepner on Friday morning around 10:30 or 11:00 and informed Kepner that they were going to have the election that afternoon when the workers got off work. Kepner objected strongly to having the election.

Kepner told Bowker he had something higher with regard to peak week in 1979, 1980 or another year and Bowker advised him to bring it over and he would look at it. Bowker said that Kepner indicated that he had a peak week higher than 80 employees. But Kepner never provided any factual evidence to back up the allegation of having more than 80 employees.

I find that Bowker made this determination that there was no fraud in the number of workers during the October 11-17, 1982 peak week on Thursday evening. I find that the lateness in making this factual determination was reasonable under the circumstances which included holding three elections and investigating three election petitions during the same period of time, and reviewing a great quantity of payroll records and materials both from Tepusquet and from Joaquin Gomez.

Ornelas testified that he spoke on Tuesday evening with some Tepusquet workers about the 1982 peak for the purpose of finding out from workers who had worked during that peak period if the 110 figure was accurate and to find out what would be a normal workforce. He testified that no declarations were provided to him that evening. He reviewed the records for that week to verify whether indeed 110 people worked that week. (Tr. IV:21.)

Ornelas testified and I find that he called Kepner the next morning (Wednesday) and set up a meeting. He told Kepner the purpose was to review company records to verify the 1982 and 1981 peak weeks. Ornelas testified that he was focusing on the body count when he visited the Employer's office on Wednesday.

Ornelas testified, without contradiction, that when he visited the Employer's office on Wednesday he asked Kepner for canceled checks given to the employees in order to verify how many employees worked during the various peak weeks. Kepner explained to him that only one check was made and that was payable to the contractor who in turn was responsible for making out the individual checks to each worker. Kepner further advised him that he would be provided with the canceled checks through the contractor. (Tr. IV:4.)

During this meeting, Kepner verified to Ornelas that September 21-27, 1981 was the peak week (See JX:6). Based upon Ornelas' credited testimony that Kepner told him that September 21-27, 1981 was the peak week for 1981 and upon the fact that the Employer gave Bowker Joint Exhibit No. 6 as a summary of the 1981 peak, I find that the Board agents and Acting Regional Director were reasonable in assuming that that particular week was the peak body count week for 1981. They were, therefore, reasonable in assuming that this peak figure of approximately 59 workers was the 1981 body count and could be used as a predictor for the Employer's labor needs for 1983 harvest season.

In response to Ornelas' request made Wednesday afternoon at the Employer's office, Kepner did provide information some twenty-four hours later to Ornelas at the Cinderella Motel in Paso Robles. This information included contract employee earnings reports for the peak periods in 1982.

Ornelas testified that he believes that Kepner brought in not only the materials in Joint Exhibits No. 12A through 12D

but also checks from the Employer to the labor contractor. He further testified that the checks that were made payable from the contractor to each individual worker were provided by the contractor on Thursday afternoon. Ornelas testified that when Kepner and Bunch came into his motel room at the Cinderella Motel in Paso Robles on Thursday afternoon, Board agents Diaz and Gastelum were present. The contractor's bookkeeper was also present. (Tr. IV:9.)

Ornelas testified that he spoke with labor contractor Gomez regarding some checks. They also discussed the type of work that had been performed during the peak week of 1982. According to Ornelas, Gomez indicated that he had a lot of people working "kind of like as a favor to finish up some work." Gomez told him that he had other clients besides Tepusquet. There was one day when Gomez asked some employees who were working under him but for an employer different than Tepusquet to help him out and do him a favor. The favor was necessary because either he had sent some people home earlier or "maybe" because they were going to do the ends of the rows. (Tr. IV:46.)

Ornelas testified that he reviewed payroll records or other kinds of records and compared the number of hours that the two groups of workers worked that day, October 13. He testified that his comparison indicated that there was a pattern of several people who worked less than a full day and a group of people who came in for just two hours that same day. I find that Ornelas did do this comparison, and a review of Joint Exhibit No. 2 corroborates his testimony. Gomez advised Ornelas that some of these workers who came in for two hours had worked the

following day. Ornelas utilized Joint Exhibit No. 4 to ascertain the hours worked by employees on October 13. Gomez told him that the extra workers had come in to do a special job or the ends of the rows. Ornelas did not know for whom they worked earlier that day. These were the workers Gomez asked to do a favor and work a couple of extra hours.

Gomez advised Ornelas that those workers who came for a couple of hours on the 13th worked several hours on the 14th and were doing the same work. Ornelas then contacted at least one person who worked in that group and confirmed what Gomez had told Ornelas.

Ornelas testified that it was his understanding from Gomez that these additional workers came in for "like a special assignment to do the ends of the rows." (Tr. IV:67.) He further testified "it was just like a one-shot operation." Ornelas testified no to the question whether, based on his experience in investigating elections of wine grape ranches, he thought picking end vines was an unusual job to be done during the harvest season.

I find that the Board agents conducted an adequate investigation of whether the 1982 peak week of October 11-17 was a "representative" week. Ornelas spoke with a Tepusquet worker who had worked that week and confirmed that a number of workers had originally worked for one employer and then later that day began work at Tepusquet as a favor to labor contractor Gomez. I further find that this was a one shot operation that is not necessarily repeated during each harvest season and that there was no specific evidence introduced by the Employer char this type of one shot operation normally occurs during the harvest

season. In the absence of evidence indicating that this is a normal yearly occurrence, I find that it was not a typical occurrence and that it is not likely to again occur during the harvest season of 1983.

In response to a question of whether Ornelas communicated to any Employer agents or Lucas himself the statements by Gomez regarding the provision of the employees to the ranch on October 13 and 14, Ornelas answered yes, that he was "pretty sure" that he told Kepner. Kepner then asked what Ornelas told Kepner regarding what Gomez had said, and Ornelas answered:

He said that he used extra people kind of like a favor to him, come in and just like a one-shot operation, and that that seemed to account for what appeared to be an abnormal peak week. These people just came in for a limited performance. . . . (Tr. IV:70.)

Ornelas testified that he believed that he told Kepner about the type of work these people were doing on Thursday evening. It was by Thursday evening that he had looked at the labor contractor's records which indicated those employees who worked for two hours on the 13th of October had earlier worked that same day for another employer. The contractor's records substantiated this, i. e. that they had received pay for two different jobs on October 13, 1982.

Ornelas testified that early on Thursday morning he spoke by telephone with a Tepusquet worker who appeared on the Employer's list. According to Ornelas, the worker stated that on some days in October of 1982 he had worked on the same day for two different employers, one of those being Tepusquet. The worker said that several other people (all from Cattleman City)

also had worked this same pattern. They had been working on a nearby ranch, and when they finished early in the afternoon, labor contractor Gomez asked them if they would do him a favor and if they would work a couple of extra hours or remain "de oquis" (out of work). The workers agreed to perform this work. The workers also worked the following day at Tepusquet. The type of work they were doing was the "ends of the rows." Ornelas was fairly certain that they did this work both days. This is further corroboration of Gomez's admissions to both Bowker and Ornelas regarding the unique nature of the October 11-17, 1982 peak week. (Tr. IV:83-85.)

