Woodlake, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BAKER BROTHERS, et al. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 83-RC-2-D 11 ALRB NO. 23

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union), a representation election was held on March 11, 1983. The Official Tally of Ballots showed the following results:

UFW	51
No Union	8
Unresolved Challenged Ballots . . .	14
Total	73

Thereafter, pursuant to Labor Code section 1156. 3(c)[1/] and California Administrative Code, title 8, section 20365, the Employer timely filed post-election objections of which the following was set for hearing: whether the bargaining unit described in the Petition for Certification constituted a unit appropriate for bargaining

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

within the meaning of section 1156.2.[2/] The unit question subsumes two additional issues; specifically, whether the petition was timely filed when the Employer was at least at 50 percent of its peak agricultural employment for the relevant calendar year, section 1156.4, and whether otherwise eligible voters were disenfranchised as a result of an election held in an allegedly inappropriate unit.

On June 14, 1985, Investigative Hearing Examiner (IHE) Matthew Goldberg issued the attached recommended Decision in this proceeding. He found that while the Regional Director had designated a bargaining unit that was statutorily defective, the unit description could be redefined, in order to bring it into compliance with section 1156.2, with no adverse impact on other relevant statutory requirements or employees' rights. Accordingly, he recommended that the results of the election be upheld and that the UFW be certified as the exclusive bargaining representative of all agricultural employees of Baker Brothers in the State of California. The Employer filed exceptions to the IHE's Decision with a brief in support of exceptions.

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

The Board has considered the exceptions and brief filed

[2/] Specifically, section 1156.2 provides that:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

by the Employer in light of the record and the IHE's Decision and has decided to affirm the IHE's rulings, findings of fact, and conclusions of law, and to adopt his recommended Order of Certification.

We find it unnecessary to pass on the distinctions drawn by the IHE with respect to unit determination procedures employed by the National Labor Relations Board (NLRB) and this Board in order to address the Employer's contention that the case of Leedom v. Kyne (1958) 358 U.S. 184 [43 LRRM 2222] mandates that the election be set aside. The issue in Leedom arose when a regional director of the NLRB commingled nonprofessional and professional employees in the same bargaining unit absent an approving vote by the latter. Section 9(b)(l) of the National Labor Relations Act (NLRA) expressly prohibits the national board from establishing bargaining units comprised of both professional and nonprofessional employees unless a majority of the professional employees has first voted for inclusion. Upon appeal and review, the NLRB refused to realign the unit on the theory that the nonprofessional employees shared a community of interest with the professional employees and therefore their inclusion would not destroy the professional character of the unit. In representation matters under the NLRA, as well as under the Agricultural Labor Relations Act (ALRA or Act), courts will not normally assert jurisdiction until the labor boards have issued

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final decisions and orders.[3/] In Leedom, however, the court assumed jurisdiction of an original suit absent final decision and order of the NLRB because the NLRB's action was contrary to a specific prohibition in the NLRA and served to deprive the professional employees of a "right" assured to them by Congress. As the court explained:

> This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. (Leedom, supra, 358 U.S. at 188.)

Accordingly, the court set aside the national board's bargaining unit determination, vacated the certification, and set aside the election.

This is not the type of situation where a complaining party has no remedy absent judicial intervention or the setting aside of the election. We affirm the IHE's finding that section 1156.2 requires that bargaining units subject to our jurisdiction be comprised of all agricultural employees of the Employer and approve of his revision of the unit in accordance with that provision. Taken in this context, and in light of the Board's action in meeting the statutory directive, we have determined that neither Leedom nor the formerly inappropriate unit designation presents an

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[3/] Decisions of the labor boards certifying the results of elections are not "final orders" subject to direct judicial review. Courts may entertain review of representation matters when they are drawn into question by means of a petition for review of a final board decision and order in an unfair labor practice proceeding. (Nishikawa Farms, Inc. v. Mahony (1977) 66 Cal.App.3d 781; Boire v. Greyhound Corp. (1964) 376 U.S. 473 [55 LRRM 2694].)

obstacle to certification.

The Employer's additional challenge, to the validity of the whole of the IHE's Decision, is premised on a circumscribed reading of section 1156.3(c). That section provides, in pertinent part, that a hearing pursuant to the filing of a petition to set aside an election "may be conducted by an officer or employee of a regional office of the board ... [who] shall make no recommendations with respect thereto."[4/] However, section 1156.3 does not preclude the Board from, as here, appointing IHE's who are not employees of the Board's regional offices. The procedures adopted and followed by the Board in this instance do not contravene the provisions of section 1156.3(c). Pursuant to the express statutory authority of section 1145 ("The board may appoint ... hearing officers, adminis-

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[4/] Section 1156.3(c) provides as follows:

> Upon receipt of a petition under this subdivision, the board, upon due notice, shall conduct a hearing to determine whether the election shall be certified. Such hearing may be conducted by an officer or employee of a regional office of the board. He shall make no recommendations with respect thereto.

Section 9(c)(l)(B) of the NLRA provides that a hearing to determine whether a question concerning representation exists "may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto." That language was adopted by Congress in 1947 "[p]resumably to isolate the Board members from the Board agents who conduct the representation investigations required under the Act." (Sen. Min. Rep. No. 105, pt. 2, 80th Cong., 1st Sess., p. 33 (1947).) Our reading of the purpose behind ALRA section 1156.3(c), which is, in pertinent part, the exact analog to NLRA section 9(c)(l), is reinforced by the Fifth Circuit's decision in Riverside Press, Inc. (5th Cir. 1969) 415 F.2d 281 [71 LRRM 2678], cert. den. (1970) 397 U.S. 912 [73 LRRM 2537]. In that case, the court surmised that the intent of NLRA section 9(c)(l) was "to separate prosecutorial and adjudicative functions of the Board," a result clearly achieved by our regulations.

trative law officers, and other employees as it may from time to time find necessary for the proper performance of its duties ..."), section 20380(a) of the Board's initial regulations (Emergency Regulations adopted August 28, 1975) provided that issues raised in petitions filed pursuant to Chapter 5 of the Act shall be heard "before the Board, or a designated administrative law officer, or by a hearing officer pursuant to the provisions of section 1156.3(c) of the Labor Code." Section 20390(f) of the same Emergency Regulations tracked the statutory language of section 1156.3(c) by providing that, in the event that election objections are to be set for hearing before a hearing officer rather than the board or an administrative law officer, "The hearing officer may transmit an analysis of the issues and evidence but shall make no recommendations in regard to resolution of the issues."