Ornelas testified that when he reviewed the labor contractor's records he saw cancelled checks for the individual contract employees. These checks verified the Employer's contention that there were 110 or 111 people working that week.

After reviewing Joint Exhibits 12A through 12D provided by Kepner Thursday evening as well as the labor contractor records provided by the contractor that afternoon, Ornelas called Kepner and advised him that in reviewing the labor contractor's records the Board agents noted that the weeks reviewed showed no more than a number of employees, in the 60s who worked any particular week and that it appeared the 110 figure was abnormal. Ornelas explained to Kepner that they had done a body count of the employees in the contractor's records and then added ten people for the direct employees. Kepner responded that he was of the opinion that 110 was still the highest figure and it shouldn't matter what the other weeks were. Kepner did not object to using

the labor contractor's records in the form that Ornelas and the Board agents were using them. (Tr. IV:12.)

Ornelas again called Kepner after completing the review of the records. Ornelas estimated the second call that evening at sometime between 9:30 and 10:30 in the evening. During this conversation, Ornelas told Kepner that the Board agents had reviewed the contractor's records, that Ornelas had discussed with Weissberg what those records indicated, and that Weissberg had told Ornelas that based on the information provided her and that which she had already reviewed, this particular week was abnormal and she felt that an election was in order. She further directed or instructed Ornelas to call Kepner and inform him of her decision. Ornelas testified that he told Kepner during this second conversation Thursday evening that Weissberg determined that the union qualified for the election and that Bowker would be working out the rest of the details with him. By qualifying for the election, Ornelas testified that he meant that they had met the peak requirement.

In response to this, Kepner was very upset and disagreed with the decision. He then repeated that 110 was the peak week and it was the only figure that Ornelas should be dealing with. Ornelas then told Kepner that if Kepner had any additional records or information to provide that he should do so and provide them to Weissberg or Bowker as soon as possible. Kepner told Ornelas that he believed that there was a week either in 1979 or 1980 where the Company had reached approximately 80 employees. Ornelas suggested to Kepner that if this were so and if the information was there, Kepner should provide it the first thing in the

morning. Kepner wished to speak with Weissberg and asked Ornelas to attempt to get permission to give out her home phone number. Ornelas said that he would do so and he tried to call Weissberg, but there was no answer. Then Ornelas called Kepner back a third time that evening and advised him there was no answer, he could not give out her phone number but he would try to call her first thing in the morning.

Subsequent to this final conversation that evening with Kepner, Jenny Diaz and Ricardo Ornelas returned to Fresno. Late the next morning, or perhaps early in the afternoon, Ornelas spoke with Weissberg. He told Weissberg that he had done what she had instructed him to do and advised Kepner about the determination. He further told Weissberg that he had told Kepner to provide the documents to Weissberg the first thing in the morning. He recalls that Weissberg told him that she had already spoken to Kepner that morning.

Ornelas testified and I find that the Employer did not raise the representativeness of the pre-petition workforce, i.e. the 37 employees on the eligibility list. (Tr. IV:85.)

Weissberg testified that the question of the representativeness of the 1982 peak week was raised on Monday. (Tr. IV:151.) She communicated this concern to Bowker during their Monday evening meeting.

Weissberg testified that she had telephone conversations with UFW representatives who would relate answers from workers to questions which Weissberg was asking (the workers were in the same room). According to information received from the UFW.

representatives by telephone conversation with Weissberg, the workers were asserting very insistently that based upon their familiarity with the Shandon Ranch over the last few years the peak labor force would be somewhere in the 50's. The workers were very insistent that a figure of 110 was "way out of line" and that 60 was about the maximum of the harvest workforce level at Tepusquet during the past few years. The declarations received by the Board agents, according to Weissberg, discussed the years 1981 and 1982 and confirmed what she had heard from the UFW representatives. This led Weissberg to order that a complete investigation be made of the 110 or 111 figure. The workers were alleging that the figure of 110 was simply not representative of the number of people performing the harvest. (Tr. IV-.190-191.)

Weissberg testified that she directed the Board agents to investigate any year that would indicate a level that was anywhere near 110. (Tr. IV:157.)

When she talked to Bowker Tuesday evening following his receipt of Joint Exhibits 3 through 11, Weissberg asked Bowker what he could tell her about how the information received would enable her to get the number of acres or the number of tons that would be increased in 1983 over 1982 and some type of a formula for applying a worker per acre or a worker per ton ratio. Yet, she was unable to determine from the information provided to Bowker a formula which would establish the number of additional workers needed during the 1983 harvest. For example, she could not determine from that information the actual period of time for harvesting that additional acreage. She was unable to derive a formula from the information provided to Bowker of how many

workers she should add based on the additional acreage that would be put into production in 1983.

Weissberg testified and I find that she relied on Bowker's description of each of the documents he had received Tuesday evening and she relied particularly on what was not received. (Tr. IV:176.) She further testified, and I find, that both she and Bowker did not believe that they could figure out from the information he had received from the Employer on Tuesday night the Employer's assertion that there would be a 15% increase in production in 1983 which would lead to a 15% increase in the number of workers. None of the information provided by the Employer enabled them to figure out how many workers would be necessary for any increase in production, assuming that there was an increase in 1983.

Weissberg testified that Bowker read to her over the phone "in very great detail the contents of these documents" on Wednesday. The documents referred to are those contained in Joint Exhibits 3 through 11. (Tr. IV:144.)

I find based on Weissberg's and Bowker's uncontradicted testimony that Bowker read to her Joint Exhibits 3 through 11. I find that Weissberg recreated a number of these documents. I also find that Ornelas gave her information regarding an hourly breakdown of several of the days in Joint Exhibit No. 5. This data referred to the group of employees that came in for the first time in the middle of the week and worked two hours on October 13. About half of those workers, according to Weissberg's recollection, returned the following day but they worked about a half a day. "It wasn't as though those workers had come in

as full-day workers." (Tr. IV:149.) A very small number of that group returned a third day and those who did, worked a minimal number of hours. At some point in a conversation with Bowker, he indicated to Weissberg that he had information that the workers in this group had been used for a "special operation."

I find that Weissberg was reasonable in concluding that this group of workers brought in for the first time on October 13 who worked two hours that first day were used for a special operation in the sense that it was unlikely that this group of people were part of a normal harvest workforce of the Employer likely to be duplicated during the 1983 harvest. Weissberg testified upon cross-examination that she was not looking at the work so much as she was looking at the workforce. She testified:

It was the level of workforce that to me stuck out as not being usual or typical for that Company.... I had not received any information, let's put it that way, that the company had a regular history of bringing in a large number of non-normal work employees to do a couple of hours of cutting these end rows; that I had never received information that substantiated that in the course of the investigation. (Tr. IV:155.)

Weissberg testified that she spoke with Kepner five or six times on Thursday, February 10. The last telephone conversation was at about 4 p.m. and Kepner was in Santa Maria at the time. During the 4 p.m. conversation, Weissberg told Kepner that she had not yet made a decision and that they were still working on the issue. Kepner was very concerned that Weissberg was not accepting the number of workers in the 1982 peak payroll period. He insisted that she use the numbers (110) that were

selected by the Employer as the peak period and that that was the only number that she should utilize. He also wanted to know why she was investigating any facts other than that particular time period in 1982. (Tr. IV:110-115.)