On October 13, 1976, the Board adopted Permanent Regulations including section 20370(a) which provides that investigative hearings pursuant to section 1156.3(c) "shall be conducted by an investigative hearing examiner appointed by the executive secretary." That section further provides that "No person who is an official or an employee of a regional office shall be appointed to act as an investigative hearing examiner." At the same time, the Board adopted section 20370(f) in which it directed that "the investigative hearing examiner shall issue an initial decision, including findings of fact and a statement of reasons in support of findings, conclusions, and recommendated disposition." The Board also provided therein that "such decision shall become the decision of the Board" in the absence of timely exceptions.

The hearings in the instant matter were held between July 19, 1983 and December 10, 1984. Accordingly, they are controlled by Regulation section 20370, et seq which was amended effective September 27, 1981. Section 20370(a) provides that only investigative hearing examiners appointed by the executive secretary will be empowered to conduct investigative hearings into any representation matter arising under Chapter 5 of the Act. That section also states explicitly that "No person who is an official or an employee of a regional office shall be appointed as an investigative hearing examiner." Section 20370(f) requires that "the investigative hearing examiner shall issue an initial decision including findings of fact, conclusions of law, a statement of reasons in support of the conclusions, and a recommended disposition of the case." Section 20370(f) also provides that "such decision shall become the decision of the Board" in the absence of timely filed exceptions thereto. Where, however, any party files exceptions to the decision of the IHE, the Board, as the ultimate fact finder, engages in an independent review of the entire record. (Reg. § 20370(g).)

The procedures utilized by the Board in representation matters under Chapter 5 of the Act, as described above, are entirely consistent with sections 1156.3(c) and 1145 and are accurately reflected in regulations duly promulgated pursuant to the provisions of section 114.4.

The objections are hereby dismissed as lacking in merit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO, and

that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Baker Brothers in the State of California for purposes of collective bargaining, as defined in section 1155.2(a) concerning employees' wages, hours, and working conditions.

Dated: September 30, 1985

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Baker Brothers
(UFW)

11 ALRB No. 23
Case No. 83-RC-2-D

IHE DECISION

Following a representation election in which the United Farm Workers of America, AFL-CIO (Union) received a majority of the votes cast, the Employer timely filed post-election objections, one of which was set for hearing to determine whether the election had been held in a unit appropriate for bargaining. In its Petition for Certification, as initially filed, the Union had designated as a single or joint employer Baker Brothers, Baker's citrus packing house, and all of the individual growers whose commodities are packed and shipped by Baker Brothers. The unit was described by the Union in that petition as all of the agricultural employees of the entities described above. The Regional Director noticed an election to be held among "all agricultural citrus workers" of the firms and/or individuals specified by the Union to comprise the employing entity. During the course of the hearing, the Union moved to limit its original employer designation to only Baker Brothers. On that basis, the Investigative Hearing Examiner defined the bargaining unit, as required by Labor Code section 1156.2, as "all the agricultural employees of an employer." He found that the statute could not serve to permit a Regional Director to specify a unit comprised of only Baker Brothers' citrus workers. The number of Baker's total agricultural employees who were eligible to vote in the election was 84, 59 of whom actually voted. Fourteen additional Baker employees voted by challenge ballot. Their eligibility is not certain as the basis for the challenges were not investigated following the election because their number would not have affected the results of the election.

The IHE found that the unit could be redefined in accordance with the statutory language and with no adverse effect on other relevant statutory requirements or employees' rights. On that basis, he recommended that the results of the election be upheld and that the UFW be certified as the exclusive bargaining representative of all agricultural employees of Baker Brothers in the State of California.

Board Decision

The Board affirmed the rulings, findings and conclusions of the IHE and adopted his Order of Certification.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: BAKER BROTHERS AND LELAND H. ("HAP") BAKER; MAC ROAM, WILLIAM CHRISTIE, CHARLIE CISNEROS, WILLIAM FERRY, CHARLES GARRITY, GILBERT AVIATION, DR. GORDON HACKETT, J.D. HAMPTON, NADINE HELDMAN, HANS HESS, HOWARD HOGAN, HOWARD-JOBE RANCH, JACKSON RANCH LTD., KAHAN-GARDNER VISALIA RANCHES, KELLER FARMS, HOMER KENDRICK, PHILLIP MAYFIELD, McCRACKEN SCHOOL FARMS, MICHAEL PACE, BLAIR REESE, RENNER BROTHERS, KEN ROUTON, CONRAD SANCHEZ, SENTINEL FARMS, INC., GEORGE SOMMERS, LUIS THIESEN, DON WAGNER, and BOB PUTNAM, Employer(s), and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 83-RC-2-D

Before: Matthew Goldberg
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

Appearances:

Ned Dunphy,
for the United Farm Workers
of America, AFL-CIO;

Carl Borden, Esq.,
for Baker Brothers and Leland H. Baker;

Howard Sagaser, Esq.,
of Jory, Peterson and Sagaser
for Charles Cisneros, Hans Hess,
Kahan-Gardner Visalia Ranches,
Ken Routon, Luis Thiesen, Mac Roam,
Howard-Jobe Ranch, Dr. Gordon Hackett,
Charles Garrity, Howard Hogan,
Rex Keller, George Somraers, Don Wagner,
Phillip Mayfield, and Nadine Heldman;

Thomas J. Yin, Esq.,
of Loflin, Campagne and Giovacchini,
for Conrad Sanchez;

Richard Papst, Esq.,
of Dressier, Quesenberry, Laws & Barsamian
for Bill Ferry;

William S. Marrs, Esq.,
of Gordon, Glade and Marrs,
for Sentinel Farms, Inc.;

Brian Vacarro,
for McCracken School Farm.

STATEMENT OF THE CASE

The procedural history of this case followed a rather tortuous course. This background is set forth below in detail, as it has a significant, if not dispositive, impact on the ultimate findings made herein.

On March 4, 1983, the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union" or the "petitioner") filed a Petition for Certification in case number 83-RC-2-D, requesting that an election be held among "all agricultural employees" in the bargaining unit described as "Baker Bros. Sunkist Packing House/Baker Bros, and all growers who pack into Baker Bros. Sunkist Packing House." On the Petition, the Union noted under item 7(a)that "the unit sought include[s] all of the employer's agricultural workers in the State of California."

In its Response to Petition for Certification dated March 7, 1983, Baker Brothers (hereafter also referred to as the "employer" or the "company") alleged that the "unit sought in the Petition" was not "appropriate" (item 7(d)), stating as follows: "Baker Brothers packs and ships citrus crops grown by itself and by members of Sunkist Growers, Inc. Less than the 25 percentage [(sic)] of the citrus which Baker Brothers packs and ships is grown by Baker Brothers. Incidential to these operations, Baker Brothers uses the services of a farm labor contractor to harvest the citrus crops .... [T]he harvesting employees of the . . . contractor which Baker Brothers uses are not within the jurisdiction of the ALRB because all of the employees of Baker Brothers are covered under NLRA."