Weissberg advised Kepner during this conversation that she was still in the course of checking out whether the 110 number was a true number. She advised him that the issue had been raised whether or not 110 people had actually worked during that week. She further explained that the issue had been raised in a number of ways. First, the issue had been raised by the UFW and by workers whose position was transmitted to her through telephone conversations with Peter Cohen, the UFW representative for the area. She told Kepner that the workers were questioning whether 110 was the normal figure for a harvest peak payroll period in any past years and whether it would be in the future years.

She also advised Kepner that the documents that Board agents were reviewing and the information transmitted to her indicated there was some basis why the 110 might not be the correct figure to apply for the peak determination. She told Kepner that she was concerned whether the 110 figure occurred in a week when a group of workers had been brought in such a manner to indicate that this was not a normal situation. She also told him that a review of other weeks during the 1982 harvest showed numbers substantially lower than the 110 figure.

Kepner responded by saying that he had presented documents which show that either Saikhon or body count comparisons for the 1982 peak period and the 1983 eligibility period indicate

that peak does not exist. He told her at 4 p.m. on Thursday that he did not think any other information was needed by her or was relevant for her to make a decision.

Weissberg then testified that Kepner told her during this conversation that he knew that somewhere in the Employer documents in past years there were figures showing a high peak harvest payroll. He said that the payroll would show a peak of somewhere between 70 and 90 workers. She told him that none of the documents that she had reviewed thus far indicated that such a figure existed and she asked him for those documents. He replied that he believed that those were for the years 1979 or 1980. She told him that she wanted him to find those documents and present those documents to her. She believes that she told him to take the documents to Paso Robles or transmit them somehow to the Board agents. Kepner said he thought that those documents or payroll periods were available and he would go through the documents and find them. Weissberg then told him "Look we're still conducting this investigation. Find those documents, because that will deal with one of my concerns, and get those to us." Weissberg told him this several times.

I find, based upon Weissberg's credited testimony, that Kepner was advised on Thursday at 4. p.m. by Weissberg that she was looking at two aspects of the October 11-17, 1982 peak week. The first aspect pertained to whether 110 people actually worked there during that week. The second aspect related to whether the figure of 110 was a typical figure which had occurred in the past or which was likely to occur in the future. I further find that Kepner indicated to Weissberg during this Thursday

conversation of 4 p.m. that he was aware of a peak between 70-90 people in a prior year (1979 or 1980) and that he would try to make this information available to the Board. I find that Weissberg requested that he in fact make this information available to the Board. I further find that neither Kepner nor any other agent of the Employer made such information available to the Board even though they were aware of the Board's concern regarding this matter at least as of Thursday afternoon at 4. p.m.

I find that Weissberg made her determination that there was peak Thursday night at about 10 in the evening. Weissberg testified that prior to making her decision on Thursday evening, she had several conversations with Board agents assigned to the election. She testified that she advised the Board agents around 10 p.m. on Thursday evening that she was directing that the election be held based on her peak determination. It was her understanding that the election would be held sometime the next afternoon. This last conversation she had with the Board agents went for an hour or more. She said that the theory that was used in making the finding of peak was that the Employer had not sustained its burden of proving that the employees listed on the payroll for the period prior to the filing of the petition was not at least 50% of the peak payroll period for the year. (Tr. IV:116.) When she considered the harvest peak for 1983 she factored in a percentage increase in labor needs because of the grafting that had been done in 1982. She testified:

And the analysis that we went through that night involved discussion of all of the information derived in the investigation, which

means more than just Employer documents; it was conversations with parties; it was declarations from workers; it was information provided by the workers. So it was a summary of everything. (Tr. IV:17.)

She had this conversation with Ornelas and Bowker. She testified that she spoke to each of them a number of times during that conversation. She testified that she had received, in telephone communications with the Board agents, a rundown of all the information received from the Employer. She had personally reviewed the documents contained in the Employer's Response. She also received information from the UFW. Her determination about peak was based on the totality of all of the facts derived from all of these sources.

I find that Weissberg directed the Board agents at about 10 p.m. on Thursday evening that there would be an election, but that they should go back again and double check all of the information. If everything was consistent with what they had discussed, then the election should be directed. She also told them that she did not want them to refuse to accept any documentation from any party. She did not "want to close the door to accepting anything that's possible to accept from the parties." (Tr. IV:119.)

I further find that Ornelas then communicated to Kepner that though there was not an issue of fraud there was an issue concerning the representativeness of the peak week. I find that Kepner still had the next morning until early the next afternoon to submit evidence that there were peak weeks approaching the 110 figure or at least over 80 for the year 1979, 1980, 1981 or 1982. The Employer had the last clear chance to rebut the finding of unrepresentativeness and failed to do so.

Weissberg testified and I find that Kepner called her again on Friday at about 9 a . m . and wanted to know if an election was going to go forward. She told him that it would, that there was peak and then she again explained to him the whole analysis, emphasizing her two concerns: whether or not there were 110 people who worked there and that this particular week in October was not a normal peak week to use for body count comparisons. I credit her testimony that during this conversation Kepner told her that there were documents establishing the higher level of body count and he again used the figure of a range of 70 to 90 . She asked whether Kepner had presented those to the Board agents. He did not state either that he had that specific documentation or that he had presented it to the Board agents. She again told him that if he had any documentation he wished to present that she was not closing the door to presenting that documentation. She did, however, indicate that she had made a determination. Kepner did not submit any further information to her or to the Board agents.

I find, based on the record evidence, that no justification or explanation was provided to the investigating Board agents or Acting regional Director explaining why the 1981 harvest which was approximately 200 tons less than the 1982 harvest required in excess of 50 workers less than the number of workers required in 1982. The Employer's testimony combined with Joint Exhibit No. 11 indicates that for anywhere from an additional 200 to 400 tons picked by machine the labor needs were approximately 50 more workers in 1982 than in 1981. This finding is based upon the Employer's testimony that the number of tons hand harvested in 1981 were anywhere from 0 to 200 tons less than

the number of tons hand harvested in 1982. (Tr. 111:52-53.) In addition, from a review of Joint Exhibit No. 11, it appears that in 1981 there were only 200 fewer tons of grapes harvested than in 1982. It seems incredible that the extra 400 tons of grapes that apparently were machine harvested would require 50 more workers during the peak of season than worked during the peak of season in 1981 with similar amounts of hand harvested grapes and only two to four hundred tons fewer of machine harvested grapes. I also note there is no evidence indicating how many tons were harvested during the peak week of 1981 or 1982. Since the harvest lasts for four weeks, and since the Employer failed to advise the Board agents of how many tons were harvested during each such week, I find the Employer failed to meet its burden.

V. Effect of Grafting

Lucas testified that the vines that were grafted in 1982 were not in production during that year. With those vines back in production in 1983, he expected to have an increased amount of grapes. In 1982 there were 56 acres of vineyard (12 to 15% of Shandon's total acreage) out of production as a result of the grafting effort. (Tr. I:53-54.)