Baker Brothers also alleged in its Response that it was a "separate and distinct" entity "from the growers whose citrus it harvests, packs and ships." Consequently, it maintained that the employees who harvest citrus for "all growers that pack into Baker Brothers Sunkist Packing House" were employees of those growers, not of Baker Brothers.

Alternatively, the employer maintained that if the bargaining unit was correctly designated, the adequacy of the showing of interest was in question: since all the agricultural employees of these growers had to be included in the unit, it was then necessary to determine whether each individual grower using the services of Baker Brothers was at 50% of peak employment during the pertinent period.[1/]

On March 10, 1983, the Regional Director for the Delano office of the ALRB issued a Notice and Direction of Election for an election to be conducted on March 11. The unit description appearing on the Notice declared that balloting was to be held among "all agricultural citrus workers of Baker Bros. Sunkist Packing House/Baker Bros, and all growers that pack into Baker Bros. Sunkist Packing House in the State of California." (Emphasis supplied.) Why the Regional Director saw fit to modify the original unit description on the Petition for Certification is not altogether

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1. Significantly, during the course of the investigation of the Petition, the Board Agent in charge requested the employer to supply a list of its grower/customers. The employer did not comply, stating that it was concerned that the Board office might then turn the information over to the Union.

clear.[2]

The Tally of Ballots issued after the voting showed that the election resulted in 51 votes cast for the Petitioner, 8 votes cast for "no union," and 14 unresolved challenged ballots. A total of 59 names appeared on the eligibility list.

On March 17, 1983, the employer filed its "Petition of Objections to Election." The employer's objections reiterated those issues raised in its Response to the Petition, to wit, that its employees were subject to NLRB jurisdiction, not ALRB jurisdiction, that "the Petition for Certification incorrectly names the employer,"[3] and the Petition "incorrectly describes the bargaining unit," in that it includes employees of the growers who pack in to the Baker Brothers shed. In addition, the employer contended that in describing the unit as "all agricultural citrus workers . . . ," the Regional Director attempted "to carve out a craft or crop unit . . . " which "is not permissible under section 1156.2 of the ALRA." Lastly, the employer urged that should it be held that the appropriate unit included employees of the employer and the thirty-one growers that pack in to the employer's shed, owing to the lack of notification to this latter group, many employees probably were disenfranchised and showing-of-interest and peak requirements

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2. Following the Petition's filing, a telegram was sent to the employer by Field Examiner Albert Mestas. The telegram notified Baker Brothers of the filing of the Petition and stated that "the Petition attempts to include all of your agricultural citrus employees for a representation election including employees hired through a labor contractor."

3. The employer maintained that its correct name was "Baker Brothers" not "Baker Bros. Sunkist Packing House/Baker Bros."

were probably not met.

On May 13, 1983, the Executive Secretary for the Board issued her Order Dismissing" Objections and Notice of Objections to Be Set for Hearing. The sole issue which was not dismissed, and accordingly set for hearing, was whether the Petition "incorrectly describes the bargaining unit." On May 19, 1983, the employer requested review of the dismissed objections. This request was denied on May 27.

An investigative hearing was originally set for June 27, 1983, for the purpose of taking evidence on the issue denoted above. After a request for a continuance was filed by the Petitioner, the hearing was re-set for August 2, with a pre-hearing conference scheduled to be held on July 8.

On June 30, 1983, petitioner served on the employer a subpoena duces tecum requesting, inter alia, that it be supplied with documents and/or information pertaining to "all grower/members that pack in to Baker Brothers." In essence, petitioner sought to ascertain the identities of said grower/members, and the nature of their respective relationships with the employer. On July 11, the employer filed a petition to revoke the aforesaid subpoena.

At the pre-hearing conference, rescheduled for July 19, the Administrative Law Judge denied the major portion of the employer's petition to revoke the subpoena, and ordered the employer to turn over the names of its grower-customers.[4/] Pursuant to that ALJ's

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4. The June 30 subpoena also requested forty-five separate categories of documents, information, etc. to be turned over to the petitioner.

order, the employer supplied the petitioner with the names of its grower/customers, and the amount of acreage on which each of its grower/customers produces citrus which is packed by the employer.

On July 28, 1983, petitioner served an additional subpoena on the employer requesting, amont other things, the addresses of all of the employer's grower/customers. In its Declaration in Support of the Subpoena, petitioner's representative maintained that it needed the growers' addresses to facilitate service of the Notice of the Hearing and subpoenaes on appropriate witnesses. In essence, petitioner, in the event that a certification resulted from the investigative hearing, wished to include the grower-customers as components of the employing entity.

At the hearing held on August 2, 1983, Administrative Law Judge Marvin Brenner quashed the July 28 subpoena.[5/] He ruled that the furnishing of the grower/customer addresses would not be relevant to the current proceeding, as these entities had not been served with any of the initial Notices of Election or Hearing, and that their participation at this advanced stage would not comport with the requirements of due process.[6/]

Petitioner thereupon took an interim appeal of ALJ Brenner's ruling and the hearing was continued pending resolution by

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5. Although the employer did not file a formal written motion to quash the subpoena until August 5, the issue was obviously before ALJ Brenner. On the record petitioner's representative requested that the ALJ ask the Board to seek enforcement of petitioner's subpoena.

6. Parenthetically, the grower/customers, owing to this lack of notice, were unable to participate either in the election process itself or file post election objections.

the Board of the subpoena issue. On August 25, 1983, the Board issued its Order reversing ALJ Brenner's ruling, and ordered Baker Brothers to comply with the petitioner's subpoena by producing and disclosing to the petitioner the street and mailing addresses of its grower/customers.

Baker Brothers resisted compliance with the Board's subpoena order. After hearing argument on the matter from counsel for the Board, the UFW and Baker Brothers, the Tulare County Superior Court, on October 20, 1983, granted the Board's request seeking enforcement of its subpoena. The employer, on November 15, 1983, complied with the court's order and furnished the Board with the addresses of its grower/customers.

On February 2, 1984, additional Notices of Hearing were served on the grower/customers of Baker Brothers.[7/] The hearing itself reconvened on March 5, 1984. Most[8/] of the respective grower/customers appeared personally or through their representatives. These grower/customers again raised due process objections to their hearing participation.[9/] ALJ Brenner concluded that owing to these due process problems, the grower/customers could not be bound by any projected certification unless petitioner were

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7. The grower/customers included twenty individuals, a partnership, five entities operating under their ranch names, an aviation company, one ranch owned by the Woodlake School District, Baker Brothers itself, and Hap Baker, a principal in Baker Brothers.