Lucas testified that in 1983 the 56 acres that were grafted from Zinfandel to Muscat Canelli in 1982 would be back in production at approximately 60-80 percent of full production. These 55.7 acres would be "likely" to be hand harvested. Lucas claimed that he explained this to Bowker. But he did not testify as to whether he advised Bowker how many more workers would be

required to hand harvest these 55.7 acres compared with the number of workers that would have been required if these 55.7 acres had remained in the Zinfandel variety. (Tr. I:84.)

According to Lucas, he grafted from Zinfandel to Muscat Canelli at the request of the winery, Monterey Vineyards Winery, and he explained this to Bowker. (Tr. I:85.)

Lucas testified that he provided to Bowker Joint Exhibits 8a-c, which is a three part document regarding harvest statistics. It should be noted, however, that the only statistics regarding tons harvested contained therein pertain to the Zinfandel variety and do not include the tons harvested for any of the other varieties at the Shandon Ranch. Lucas testified that the purpose of providing Bowker with Joint Exhibits 8a-c was to show him that only 264 tons of Zinfandel were produced in 1982 because of the reduced acreage.

Though Lucas testified that he invited Bowker to visit the Shandon Ranch to personally view the grafting and that Bowker did not accept the invitation, Lucas later testified it would have taken days to determine by visual inspection whether grafts had taken. (Tr. I:88.)

Regarding production of the 56 grafted acres in 1983, Lucas testified that he is estimating he will get approximately four tons per acre for the Muscat Canelli. He testified that he did give this information to the Board agents.

Yet Lucas testified that he did not provide any documentation that would substantiate that the Muscat Canelli would be producing four tons per acre in 1983. He further testified that the four ton figure is very flexible since many graftings

may not take. Most importantly, though Lucas claims that he knew as of the end of 1982 that more than 90% of the grafts took regarding the 56 acres of Muscat Canelli, he did not provide this information to the Board agents. Instead he testified that he had invited the Board agents to go down and see the actual grafting but that they never did. Upon further cross-examination when Camacho asked Lucas whether any documentation was provided to the Board agents showing the actual number of vines that took to grafting, Lucas answered "No." (Tr. II:39-41.)

Upon redirect examination Lucas was asked whether he conveyed to Bowker in the course of the Tuesday meeting Lucas' projection for production in the 56 acres of Muscat Canelli for 1983, Lucas answered, "Only to the extent that we produce 60 to 80% of normal, that I recall." He testified that at that same time he provided documents which showed what normal had been in past years of the varieties. However, it appears from this testimony of Lucas that he never had grown the Muscat Canelli variety in previous years nor did he have any experience with the success or lack of success of this particular variety at Shandon. (Tr. II:59.)

On redirect examination of Lucas, Kepner asked whether at the time of the investigation Lucas had any documents which would show the production of that vineyard (referring to the Muscat Canelli acres), in 1983. Lucas answered yes and that he had a budget. However, Lucas testified that he failed to provide the Board agents with this budget which allegedly showed how many tons per acre would be harvested from the grafted Muscat Canelli grapes. (Tr. II:58.)

Lucas testified that in order to illustrate the effect of grafting, he himself computed the number of tons of grapes that had been harvested the last couple of years by hand and considered this with the total number of acres harvested and then came up with a 12 to 15% increase in acreage for 1983. Most significantly, he testified that "If you take the production that's been picked by hand and compare it to the increased production by that 56 acres, you get in excess of 20 percent increase in the amount of hand work." (Tr. II:38.) The problem is that although he had this information available to him, he did not relate in this testimony how many acres or tons harvested during the last couple of years were harvested by hand. I am not, therefore, able to give full weight to his testimony regarding the 12 or 15% increase. In addition, in light of the fact that he failed to tell the Board agents that he would be grafting in 1983 thereby taking a certain number of acres out of production, I am not inclined to find that there would be an extra 15% in production for the harvest of 1983.

I find that Weissberg contacted the University of California Cooperative Agricultural Extension Division and several branches of the California Employment Development Department to try to determine the number of workers required to harvest an acre or ton of wine grapes. I credit her testimony that the state agencies had produced a document in some past year which indicated for some crops in a particular county how many people could be expected to be used per acre but that there was no such information or data available for this particular area where Shandon Ranch was located for the time period involved.

I find that the Employer's Response did not provide adequate information to enable the Acting Regional Director to determine how many more workers would be required in 1983 because of the grafting that was done in 1982. I further find that the Employer did not subsequently provide the necessary information to enable Weissberg to make a reasonable assessment of the additional workers that would be needed because of the grafting. Though it was within the Employer's ability to do so, the Employer failed to inform the Board agents or Weissberg at any time of the percent of grapes that were hand harvested or machine harvested in 1982, 1981 or any other year. Nor did the Employer provide information which set forth how many acres were expected to be hand harvested in 1983. For example, the Employer did not provide harvesting schedules for past years. I find that Weissberg reasonably developed a formula for trying to work out the number of employees per tons harvested. I find that based on the information available, she was reasonable in calculating that the 56 acres, assuming that they yielded the same quantity of production as was produced by each of the acres in 1982, would have required approximately eight additional employees.

I find that the process of determining or calculating the number of employees required per ton and then using this to determine the number of employees per acre, was a reasonable method of calculation based upon the limited information available.

I find that Weissberg reasonably concluded based on the limited information available to her that turnover was not

a factor which would cause her to have to reject using the body count figure.

E. Credibility Resolutions

In resolving conflicts between the testimony of the witnesses and in determining which witnesses to credit, I relied upon my observation of the demeanor of the witnesses.

I was particularly impressed with Judy Weissberg's direct and straightforward manner of testifying. Her memory was excellent. She was calm and deliberative, and she consistently made a sincere effort to accurately recall information and conversations.

I was impressed by Weissberg's demeanor during cross-examination. Her testimony was very forthright and honest in answering such questions as whether or not she had contacted or communicated with UFW representatives prior to the hearing and whether or not she had reviewed various exhibits prior to her testimony at the hearing.

I note that she was an experienced ALRB employee having been an attorney with the Agency for a number of years. Her roles as an attorney included assignments as Board counsel, counsel with the Executive Secretary's office as well as her substantial regional experience. She first began working for the Board in 1975 on a part-time basis for two years and was a full-time attorney for the agency for six years. She was assigned to the Oxnard Regional Office since March of 1981, and she had acted as Regional Director during the Fall of 1982. She was officially appointed as Acting Regional Director in January 1983. In summary, Weissberg was very credible.

Carlos Bowker was also a very experienced Board agent, having served as a field examiner since October 1975. Though this was his first wine-grape election, he had investigated peak issues in dozens of other elections. He had been Board agent in charge of about 4-0 elections, including a number of strike elections.

One factor supporting Bowker's credibility was his unhesitating testimony that Lucas was cooperative. He also conceded this was his first wine grape election. His testimony concerning Kepner's persistence and repetitiveness was believable. Bowker conceded that Board agents were not present when workers prepared and signed, the declarations.

Bowker displayed a good recall for a number of details, and he was very definite about his conversation with Joaquin Gomez, the Employer's labor contractor. His testimony about his comprehensive explanation of documents to Weissberg and his reliance upon Ornelas rang true in the context that this was his first wine grape election.