8. Twenty of the grower/customers, including Baker Brothers, entered appearances.

9. The Board's August 25 order stated that it wished that evidence be taken "from the growers . . . regarding whether they should be made parties to the instant proceedings."

able to prove that they and Baker Brothers constituted a single employer, or that Baker Brothers was acting as an agent for said growers. As it was determined that these matters were of a threshhold nature requiring resolution before the election objection itself could be ruled upon, the hearing was duly bifurcated.

The hearing reconvened on March 14, 1984, for the purpose of taking evidence on what was termed the first phase of the bifurcated case, i.e., whether petitioner could demonstrate that the grower/customers, together with Baker Brothers, constituted a single employing entity, or whether Baker Brothers was acting as an agent of these growers/customers.

On May 3, 1984, ALJ Brenner issued his decision on this first phase.[10/] As noted in that decision, should it be determined that Baker Brothers and its grower/customers constituted a single employing entity, then service of the various notices on Baker Brothers would constitute effective service on the grower/customers. (See Perry Farms, Inc. v. ALRB (1979) 86 Cal.App.3d 448.) By contrast if it were decided that Baker Brothers was a joint employer with its grower/customers, under ALJ's Brenner 's interpretation of Alaska Roughnecks and Drillers v. N.L.R.B. (C.A. 9, 1977) 555 F.2d 732, cert. den. 434 U.S. 1069, the service on Baker Brothers would not constitute adequate service on the growers, and they accordingly should be dismissed from the case owing to lack of notice.

ALJ Brenner found that the evidence did not support the UFW's position either that Baker Brothers and its grower/customers

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10. This decision was served on all parties on May 7.

were a single employer or that Baker Brothers somehow acted as the agent for these growers. He therefore concluded that notice to Baker Brothers of the election proceedings herein did not constitute notice to its grower/customers. As "notice to one" was not "notice to all," due process requirements had not been fulfilled vis-a-vis the grower/customers. Consequently, ALJ Brenner ruled that the grower/customers should not be made parties to the representation proceedings, and should therefore be dismissed from the case.

Petitioner, on May 24, 1984, filed its interim appeal from Brenner's above ruling. The Board, on October 18, 1984, granted the appeal in part. In its ruling, the Board stated that Alaska Roughnecks, supra, was not dispositive of the notice issue since in that case one of the joint employers involved[11/] not only was aware of the prior certification proceedings therein, but also had actual notice that there was no original intent to bind it to the bargaining obligation which might result from those proceedings. By contrast, the unit description in the instant case evinced an intent to include the grower/customers within the ambit of the certification, and these entities were currently being given the opportunity to challenge their joint employer status in the election objection proceeding. The case was remanded for the taking of additional evidence on the joint employer issue as well as on the following matters:

1. Whether the individual growers had actual notice or knowledge before the election that the union sought to bind them to

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11. That joint employer consisted of two otherwise distinct entities.

the certification;

2. Whether the individual growers had constructive notice, growing out of the alleged joint employer relationship, that the union sought to bind them to the certification;

3. Whether, if the individual growers had neither actual nor constructive pre-election notice, pre-certification notice that the union sought to bind them to the certification protected their due process rights;

4. Whether an outcome determinative number of voters were disenfranchised due to lack of notice of the election; and

5. Whether the regional director's peak determination was proper.

The matter was re-set for hearing to convene on November 12, 1984. Upon motion of Howard Sagaser, counsel for some of the grower/customers, the matter was continued for one day, at which time the Board ordered that a pre-hearing conference be held. The hearing itself was re-scheduled for December 10, 1984. I presided over both the pre-hearing and the actual hearing itself.

During the course of the pre-hearing conference Mr. Sagaser made a motion that the election be set aside "as the petition for bargaining unit and the bargaining unit contained in the direction of election ... is illegal and inappropriate in that the bargaining unit violates the express provisions of Labor Code section 1156.2. . . ."[12/] In essence, the motion was based on the contention that the Union sought a certification for a particular

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12. Labor Code §1156.2 states that "[t]he bargaining unit shall be all the agricultural employees of the employer."

craft or crop unit.[13] The motion was joined in by all the remaining representatives of the respective growers.[14]

Counsel were invited to submit argument, oral and written, on this particular issue, as well as to confer and attempt to arrive at stipulations regarding the number of employees employed by each of the various entities in various crop operations at various times of the year.

The hearing itself re-opened as scheduled on December 10, 1984. Those parties noted in the "appearance" preface were present through their respective representatives, and were given full opportunity to present oral and written evidence, to examine and

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13. Mr. Dunphy stated that the bargaining unit which the Union was seeking to have certified was "all citrus agricultural employees that work on land, citrus groves . . . ., in which that citrus is harvested and/or packed into Baker Brothers/Sunkist Packing House." Mr. Dunphy further noted at that time that the Union had no interest in representing the entire complement of agricultural employees of this employer.

14. Notwithstanding the language of Regs. §20365(g) ("The hearing shall be limited to the issues set forth in the Executive Secretary's notice of hearing"), the rationale for entertaining such a motion, and basically adding another issue to those already set for hearing, was three-fold. First, the aforementioned objections set for hearing following the interim appeal did not contain specific reference to the particular objections filed by Baker Brothers, as is customary in representation case hearings. They were essentially devised and formulated by the Executive Secretary. Secondly, the original objections filed by Baker Brothers did allude to the problem of attempting to certify a craft or crop unit in contravention of the statute (see discussion, supra). The issue was also raised in proceedings presided over by ALJ Brenner. Lastly, as noted above, due process problems arising as a result of the lack of notice of the election itself included the lack of an opportunity to file post-election objections. It would be a hollow gesture, indeed, to expect certain grower/customers to "participate" in the representation case hearing and not allow them to raise objections to the conduct of the election. By permitting these grower customers to voice specific objections at this stage of the proceedings, it was felt that this particular due process problem would be obviated.

cross-examine witnesses, and to submit post-hearing briefs. Based upon the entire record in the case,[15] and having read the brief[16] submitted since the close of the hearing, I make the following:

II. FINDINGS OF FACT

The employer, Baker Brothers, is a partnership which grows and harvests citrus, olives, and avocadoes, and operates a citrus packing house in Woodlake, Tulare County, California. The business has been in existence since 1960. The packing house packs and ships Valencia and navel oranges produced on lands owned by itself and by some thirty (as of the date of the December 10 hearing) "grower/customers."[17] For the harvesting of the oranges for the shed, including the oranges of its grower/customers, the employer utilizes the services of labor contractor Conrad Sanchez. The same rates are paid by Baker Brothers to Sanchez regardless of on whose lands the work is performed. The employer charges its grower customers amounts for the work of the Sanchez' crew(s), as well as fees for grading, packing and shipping their citrus.

In addition to the citrus lands owned by the employer, Baker Brothers also owns or manages acreage on which olives and avocados are grown. The employer and the Union stipulated as follows regarding the totality of Baker Brothers' operations:

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15. The "entire record" consists of the representation case file, the transcripts of the pre-hearing and hearing presided over by ALJ Brenner, the transcripts of the hearings over which I presided and the stipulation profferred following the close of the December 10 hearing at which no testimony was presented.

16. Only the employer timely filed a post-hearing brief.

17. The citrus lands owned by Baker Brothers Inc. comprise some 270 acres. Grower/customer citrus lands total about 870 acres.

1. The seasonal periods for crops in which Baker Brothers agricultural employees work are as follows:

a. Oranges

(1) Valencias -- April through October, with some years into November;
(2) Navels -- November to late May.

b. Olives -- late September through October,

c. Avocados -- October through December.

2. 1982 peak employment figures are as follows:

Week Ending 10/30/82

a. Olives	
Sanchez crew working on Jackson Ranch	47
Acosta crew working on Jackson Ranch	46
Moreno crew working at Baker Brothers	58
	151
b. Baker Brothers Steadies	
(2 week period ending 11/6/82)	27
c. Oranges	
Balderas crew working for Baker Brothers	38
Barba crew working for Baker Brothers	41
Total of (c) =	79
Total of (b) & (c) =	106
Total of (a), (b) & (c) =	257

3. Employment figures for the eligibility period (2/20/83 - 2/26/83) are as follows:

a. Oranges	
Balderas crew working for Baker Brothers	31
Barba crew working for Baker Brothers	31
	62
b. Steadies	22
Total of (a) and (b)	84

4. 1983 peak employment figures are as follows:

Week Ending 10/30/83

a. Olives	
Moreno crew working at Baker Brothers	38
Vasquez crew working at Jackson Ranch	19
Cisneros crew working at Jackson Ranch	34
	91

b. Steadies 13

c. Oranges
Balderas crew working for Baker Brothers 25
Barba crew woring for Baker Brothers 25
50
Total of (b) and (c) 63
Total of (a), (b) and (c) 154

5. At all times mentioned herein, Baker Brothers was the farm manager of Jackson Ranch.

6. There is no interchange of work amongst the workers in the olive and those in the oranges.

7. Baker Brothers does not process the olives its workers pick. The olives picked do not enter Baker Brothers shed.

8. A map showing all the locations of Baker Brothers harvesting work in oranges and olives shall be submitted shortly hereafter.[18]

At the December 10 hearing the Union's representative stated that it was moving to withdraw its "joint employer allegation such that the growers except for Baker Brothers and Hap Baker, are no longer -- we're no longer asking that those other growers be included in this unit as joint employers. And we would ask that they be allowed to withdraw from the hearing. And we'd ask that the Hearing Officer dismiss them." The motion was granted, thus rendering moot the objections set for hearing pertaining to the grower/customers (objections 1, 2, and 3). Consequently, these

18. The map submitted was titled "Woodlake Valley" and depicted the area in and around the town of Woodlake. The northernmost properties which Baker Brothers owns or manages are at Jackson Ranch, located at or near the junction of Highway 69 and Avenue 398. The sole avocado grove harvested by Baker Brothers is in this area. The southern-most properties are at the junction of Avenue 324 and Road 230, between Lindcove and Lemon Cove. As described in the employer's brief, the groves harvested by the employer, not including the citrus groves owned by the thirty grower/customers, are contained in an area separated by about ten air miles and fifteen driving miles. The groves are within a maximum seven mile radius of Woodlake.

objections are dismissed and will not be considered.

III. CONCLUSIONS OF LAW

A. The Unit Description

As previously noted, §1156.2 of the Act mandates that the "bargaining unit shall be all the agricultural employees of the employer." (Emphasis supplied.) The employer argues that the unit in which the election was noticed and held, "all agricultural citrus workers of Baker Brothers, etc." is inappropriate under the statute, and the appropriate unit "is one consisting of all of Baker Brothers' agricultural employees in the State of California. . . . [which] must include citrus and non-citrus workers alike."[19/]

The unit determination must be made prior to resolving the "disenfranchisement" and "peak" issues set for hearing, since if non-citrus workers are included in the unit, the number of these employees might affect the "peak" and "disenfranchisement" determinations.

The legislative history of the Act, as well as a number of cases arising since its promulgation, make clear that an agricultural employer's operations may not be compartmentalized according to craft or crop, and appropriate units established

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19. Regs. §20310(a) (2) states that when the employer contends that the unit petitioned for is inappropriate, the employer shall provide a list of names and addresses of the employees in the unit "the employer contends to be appropriate, together with a written description of that unit." Here, the employer was not alerted to the unit description problem by the Petition, which did in fact seek a unit of all its agricultural employees. It was the Notice and Direction of Election which altered the original unit description: thus the employer's Response to the Petition comported with the requirements of the above-cited regulation.

thereby.[20] see Hearing before Assembly Labor Relations Committee on Assembly Bill No. 1533 (May 12, 1975), p. 5 (testimony of Rose Bird) and pp. 13-16 (testimony of Jerry Cohen); see also Vista Verde Farms v. A.L.R.B. (1981) 29 Cal. 3d 307, 323-324). As noted by the Board in Prohoroff Poultry Farms (1983) 9 ALRB No. 98, p. 7,

> The express language of the ALRA. . . ., severely limits our discretion [in the area of determining the appropriate bargaining unit]. While we exercise some discretion in the naming of agricultural employers so as to effectuate the purposes of the Act and provide for stable collective bargaining relations[21] [citing cases], once the parameters of the employing entity are determined, all agricultural employees working on geographically contiguous operations must be included within the appropriate collective bargaining unit. [Cases cited] Only where an agricultural employer operates in two or more noncontiguous georaphical locations did the Legislature grant to this Board some discretion in selecting appropriate bargaining units, and even then limiting that discretion to the designation of "the appropriate unit or units," rather than giving this Board the discretion to select "an" appropriate bargaining unit.

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20. The one apparent and notable exception to this general proposition was presented in San Justo Farms (1981) 7 ALRB No. 29. There, a bargaining unit was sought only for the garlic harvest workers of the employer, who also conducted other crop operations. The Board noted in fn. 1, p. 5, that a particular crop unit might be certified where employees working on that crop were employees of a distinct employing entity which differed from other employing entities participated in by owners or managers of the first entity. The Board might therefore appropriately define a "crop" or "craft" unit by designating a particular employing entity, since this unit would contain "all the agricultural employees" of that particular employer. One may infer that this is more or less what the Union sought to achieve herein by designating Baker Brothers and its grower/customers as the "employer" on its petition. "All the agricultural employees" of this joint employment relationship would consist solely of citrus workers. It is significant, however, that in San Justo, the garlic worker complement was numerous enough to satisfy peak considerations and the certification was ultimately issued for a unit of all of San Justo's agricultural employees, not just its garlic workers.