Ricardo Ornelas has been with the Agency since November 1976. He was a very responsive and straightforward witness who manifested a good memory. In short, he was a credible witness. On cross-examination, he looked directly at Kepner and he answered the questions promptly.

I found Lucas to be a generally credible and cooperative witness on most issues. He displayed a thorough knowledge of the wine-grape industry and he patiently explained his Shandon operation in response to a number of questions from the

Investigative Hearing Examiner. However, I found his answers evasive to some questions on cross-examination including questions regarding his instructions to his clerical staff for computing the 1981 peak week. I also found some of his answers non-responsive to questions on cross-examination including questions regarding whether he usually brings in workers just to work on the end vines as was done in 1982.

Though Ms. Bunch was initially hostile on cross-examination, I found her to be a credible witness.

Mr. Kepner tended to volunteer information during his testimony on direct. Though I find that he sincerely and persistently disagreed with the peak determination of the Acting Regional Director and thought that games were being played during the peak investigation, I felt his testimony was not precise on the question of what information Bowker and Weissberg had requested related to how many workers were required to harvest a ton or acre of grapes. I left the hearing with a sense that his attitude and testimony during the-hearing were affected by his strongly held belief that the peak requirement was never met and the election should never have been held.

Mr. Aquino was a responsive witness and generally answered in a straightforward manner. Though I credited substantial portions of his testimony, I was not impressed by his lack of recollection whether Bowker asked him for information showing how many tons a worker could produce or work days required per acre harvested. I, therefore, credited Bowker on these issues.

LEGAL ANALYSIS

Eighty six percent of the ballots counted were cast in favor of installing the UFW as the exclusive bargaining representative of Tepusquet's agricultural employees at the Shandon Ranch.

In recognition of seasonal fluctuations in agricultural workforces, the Legislature has provided that elections under the ALRA be conducted only when a representative number of workers are employed. This representative number has been defined as at least 50% of the employer's highest, or "peak," employment level. (See Lab. Code, sections 1156.3 (a) (1).)

Labor Code section 1156.4 reads as follows:

Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of their rights included in this part, the Board shall not consider a representation petition or a petition to decertify as timely filed unless *the* employer's payroll reflects 50% of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

In this connection, the peak agricultural employment for the prior season shall not alone be a basis for such determination, but rather 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.

There is a strong statutory presumption that elections are valid expressions of employee free choice:

Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election (Lab. Code, section 1156.3 (c) , ~~emphasis~~ *emphasis added.*)

And the objecting party bears the burden of establishing grounds for refusing to certify the election results. (Cal. Admin. Code, sections 20310(a)(6)(B), 20365, 20370. See also Charles Malovich (1979) 5 ALRB No. 33, pp. 8-9.)

The Employer's objection raised a "prospective peak" question—i.e., the Employer claimed that its 1983 peak employment level had not yet been reached when the UFW filed its election petition on February 3.

Clearly, some degree of speculation is inevitable in prospective peak cases, since, at the time the Regional Director evaluates the election petition, the precise time of this future peak, and the actual size of the peak workforce are unknown. The Board has been cognizant of this problem in developing a fair standard by which to review the Regional Director's decision to hold an election:

[O]ur review in all prospective-peak cases will be based upon whether the Regional Director's peak determination was a reasonable one in light of the information available at the time of the investigation. Charles Malovich, supra, 5 ALRB No. 33, pp. 3-4.

In its consideration of both prospective and past peak cases, the Board has set forth certain factors which are relevant and helpful in determining the peak issue in Tepusquet.

In a decision involving a past peak question, the full Board recognized that section 1156.4 poses troublesome questions of statutory interpretation. Bonita Packing Co., Inc. (1978) 4 ALRB No. 96. The difficulty is inherent in the statute's mandate that the Board apply a "clear and specific rule...exercise

discretion by making an estimate based on '...relevant data'".

Id. at page 7. The Board stated that,

in policy terms, [it is] faced with the problem of resolving complex questions concerning the nature of a representative vote in a unit of fluctuating size and composition, within the time constraints imposed by our expedited election procedures."
Id. at page 7.

In Bonita, the Board indicated that the body count approach and the Saikhon averaging approach are "two separate measures of the representative nature of the vote, neither of which is wholly satisfactory under all circumstances." Id. at page 8. The Board suggested that it is incumbent upon the Board to develop standards for estimating peak employment and determining the timeliness of petitions which reflect factors such as crop and acreage data applicable on a statewide basis. Though the Board did not in Bonita establish such standards, it did set forth certain guidelines which are helpful in analyzing a peak case. For example, the Board states that the body count in effect designates the total number of employees who are working at peak for the prior season as a "first estimate of peak employment for the current calendar year." Id. at 9.

In Bonita, the Board held that both the body count and Saikhon approaches are reasonable measures of the timeliness of election petitions and indicated that it will continue to find petitions which meet either of these formulas as timely. The Board expressed its concern that it might "deny employees access to the collective bargaining rights conferred upon them by the Legislature, pending [its] accumulation of more information

and experience with the varied and complex seasonal patterns of agricultural employment in California." Id. at page 10.

Significantly, the Board in Bonita found the petition to be timely filed even though, in this past peak case, the total number of eligible voters fell short of being 50% of peak by a margin of 2 employees out of 119.

In High and Mighty Farms (1977) 3 ALRB No. 88, the Board applied the Saikhon formula and agreed with the Investigative Hearing Examiner's conclusion that there were four unrepresentative days within the labor contractor's employees' payroll period. The Board, therefore, did not count these four days for purposes of calculating peak, since it did not wish to give a distorted average by including four days of a seven-day period, when the workers only worked the last three days. This holding is significant in that it manifests the Board's concern with ensuring that the periods or days utilized in a calculation of peak are truly representative of an employer's actual labor needs.^{12/}

In Donley Farms, Inc. (1978) 4 ALRB No. 66 the Board held in a prospective peak case that the use of the Saikhon method is unwarranted where a conventional count of the number of employees in the relevant payroll periods establishes that the petition was timely filed (i.e. the employer was. at least at

12/But see Court of Appeal decision in High & Mighty Farms v. Agricultural Labor Relations Board, 4th Civil No. 20452, where the court overruled the board's use of the Saikhon formula and set aside the election. The Board has filed a Petition for Hearing in the California Supreme Court, which is pending at the time of issuance of my decision.

50% of peak during the payroll period immediately preceding the filing of the petition). In that decision, the IHE had recommended that the Board compare a body count of employees for the pre-petition payroll period with an average of employees during the peak period. Instead of applying the IHE's formula, the Board found that during the pre-petition period, the body count of employees was more than 50% of the body count during the peak period, which actually occurred subsequent to the election.