21. The possibility of esxercising this particular prerogative was eliminated by the Union's withdrawal of its joint employer allegation and dismissal of the alleged joint employers (grower/customers) from this proceeding.

Consistent with ALRA §1156.2 and the above quoted language, the only appropriate unit here is not one consisting solely of the employer's citrus workers, but one which contains all of its agricultural employees, including the agricultural workers employed in crops other than citrus (i.e., olives and avocados). The "parameters of the employing entity" have been defined as Baker Brothers: hence the appropriate unit is all of its agricultural workers.

Neither Baker Brothers nor the Union formally contend that the employer's crop operations are in geographically noncontiguous areas.[22/] A legislative presumption arises in favor of comprehensive units. (Prohoroff Poultry, supra). The Board has not interpreted the phrase "noncontiguous geographical areas" in its exact, literal sense, but has construed the phrase to permit the establishment of bargaining units where employees work in a "single definable agricultural production area" even though they may be employed on facilites which are physically separate.[23/] John Elmore Farms (1977) 3 ALRB No. 16; see also Pioneer Nursery/River West, Inc. (1983) 9 ALRB No. 38; Prohoroff Poultry Farms, supra.)

Commonly, in determining whether employees work in a single definable production area, an inquiry is made into whether varying operations exhibit similar characteristics such as climate, seasonal

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22. Baker Brothers in its brief argues in support of the point; the Union made passing reference to it at the hearing.

23. In its response to the Petition for Certification, the employer did not maintain, as per Regs. §20310(a)(2), that the non-contiguity of its operations was an issue in determining the appropriateness of the unit.

practices, crops, and the source of the labor supply utilized to perform the various cultural practices (John Elmore Farms, supra). Such a detailed inquiry need not be made here, particularly where no party has placed this particular matter in issue.[24/] The Board has stated in Pioneer Nursery, supra, that "we will generally presume that operations in close geographical proximity are in a 'single definable production area.'" Here all of the employer's operations are carried out on ranches or farms contained within a seven mile radius of Woodlake. Such "close geographical proximity" provides an adequate basis for bringing the Pioneer Nursery presumption into play,[25/] particularly in the absence of argument to the contrary.

Thus, the appropriate unit for bargaining here is all the agricultural employees of Baker Brothers, not simply the citrus employees as described in the Notice and Direction of Election.

B. The Impact of the Incorrect Designation of the Appropriate Unit

The employer argues that since the Regional Director designated that the election be conducted in an inappropriate unit, the election must be set aside. It contends that the instant situation is analogous to the one presented in Leedom v. Kyne (1958) 358 U.S. 184, where the NLRB declared a unit appropriate which contained professional and non-professional employees, contrary to

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24. The rationale for treating the issue is to lend a general cohesion to the discussion of the unit question as a whole, and because the employer has discussed the matter in its brief.

25. As the employer points out in its brief, Pioneer Nursery's facilities were separated by forty-eight miles, yet were considered to be within "close geographical proximity." (Pioneer Nursery, supra, IHED p. 4.)

specific dictates of §9(b)(l) of that statute.[26/] The Supreme Court held the unit determination void. As the Union here attempted to obtain a certification for a type of unit which is expressly prohibited by §1156.2 of the Act (citrus employees as opposed to all agricultural employees), the argument runs, the election should similarly be declared void.

The employer, however, ignores one of the fundamental distinctions between election proceedings under our Act and those under the N.L.R.A. In the latter situations, unit determinations are made prior to the conducting of the election. (See, generally, N.L.R.A. §9(c)(l)(B) and N.L.R.B. Regs. §§102.64 and 102.67(b)). However, as noted in Mike Yurosek & Sons (1977) 4 ALRB No. 54 at p. 6, "[G]iven the expedited election procedure mandated by Labor Code 277 Section 1156.3,[27/] Board review of Regional Director unit determinations necessarily follows the election." (Emphasis supplied; see also Labor Code §1156.3(c)).

A number of cases have involved the certification of a unit which was not originally designated on the Petition or determined by the Regional Director to be appropriate. (See, e.g., Bruce Church (1976) 2 ALRB No. 38; Kawano Farms, Inc. (1975) 3 ALRB No. 25; Signal Produce (1978) 4 ALRB No. 7; Mike Yurosek & Sons,

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26. Section 9(b)(l) of the N.L.R.A. declares that in order for a unit to contain both professionals and non-professionals, a majority of the professionals must vote to be included in that unit

27. That section provides that a representation election must be held "within a maximum of seven days of the filing of the petition."

supra; Saticoy Lemon Association (1981) 8 ALRB No. 104; Cream of the Crop (1984) 10 ALRB No. 43; Prohoroff Poultry Farms, supra.) In none of the aforementioned cases was the alteration of the unit designation fatal to the ultimate certification obtained. Research has failed to disclose any such case; nor has counsel for the employer cited any ALRB case which supports its contention. To the contrary, the clear wording of the Act, as previously noted, contemplates the resolution of unit issues after the election has been held, and additionally creates a presumption in favor of certifying the results of an election. (California Lettuce Co. (1979) 5 ALRB No. 24; Tepusquet Vineyards (1984) 10 ALRB No. 29.; ALRA §1156.3(c).) Accordingly, it is found that insufficient grounds exist for setting aside this election based on the Regional Director's improper unit determination.

C. The Peak Issues

An election petition must be filed at a time when the employer's payroll for the payroll period immediately preceding the filing "reflects 50 percent of the peak agricultural employment for the current calendar year." (A.L.R.A. §1156.4.) No certification may issue as a result of an election conducted among an eligible pool of voters which amounted to less than fifty per cent of the employer's peak for that year. (A.L.R.A. §§1156.3(c) and 1156.4; Regs. §202352; see, e.g., Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 57.) Having determined that the appropriate bargaining unit in this case consists of all of Baker Brothers' agricultural workers, it must be determined whether the election was conducted when the number of employees eligible to vote was at least fifty

percent of the employee complement during its peak, which, pursuant to stipulation, occurred at a time when the employer engaged citrus and non-citrus workers.[28/]

The parties stipulated that during the 1983 peak period[29/] (week ending 10/8/83), a total of 154 workers were employed, including olive workers (91), steadies (13) and orange workers (50). Eighty-four workers were employed during the eligibility period. Since this number is more than half of the peak figure for that year, the petition was timely filed. Hence, the percentage of peak issue presents no impediment to certifying the results of this election.[30/]

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28. As attachments to its Response to the Petition, the employer submitted two sets of payroll records for orange pickers during the eligibility period: one in compliance with the response to query number eight (a list showing employee names and hours worked during the period), and the other in response to the request in number nine to submit an employee list with current names and addresses. The employer did not submit employee lists or other data for past seasons indicating peak; nor did it indicate what it believed the peak period to be.

29. 1983 was the calendar year "current" with the filing of the petition. The reasons for not using the 1982 peak figures will be discussed below.

30. The peak and eligibility employment figures submitted via stipulation were presumably obtained by the "body count" method, even though no specific reference is made to the manner of peak calculation. This method is perfectly acceptable for measuring employment level requirements for holding an election. (See, e.g., Donley Farms (1978) 4 ALRB No. 66; Bonita Packing (1978) 4 ALRB No. 96; Kamimoto Farms (1981) 7 ALRB No"31.)Had one of the parties objected to the method of determining peak, it was incumbent upon them to demonstrate a more appropriate or different means of doing so, with the object of exhibiting a result different than the one obtained which satisfies the statutory requirements. (See Adamek and Dessert (1985) 11 ALRB No. 8; Harden Farms of California Inc., (1976) 2 ALRB No. 30; Regs. §20510(a)(6).)

The employer raises several arguments in connection with the peak issue in an attempt to have the results of the election set aside. It first contends that the Board Agent in charge of investigating the petition "failed to adequately investigate the question of peak employment."

The Regulations place the responsibility for raising peak issues in connection with the Petition squarely on the employer. Regs. §20310(a)(2) states that "if the employer contends that the unit sought is inappropriate, the employer shall . . . provide a complete and accurate list of the names and addresses of the employees in the unit the employer contends to be appropriate, together with a written description of that unit." Regs. §20310(a)(6) provides that "[I]f the employer contends that the petition was filed at a time when the number of employees employed constituted less than 50 per cent of its peak agricultural employment for the current calendar year, the employer shall provide evidence to support its contention." Similarly, if the employer contends that peak has already been reached during that year ("past peak") it "shall provide the regional director" with information to support this claim (Regs. §20310(a)(6)(A)); or, if the employer maintains that peak for the year has yet to be attained ("prospective peak"), it similarly "shall provide the Board with information to support this contention." (Regs. §20310(a)(6)(B)).[31/]

31. In Ranch No. 1 (1976) 2 ALRB No. 37, the Board held that post-peak determinations were purely a matter of mathematical comparison, whereas in prospective peak situations, crop and acreage statistics are needed in order to estimate peak. (See also A.L.R.A. §1156.4).

In the absence of providing adequate information in support of an employer's peak contentions, where "such failure frustrates the determination of particular "facts" regarding peak, a regional director may invoke the presumption "that the petition is timely filed with respect to the employer's peak of season." (Regs. §20310(a).)

The employer's Response to the Petition failed to provide any information which would alert the Regional Director to the possibility that either a problem existed with the percentage of peak for the eligibility period, or that the employer anticipated reaching its peak employment at some point later that year.[32/] There, the employer alternatively contended that either the workers which the Union sought to represent were under NLRB jurisdication, or, should the unit be appropriate as the Union described, that the grower/customers sought to be included were not at fifty percent of employee peak. The employer did not supply any data to support its peak contentions[33/] either in the Response to the Petition, or

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32. Interestingly, the employer, under penalty of perjury, declared that there were forty-four employees employed in the period immediately preceding the filing of the petition. Fifty-nine names appeared on the eligibility list. A total of eight-four employees made up the stipulated eligibility period employee complement, including sixty-two workers in two citrus crews and twenty-two "steadies." The discrepancies were not explained, although the form Response to the Petition requests that the employer provide the number of employees employed in the payroll period by "calculating the average number of employee days worked in that . . . period," as opposed to the "number of different individuals who appeared on the payroll," or "body-count" method.

33. As may be recalled, around the time of the petition's filing, the employer resisting the supplying to Board Agents the names of its grower/customers. The peak issues which it raised in conjuction with these grower/customers could not therefore be investigated.

in response to follow-up inquiries memorialized in telegrams to it from the Board Agent in charge, sent several days after the Petition was filed. Under the Regulations cited above, it is the employer's obligation to do so. Failing this, the Regional Director may properly invoke the presumptions set forth in the Regulations, to wit, that the Petition was timely filed insofar as percentage of peak requirements are concerned.

The cases of Tepusquet Vineyards, supra, and Charles Malovich (1979) 5 ALRB No. 33, are instructive in emphasizing where the burden lies for developing peak information in the course of a representation petition investigation, and the ultimate effect the failure to provide certain information might have on the results of the election. In Malovich the employer argued that its actual peak figures, attained some six weeks after the filing of the Petition, demonstrated that employment was not in fact at 50% of peak at the time of filing. Despite the fact that the Regional Director could not have relied on such figures in his percentage of peak determination, the employer contended that such a determination, once peak figures became known, was, like in a post-peak case, a simple matter of mathematical computation. (See fn. 31, supra). The Board disagreed, holding that in prospective peak cases the appropriate standard for reviewing a Regional Director's peak determination was whether "the determination was a reasonable one in light of the information available at the time of the investigation." (Malovich, supra, p. 4, emphasis supplied). The Board went on to state that:

> . . . we find strong policy and administrative reasons for adopting a standard of reasonableness in our review of

> prospective-peak determinations. The peak requirement and the seven-day requirement recognize the opportunities for representation elections in agriculture are limited. For this reason, our decisions in representation cases have consistently followed a policy of upholding elections unless it is clear that to do so would violate the rights of employees or a reasonable interpretation and appplication of the Act. The limited time in which elections may be held each year, in most cases, places a premium on speed and finality in deciding the results of elections. (Malovich, supra, p. 6).

The instant case is not, strictly speaking, one involving a prospective peak, since the figures for the calendar year in which the petition was filed show that the statutory 50% of peak requirement was in fact met. Nor does the employer argue such.[34/] However, Malovich did set forth criteria for determining the reasonableness of the Regional Director's percentage of peak determination around the time of the filing of the Petition. As noted previously, it is this issue, i.e., that the Regional Director failed to "adequately investigate" Baker Brothers' peak, that the employer contends should be used to overturn the result of this election.