In California Lettuce Co. (1979) 5 ALRB No. 24, the Board was again faced with a question of whether a particular work week was representative. In this past peak case, the Board determined that a work week of three working days was representative and that the employer did not establish that the Regional Director erred in finding that the three days on which no work was performed during the eligibility week (excluding Sunday) were unrepresentative. The Board warned against the danger of utilizing an approach which would require a petitioner to out-guess the vagaries of weather and markets and which might encourage employers to manipulate payrolls and work periods to affect the timing of elections. The majority of the Board attempted to calculate peak in such a manner as to gauge the actual labor and employment levels during the eligibility week, as well as during the peak week. This case was a reaffirmation of the principle set forth in High and Mighty Farms that the Board (in the computation of peak) would not consider in its calculations unrepresentative days on which no work was performed.

In Wine World, Inc. dba Beringer Vineyards (1979) 5 ALRB No. 41 the Board in a past peak case overruled Ranch No. 1 (1976) 2 ALRB No. 37 to the extent that Ranch No. 1 indicated that a simple mathematical computation is all that is necessary to determine peak. The Board recognized that, at best, it is merely estimating peak. The Board stated that payroll records from prior years are critical in supporting a finding of peak, as are other factors, including a change in the types or varieties of crops planted, an increase or decrease in the acreage, or weather conditions, any of which in a given situation could be determinative of the employer's peak labor needs. The Board indicated that payroll records for prior years are generally the most important single factor in estimating peak employment for a current year, as such records "provide a standard for comparison." The Board recognized that the Regional Director must usually make an investigation and determination of peak within three days after receiving the Employer's response, and that this is not an easy matter. The Board also recognized that use of prior payrolls "can at best establish an estimate of peak and generally a high estimate. Thus, in close cases, we are not inextricably bound to the Regional Director's estimate of peak employment." Id. at page 7.

In Wine World, the Board looked to the legislative purpose behind the enactment of Labor Code section 1156.4, which is to insure that the number of employees eligible to vote is representative of the workforce who will be affected by the results of the election. In this past peak decision, the Board

held that a 7% margin of error was too great and, accordingly, set aside the election. Although the Board rejected the UFW's contention that the employer's 1975 employment figures were "unique" and "unrepresentative," the Board did so because of Labor Code section 1156.4's mandate that an election petition is timely filed only if the employer's payroll immediately preceding the filing of the petition reflects at least 50% of the peak agricultural employment for such employer for the current calendar year. This left open the question presented in the instant case; that is, whether the year prior to the year the election is held may be considered unrepresentative for purposes of estimating peak in the calendar year the election is held.

In Holtville Farms, Inc. (1979) 5 ALRB No. 48, the Board upheld the use of a formula to calculate the employer's labor requirements based upon anticipated acreage increases. In that case, the IHE used the employer's 1977 peak payroll records and 1977 acreage figures to compute the average number of acres cultivated per person. This figure was then divided into the estimated acreage increase for 1978 to determine the probable number of additional positions the employer would need to cover the additional acreage. In the present election, the Acting Regional Director utilized a similar type of formula in order to anticipate or calculate future labor needs for 1983. In Holtville Farms, the formula utilized by the IHE received some corroboration in data contained in a publication issued by the Department of Employment Development. In Tepusquet, however, despite efforts to obtain corroboration from the

Department of Employment Development or the Agricultural Extension Service, Weissberg found that there were no available studies or publications which were related to estimating the number of additional workers required when additional acres of a particular variety of wine grape are put into production.

In Charles Malovich (1979) 5 ALRB No. 33, the full Board recognized that a peak estimate will be made on the basis of crop and acreage statistics "and all other relevant data." The Board found that "such an estimate is necessary in order to carry out the broad purpose of the peak requirement, which is to 'provide the fullest scope for employees' enjoyment of their rights under the Act'." The Board stated that these rights include the right to be represented for the purpose of collective bargaining, as well as the right to vote in elections. The Board expressed the need to determine whether the electorate is representative of the bargaining unit which may ultimately be certified. Most importantly, the Board recognized that the number of employees hired in a single year may not accurately reflect the size of the potential bargaining unit. In Malovich, there was an unusually high peak employment figure because of unexpected weather conditions, which resulted in a much larger crop than could reasonably have been anticipated. The Board stated that "no showing was made that the high level of employment in 1977 was likely to continue." Id. at footnote 3, page 5.

Significantly, the Board in Malovich, taking into consideration that both the peak requirement and the Act's requirement that an election be conducted within seven days of

the filing of the petition,

"recognize[d] that opportunities for representative elections in agriculture are limited. For this reason, our decisions in representation cases have consistently followed a policy of upholding the elections unless it is clear that to do so would violate the rights of employees or a reasonable interpretation of application of the Act." Id. at page 6.

A further important holding by the Board in Malovich is that the Board's,

"regulations place on the employer the burden of providing the Board with information to support its contention that it has not yet achieved 50% of its anticipated peak for the calendar year. 8 Cal. Admin. Code section 20310(a)(6)(B). [The Board found] it more reasonable to require the party with the access to information to produce it in support of its claim than to require a Board agent to frame speculative questions about possibilities which might or might not affect employment at a particular ranch." Id. at pages 8 and 9.

Relevant to the factual context in the present case is the following holding of the Board in Malovich:

Even if the Employer had provided the Board agent with all the information it had about the expected increase in production, the record indicates that an increase in employment over past years would not have been predictable. Id. at page 9.

In Domingo Farms (1979) 5 ALRB No. 35, the full Board indicated that the focus of its inquiry in a prospective or future peak case is on the reasonableness of the Board agents' determination at the time it was made. The Board recognized in Domingo that, in prospective peak cases where an estimate of future workforce is made, past payroll records are only one guide, and any other relevant factors must be brought to light

to assure the most accurate determination. The Board again placed on the employer the burden of providing the Board with information to support a contention that it has not yet achieved 50% of its anticipated peak for the calendar year, citing 8 Cal. Admin. Code section 20310(a)(6) (1978).

We have rejected the argument that the burden is on the Board agent to make specific inquiries in order to determine the correctness of an employer's anticipated peak figure. Id. at pages 6 and 7.

In A & D Christopher Ranch (1981) 7 ALRB No. 31, the Board held that a Board agent is entitled to rely on the accuracy of payroll information submitted by the employer (see footnote 1 at page 3). In the present case, the Employer provided Board agent Bowker with Joint Exhibit No. 6, which, based on my findings, reflected the Employer's statement of its peak body count for 1981. A & D Christopher Ranch is ample authority for my finding and conclusion that the Acting Regional Director was reasonable in relying upon this information as reflective of the body count for the 1981 peak of season.

Kamimoto Farms (1981) 7 ALRB No. 4.5 is a prospective peak case which is easily distinguishable from this case. In Kamimoto, there was an obvious discrepancy in the employer's response to the petition for certification, which should have led the Board agent to make inquiries of the employer regarding the issue of peak. In this case, there was no such obvious discrepancy and the Board agents made specific requests for information. Yet, the Employer failed to provide the necessary acreage and production standards which would have enabled the

Acting Regional Director to accurately determine the Employer's peak labor needs.

Applying existing Board precedents to the facts of this case, I conclude that the Employer failed to carry its burden of showing that the 1982 peak labor force, based on the body count method, would again be required in 1983. For example, the evidence indicates that the Employer brought in 21 to 26 workers on October 13, 1982, several hours after the regular crews began working. The extra workers were brought in as a favor to labor contractor Gomez. There is no evidence in the record to support a finding that it is likely that such a large crew or group of workers would be brought in during the middle of the 1983 harvest.