In Malovich the Board underscored the obligation of the employer to supply information, as per the Regulations, to support

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34. The Board specifically noted in Malovich that "hindsight" figures (data obtained after the election) might be used to demonstrate that the petition was timely filed. The employer misreads Malovich in an attempt to discount the impact of stipulations evidencing the timeliness of the Petition, asserting that Malovich "rejected using a 'hindsight' approach -- i.e., one relying on exact post-election payroll figures introduced in an objection hearing . . . ." Malovich rejected this approach only where an employer attempts to have an election set aside based on actual post-election data, not where such data can be used to support the fact that the petition was timely filed (Charles Malovich, supra, at p. 7; see also John J. Elmore (1977) 5 ALRB No. ~

its contention that percentage of peak requirements were not met in the relevant payroll period.[35] A Board Agent, owing to the time constraints surrounding the filing of an election petition, can only "adequately investigate" the petition when an employer supplies information which can directly indicate problems with the Petition. As noted in Malovich, supra, p. 9, it is "more reasonable to require the party with access to infomation 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."[36]

Tepusquet Vineyards, supra, another prospective peak case, reiterated the principles established in Malovich, adding on page 7 of the decision that the "Regional Director should investigate all relevant data . . . ., including information not provided by or accessible to an employer, if reasonably apparent or accessible to the Board Agents. . . . Only if an employer fails to provide the necessary information available to it, which failure obstructs or precludes the peak determination, may the Regional Director properly

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35. There, the employer's statement that peak would reach a certain figure that calendar year greater than 50% of the eligible employee complement was unsupported by any additional information. Employment levels for past years, which were submitted to the Board, plus statements that acreage was being sold and new, currently unproductive trees being planted, reasonably indicated that peak would not surpass previous levels. Information known to the employer, that unusually heavy budding would require increased harvesting crews, was not communicated to Board Agents. The Board held that in the absence of such information the Board Agent was under no obligation to inquire into the discrepancy between the employer's assertions and the facts at hand.

36. Domingo Farms (1978) 5 ALRB No. 35, similarly placed the burden of supplying supporting information on the employer, where that employer raised an issue regarding peak.

invoke the [percentage of peak] presumptions of the Board's regulation section 20310(a)."

Here, the employer was requested to supply peak and eligibility figures regarding its citrus workers.[37/] it was also requested by the Board Agent in charge to supply the names of its grower/customers. This was information available or accessible only to the employer, information which was not "reasonably apparent or accessible to Board Agents." It was also information without which the Board Agent could not develop support for the employer's peak argument that its grower/members were not at 50% of peak during the eligibility period. Since the failure to provide this information "obstruct[ed] or preclude[d] the peak determination," the Regional Director properly invoked the presumption that the Petition was timely filed in reference to peak. This determination was thus a reasonable one in light of the information available to the Regional Director "at the time of the investigation".

As noted in Tepusquet Vineyards, examination of prior years' peak figures and other relevant data is necessary to establish the underlying principle inherent in all representation matters that the number in the work force eligible to vote is "representative of the potential size of the peak work force that will be affected by the election results." Given the stipulations of the parties, that the peak number for 1983 was 154, and the eligibility period showed a total of 84 employees, the conclusion is

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37. Notably, peak figures or dates from past seasons were not attached to the employer's Response to the Petition as requested on the form. Nor did the employer contend that its peak employment roster included citrus and non-citrus workers.

inescapable that the number employed during the eligibility period was indeed representative of the potential size of the peak work force.[38/]

The employer's remaining arguments in regard to the peak issue are similarly unavailing. Baker Brothers phrases its arguments in the conditional: "had the Petitioner correctly described the unit . . . , the Regional Director would have had to determine . . . peak ... on a prospective basis ....."[39/] Again, the employer misplaces the burden of developing information and raising peak issues on the Regional Director, and does not assume that burden for itself, as is appropriate under the authorities cited above.

The employer urges that the stipulated 1982 peak figure, or 257 workers, should be utilized in determining percentage of peak herein, "because the number of employees employed during the eligibility period was less than fifty percent of the number employed during the [1982] peak week to which the Regional Director would have looked had he properly investigated the peak issue, the Petition . . . must be dismissed and the election set aside." The employer again fails to acknowledge its responsibilities as per the

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38. The employer raises various arguments in conjunction with the Union's various "changes of position" regarding the inclusion, then the exclusion, of its grower/customers in the unit, and the exclusion, then the inclusion, of non-citrus workers in the unit. It states that since these changes have been made, the issues of peak employment and disenfranchisement of workers should now be re-examined. However, on re-examination of these issues, it has been concluded that a representative number of employees, in compliance with §1156.4 of the Act, voted in the election

39. As previously noted, the Petition did describe the unit as "all agricultural employees . . . ."

Regulations to provide the Regional Director with information supporting its peak arguments prior to the election itself.

Furthermore, Ruline Nursery, (1980) 6 ALRB No. 33, makes it abundantly clear that the phrase "current calendar year" used for measuring percentage of peak in A.L.R.A. section 1156.4 means the same year as that of the payroll period immediately preceding the filing of the petition. (See also Wine World (1979) 5 ALRB No. 41.) In this case, that year is 1983, not 1982. Peak figures for 1982 might have been used as a factor in determining percentage of peak requirements for the eligibility period had they been supplied prior to the election. However, they would not, under any circumstances, be dispositive of the issue.[40/]

The employer additionally argues that averaging the 1982 and 1983 figures would be a "proper approach" in ascertaining peak, "since that may more realistically reflect the peak employment over more than one season." This novel averaging "approach," so novel, in fact, that the Board has never resorted to it in making a peak determination, directly contravenes the statutory requirement of section 1156.4 that percentage of peak determinations be made only with reference to the "current calendar year."

Lastly, the employer contends that the fifty-nine employees named on the eligibility list should be the figure to which the peak comparison should be made, rather than the eight-four employees it

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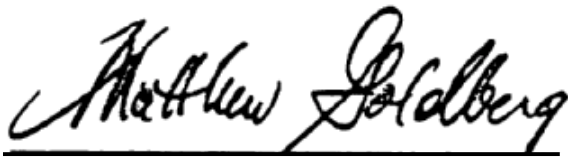
40. A.L.R.A. §1156.4 notes that the peak figure from the prior season, standing alone, "shall not be a basis for the percentage of peak determination but shall be utilized in conjunction with crop and acreage statistics and all other relevent data in making such a determination."

stipulated as employed during the eligibility period, or the seventy-nine names which it submitted pursuant to the eligibility list request. Since 59 is not 50% of 154, the petition, it urges, was not timely filed.[41/] Viewed in one sense, this argument is more in the nature of a "disenfranchisement" contention. The Regional Director's eligibility list determination, in effect, "disenfrancised" 25 voters who were, as per the stipulation of the parties, eligible to vote in the election. Since the Union's margin of victory was greater than 25 votes, this conduct could not have had a numerical impact on the results of an election.[42/]

CONCLUSIONS OF LAW

It is recommended that the results of the 1983 election be certified, and that the United Farm Workers of America, AFL-CIO, be declared the exclusive collective bargaining representative of all the agricultural employees employed by Baker Brothers.

DATED: June 14, 1985



MATTHEW GOLDBERG
Investigative Hearing Examiner

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41. The employer's obligation to supply a complete and accurate employee list is clearly spelled out in Regs. §20310. An employer may not rely on its own misconduct in supplying a deficient or inaccurate eligibility list as a means to set aside an election. (Pacific Farms (1977) 3 ALRB No. 75.)

42. A number of those "disenfranchished" did vote challenged ballots.