Despite several requests from the Board agents and the Acting Regional Director, the Employer failed to provide information indicating how many tons or acres of grapes could be harvested by a worker. Nor did the Employer provide any information during the investigation which would have enabled the Acting Regional Director to readily ascertain which varieties of grapes were hand harvested and which were machine harvested (except for the 55 acres of Muscat Canelli which the Employer told Bowker would be hand harvested). Even if, contrary to my findings, the Board agents were able to ascertain, based on Lucas' explanation of certain records including Joint Exhibit No. 9 and the map of Shandon Ranch, which acres had been harvested by hand, there was still inadequate information regarding the yield of these particular acres to be able to determine how many

tons had been hand harvested and how many tons had been machine harvested. Since this is very relevant to peak labor needs, the Employer should have provided this information in a format easily understood.

The Employer failed to indicate how many workers were required per ton or per acre for each of the varieties when that variety is machine harvested or when it is hand harvested. Nor did the Employer provide to the Board agents or Acting Regional Director any information indicating how many tons were machine harvested or hand harvested in 1982 or in any prior year. Though Lucas was able to testify that from 800 to 1,000 tons were hand harvested in 1981 and 1000 tons were hand harvested in 1982, that information was never provided to the Board agents or Weissberg during the investigation. Certainly the information mentioned by Lucas in his testimony when he referred to various records which would, taken together (in his view) indicate the number of tons hand harvested each year is less than clear and is at best very difficult to decipher or interpret. That data was not in the format contemplated by the Board as being sufficiently clear to enable a Regional Director to make an intelligent analysis and prediction of peak employment. It is the Employer's burden to provide this information in some intelligible and clear format. Charles Malovich, supra. 5 ALRB No. 33.

During the investigation, the Employer did not provide information indicating how many tons of a particular variety were yielded during the harvest in 1980, 1981 or 1982.

Despite the testimony of Lucas and Kepner and my finding that much of this information was available or could have been compiled (e . g . the original documents from which Joint Exhibits 7 and 8 were copied contained tonnage per block and variety), the fact is that none of it was provided to the investigating Board agents in an easily understandable format. My analysis indicates that Board precedent places on the employer the burden to provide precisely this type of information to the investigating Board agents, whether or not such information is actually requested. Charles Malovich, supra. 5 ALRB No. 35, pp 6-7. It would be unfair and unwise to impose this burden of analyzing complex payroll records upon the Board agents in light of the much greater familiarity of the Employer with its own records and the very limited time a Board agent would have to compute this information. In addition, this interpretation is consistent with the regulations which place the burden on the employer to establish that peak has not been met. The Employer's failure to provide this information to the investigating Board agents or to the Acting Regional Director remains unexplained and constitutes a failure to provide sufficient information to establish that the Petition was untimely.

The Employer failed to explain why so many more workers were needed during the peak in 1982 than during the peak in 1981, despite a similar number of tons harvested in each year and the fact that a lesser amount of acreage was harvested in 1982 than in 1981.

Lucas' testimony clearly evidences the fact that the method of harvesting (except perhaps the harvest of the newly grafted Muscat Canelli) was discretionary with the Employer. The Employer introduced no evidence that any winery required a particular variety to be hand harvested rather than machine harvested in 1983 or, for that matter, that such a requirement was imposed by any winery in prior years. Rather, the clear thrust of Lucas' testimony was that the red and white varieties could both be machine harvested.

The Acting Regional Director reasonably determined, in light of all the evidence she acquired during the course of investigation, that the peak body count labor force in 1982 would not be repeated in 1983. She found that it was more likely that the other peak weeks in 1982 (reflecting somewhere in the neighborhood of 55 to 65 workers), as well as the body count peak provided by the Employer for the year 1981 (which amounted to 59 workers), were more adequate or reasonable predictors of what the Employer's labor force needs would be in 1983.

For example, the evidence indicates that the Employer brought in 21 to 26 workers on October 13, 1982, several hours after the regular crews began working. The extra workers were brought in as a favor to labor contractor Gomez. There is no evidence in the record to support a finding that it is likely that such a large crew or group of workers would be brought in during the middle of the 1983 harvest.

Lucas testified that normally his workers do not pick Saturday and Sunday during the peak of season. This is yet

another factor which would indicate that Weissberg was reasonable in disregarding the peak week of 1982 as being nonrepresentative. Or, put another way, Weissberg was reasonable in assuming that the peak week in 1981 (59) would be more reflective of the peak labor needs for 1983 than was the peak week for 1982. A review of Joint Exhibit No. 6 which reflects the peak season of 1981 for the week of September 21-27 as provided by the Employer to Bowker, indicates that only three workers were employed on the Saturday or Sunday of that week. This further corroborates Lucas' testimony that normally his employees do not pick during Saturday and Sunday during the peak.

I note that the record is devoid of any evidence submitted by the Employer to the effect that the Employer attempted to contact Gomez prior to the election to gather information to rebut what Ornelas advised Kepner on Thursday. If the Employer felt that this was not a one-shot operation, I find that the Employer had time to contact Gomez and provide the Board agents Friday with information indicating that this was not a unique or one-shot operation. This the Employer failed to do. I conclude, therefore, that although cleaning the ends of rows is not an unusual procedure, in the context of the 1982 peak week where a number of employees did leave early on October 13 and a number of other employees arrived subsequently thereto, it does appear that the later arrivals were completing a job left undone by those who left early.

It also appears from my review of time cards and daily crew sheets contained in Joint Exhibit No. 2 that workers on

other days during the week of October 11-17, 1982 had not left early nor were there a number of workers brought in later as happened during October 13, -1982. For example, I note that the daily crew sheets for October 11, 1982, (Joint Exhibit No. 2) indicate that for that day all of the crew 'members came in at 7:00 a.m. Similarly for October 12, 1982 all of the crew members working that day arrived between 7:00 and 8:30 a.m. On October 13, 1982, however, there was a group of five workers that began work at 12:00 noon and left at 4:00 p.m. and a group of 21 workers who began work at 3:00 p.m. and left at 5:00 p.m. The other workers for October 13 arrived at 7:00 a.m. except for one who arrived at 8:00 a.m. This is the same day where six workers left at 1:00 p.m.

In summary, there is ample evidence in Joint Exhibit No. 2 related to October 13, 1982 to corroborate the statement made by labor contractor Joaquin Gomez to Board agents Bowker and Ornelas that Gomez did bring in a crew of workers for a one shot or special project as a favor to him and Tepusquet. I find that this is a unique situation and the Regional Director was reasonable in concluding that this influx of workers would not likely reoccur in subsequent years and specifically in the Fall of 1983. If these 21 workers or 26 workers are deducted from the 110 total, we then have a peak body count for 1982 of approximately 89 or 84 workers. Given the other information available to the Acting Regional Director, including Lucas' testimony that he does not ordinarily employ workers on Saturday or Sunday, I conclude that Weissberg was reasonable in projecting

that the peak labor force needs for the harvest peak week in 1983 would be closer to the 1981 level with a factored in 15% increase because of possible higher number of tons than the 1982 workforce level.

Though the Board has not had occasion to rule on the reasonableness of disregarding as unrepresentative a past peak week unlikely to be repeated in the current calendar year, I find applicable the same principles set forth in High and Mighty Farms, supra, 3 ALRB No. 88, and California Lettuce Co., supra, 5 ALRB No. 24 wherein the Board expressed its concern that periods used to calculate peak be reflective of an employer's actual labor needs. These Board decisions lend support to my conclusion that Weissberg was reasonable in placing greater reliance on the 1981 peak than on the 1982 peak in predicting the 1983 peak labor needs.

Since the Employer gave only sketchy information to the Board agents regarding the effect on 1983 peak labor needs of the grafting of 55 acres of Muscat Canelli grapes, I have concluded that Weissberg acted in a reasonable manner when she made allowances for an increased labor need of eight additional workers for the anticipated increased production (which was unspecified) resulting from the 55 acres of Muscat Canelli grapes.

If the Employer did not know during the investigation that he would definitely be doing some grafting in 1983, it is unclear what weight should be given to the fact that 16 acres were grafted in February 1983. At the very least, I believe that the Board should take notice of this fact and I find that

this 1983 grafting would indicate that Weissberg's position has even more support since there will be less tons harvested than she had originally believed.

The fact that the Employer did not advise the investigating Board agents or the Acting Regional Director that some acres would be grafted in 1983, thereby reducing the acreage in production for 1983, also indicates a less than candid approach to the investigation. In a similar vein, Kepner's insistence during the peak investigation preceding the election that there was no alternative for the Board agents or Acting Regional Director other than to find that the peak requirement was not met is also some indication that the Employer was not inclined to provide that information which I find it had an obligation to provide to the Acting Regional Director in order for her to make an informed and reasonable prediction of the Employer's peak labor needs for 1983.

I have found that the Acting Regional Director conducted a very thorough investigation within the short time span allowed. This investigation included a number of contacts and meetings with the Employer and its agents, meetings and communications with the Petitioner, meetings and obtaining declarations from workers, and communications with various state agencies which were requested to produce data or studies indicating how many workers it would take to harvest a ton or an acre of a particular variety of wine grapes.

There was no persuasive reason for the Board agents or Weissberg to conclude that the 1982 peak body count of 110

would be duplicated in 1983 in light of the following factors: (1) The 1981 peak body count was 59 employees according to information provided to the Board agents by the Employer; (2) Weissberg had received worker declarations and been advised of statements from the labor contractor Gomez indicating that this was an unusual week because of the need to bring in a number of workers to complete unfinished work (see Vista Verde Farms vs. Agricultural Labor Relations Board (1981) 29 Cal.3d 307, 322-323 and Evidence Code section 1222 for the basis of my admission of Gomez' statement); (3) the Employer failed to provide the investigating Board agents with information related to the tons picked during the 1981 peak week or the 1982 peak week; (4) the Employer failed to provide information regarding the number of tons picked by hand and by machine for 1981 or 1982; (5) the Employer never explained why an additional 50 workers were required in 1982 during peak compared with 1981 when there were only an additional 200 tons to be machine harvested in 1982 compared with 1981. By dividing the 1982 tonnage by 110 (number of workers employed the week of October 11-17, 1982) , the result is approximately 24. tons per worker. This does not take into account the different numbers of workers required when hand harvesting compared with machine harvesting. Using this calculation for an additional 200 tons of grapes, only nine additional workers would be needed for 1982 compared to 1981; (6) the Employer does not usually hire workers on Saturday or Sunday during peak week; and (7) it is unlikely the Employer will be penalized by the wineries during the 1983 peak week as was the case in 1982.

I note that there is no record evidence that the Employer or any of its agents ever suggested to the investigating Board agents or the Acting Regional Director that the pre-petition count of the 37 employees was not representative. Therefore, I find that the Employer waived this argument. However, even if five workers were subtracted from the 37, that would leave 32 which is more than half of 59 which is the body count peak for 1981.

Even if, contrary to my finding, the Board agents should have independently determined that the body count peak week of 1981 was the week of September 28 - October 4 which had a body count of 81, I find that the petition would still be timely. The pre-petition count of 37 equals approximately 4.5.6% of 81. This would mean, assuming that the 1982 peak week of 110 is disregarded as nonrepresentative, that the 37 was only about 4.4% less than half of peak. In the context of the yearly fluctuations in tonnage in the wine grape industry and the lack of information provided by the Employer, this is not too large of an error in determining that peak was met. See Wine World, Inc. dba Beringer Vineyards, supra, 5 ALRB No. 41^{13/}

^{13/}Though I have concluded that the 1982 peak week of October 11-17 of 110 should not be used to predict 1983 peak, I note that if the 26 workers who arrived the afternoon of October 13 are disregarded, the body count for that week would be 84 and the error (37/89) would be 6%. If only the 21 workers who arrived at 3 p.m. are disregarded the body count would be 89 and the error (37/89) would be 8.5%. I would find the Petition timely in either case giving the Employer's failure to provide information and the fluctuation in tonnage. Since the Employer did not advise the Board agents it would do any grafting in 1983, the Employer did in fact graft 16 acres thereby taking them out of production, the Employer failed to provide requested production information, and there is great fluctuation in tons harvested, I would not add any workers to the 1982 peak workforce level to compute the estimated 1983 peak. If, however, eight workers were added to 84, the error (37/92) would be 10%. If eight were added to 89, the error (37/97) would be 12%.

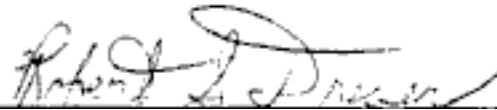
Even were the Board to find that the Acting Regional Director was not reasonable in determining that peak existed, I would urge the Board to consider adopting the dissent's position in Kamimoto, supra, of comparing the pre-petition body count (37) with the Saikhon average for the 1982 peak (61) . I believe that the facts of this case indicate that the wine grape industry is quite unique, since it is extremely difficult to predict labor needs because of the wide fluctuation in tonnage from harvest to harvest, the discretion the Employer has as to whether to hand harvest or machine harvest a particular variety, the factor of weather, the uncertainty as to when the sugar content in any of the several varieties grown would require one or more different varieties to be harvested at the same time, and, finally, the uncertainty of the demands of a particular winery. These many uncertainties concerning this particular agricultural commodity suggest that a comparison of the body count during the eligibility period with the job slots or average employee days for the past peak would provide the degree of certainty which is required for employers, unions and workers to know whether or not an election petition will be deemed timely. The Board has long recognized that peak issues are very complicated, and it is only with "time that all of the complexities and variations will be apparent. This particular case, in my view, presents a good opportunity for the Board to adopt the aforementioned approach.

Recommendation

Based on the findings of fact, analysis and conclusions of law herein, I recommend that the Employer's objection be

dismissed and the UFW be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in North San Luis Obispo County near Shandon and Paso Robles.

DATED: December 27, 1983

A handwritten signature in cursive script, appearing to read "Robert S. Dresser", written over a horizontal line.

ROBERT S. DRESSER
Investigative Hearing Examiner